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Decision

Matter of: FedSys, Inc.

File: B-401453

Date: September 8, 2009

Richard J. Webber, Esq., Lisa K. Miller, Esq., and Kavitha J. Babu, Esq., Arent Fox LLP, for the protester.

J. Alex Ward, Esq., Leslie H. Lepow, Esq., Damien C. Specht, Esq., and Eric R. Haren, Esq., Jenner & Block LLP, for A-T Solutions, Inc., an intervenor.

Maj. Walter R. Dukes, and David Scott, Esq., U.S. Army Materiel Command, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's cost realism analysis is denied where the agency reasonably adjusted the protester's proposed costs to account for its failure to propose the correct number of labor hours, as required by the solicitation.

2. Protest challenging agency's technical evaluation is denied where the record shows that even if the agency's identification of a minor weakness in the protester's proposal was unreasonable, the conclusion did not materially affect the award decision.

DECISION

FedSys, Inc., of Juno Beach, Florida, protests the award of a contract to A-T Solutions, Inc. (ATS), of Fredericksburg, Virginia, under request for proposals (RFP) No. W91CRB-08-R-0011, issued by the Department of the Army, Army Research, Development and Engineering Command Contracting Center, for counter-improvised explosive device (IED) training services. FedSys argues the agency's evaluation of the protester's proposed costs and technical proposal was unreasonable, and that the selection decision was also flawed.

We deny the protest.

BACKGROUND

The RFP was issued on December 15, 2008. The RFP anticipated the award of a cost plus fixed-fee contract, with a 1-year base performance period and four 1-year option periods. Offerors were required to propose all required personnel, equipment and resources to provide counter-IED training services. The training is to be provided at locations within the continental United States (CONUS) and outside the continental United States (OCONUS).

The RFP stated that proposals would be evaluated on the basis of three evaluation factors: technical, cost, and performance risk. The technical factor was “significantly more important” than cost, which was in turn “slightly more important” than performance risk. RFP § M.D. The technical factor had four subfactors: management capability and approach, recruitment/retention and key personnel, integrated logistics support, and engineering. Management capability was the most important technical subfactor, and was equal to the combined weight of the other three subfactors. Id.

Offerors were instructed to submit written proposals that addressed the RFP evaluation factors and the requirements of the statement of work (SOW). Offerors were also required to make oral presentations, which were intended to provide an opportunity to expand upon their written proposals. The RFP advised offerors that any questions asked during the oral presentation would be limited to clarifications, rather than discussions, and that the agency reserved the right to make award without discussions. RFP § L, Oral Presentations; § M.D. The Army received proposals from four offerors by the closing date of January 30, 2009: FedSys, ATS, and two other offerors.

The agency convened a proposal evaluation board (PEB) to evaluate offerors’ technical proposals. As relevant here, the PEB identified one minor weakness in FedSys’ proposal under the management capability and approach subfactor, and one minor weakness under the recruitment/retention and key personnel subfactor. Agency Report (AR), Tab 8, PEB Report, at 5-6.

With respect to the cost realism evaluation, the RFP instructed offerors to “[i]dentify the various labor categories intended for use under this contract, including the number of hours, the hourly labor rates, and total cost for each labor category proposed.” RFP § L, Factor 3. Offerors were also instructed to propose 40 hour workweeks for CONUS personnel, and 80 hour workweeks, plus a salary adjustment for hazard and hardship pay, for OCONUS personnel. RFP amend. 2, Question and Answer (Q&A) No. 1; RFP amend. 1, Q&A No. 18.

The agency made two adjustments to FedSys’ probable cost: (1) an increase of approximately \$[deleted] million for labor costs (and associated other direct and indirect costs) because both the protester and its subcontractor, The O’Gara Group, proposed [deleted] hours per year for OCONUS personnel—which corresponded to

40 hour workweeks, instead of the required 80 hour workweeks; and (2) an increase of approximately \$2 million because the protester had not proposed any travel costs for the OCONUS portion of the work. AR, Tab 9, Cost/Price Report, at 4, 10. The agency made no adjustments to ATS's probable cost. Id. at 5-6.

The Army received oral presentations from all offerors, but did not conduct discussions or allow any proposal revisions. The Army's final evaluation of the offerors' proposals was as follows:¹

	FEDSYS	ATS
TECHNICAL	GOOD	EXCELLENT
Management Capability and Approach	Good	Excellent
Recruitment/Retention and Key Personnel	Average	Excellent
Integrated Logistics Support	Average	Excellent
Engineering	Excellent	Excellent
PERFORMANCE RISK	VERY LOW	VERY LOW
PROPOSED COSTS	\$[deleted]	\$198,920,794
EVALUATED/PROBABLE COST	\$191,967,499	\$198,920,794

AR, Tab 11, Source Selection Decision Document (SSDD), at 2; Tab 8, PEB Report, at 2.

The selection decision was made by the contracting officer (CO), who also acted as the source selection authority (SSA). FedSys received the second-highest technical score, and had the second-lowest evaluated cost; ATS received the highest technical score, and had the third-lowest evaluated cost. AR, Tab 11, SSDD, at 2. All offerors received a "very low" rating for performance risk. Id. In comparing the offerors, the CO identified 11 areas where ATS's proposal was superior to FedSys' proposal, and 15 areas where ATS's proposal was superior to all of the offerors' proposals. Id. at 4-7. The CO concluded that the advantages of ATS's technical proposal merited the cost premium, as compared to the lower-cost offerors. The Army awarded the contract to ATS on May 19. The agency provided FedSys a debriefing on May 29, and this protest followed.

DISCUSSION

FedSys challenges the reasonableness of the Army's cost realism and technical evaluations, and also argues that certain of the discriminators in the selection

¹ For the technical factor, the agency used an evaluation scheme of excellent, good, average, marginal, and unsatisfactory. RFP § M, Factor 1. For the performance risk factor, the agency used an evaluation scheme of very low, low, moderate, high, very high, and unknown risk. Id., Factor 2.

decision were unreasonable. For the reasons discussed below, we conclude that there is no basis to sustain the protest.

Cost Realism Evaluation

FedSys argues that the Army's cost realism evaluation made two unreasonable adjustments to the protester's proposed costs. These two adjustments increased FedSys' evaluated costs by approximately \$[deleted] million, and narrowed the difference between FedSys' costs and ATS's higher costs from approximately [deleted] percent to approximately 3 percent. For the reasons discussed below, we find no merit to the protester's arguments.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1).

First, the protester contends that the agency made an improper adjustment to its proposed labor hours. As discussed above, offerors were required to propose 40 hour workweeks for CONUS employees, 80 hour workweeks for OCONUS employees, and were advised that OCONUS labor costs should include a premium for hazard and hardship pay. RFP amend. 2, Q&A 1; RFP amend. 2, Q&A 18. The protester's cost proposal, however, stated that FedSys and O'Gara personnel, both CONUS and OCONUS, would work [deleted] hours per year—corresponding to 40 hour workweeks. AR, Tab 15, FedSys Cost Proposal, Schedule 1 (FedSys Direct Labor); Schedule 2 (O'Gara Direct Labor). The cost proposal did not state whether hazard and premium pay was included. *Id.* In response, the Army adjusted the proposed OCONUS salaries for FedSys and O'Gara, to account for 80 hour workweeks, and to add a 35 percent premium for hazard and hardship pay. AR, Tab 9, Cost and Price Analysis, at 4, 10.

FedSys concedes that its cost proposal worksheets showed 40 hour workweeks for its OCONUS personnel, rather than the 80 hour workweeks required by the RFP. Protester's Comments on AR at 3-4. FedSys argues, however, that the cost adjustment was not warranted because the proposed salaries were correct, and the proposal's reference to [deleted] hours per year, rather than [deleted] hours per year, was simply an error. In this regard, the protester points to its higher proposed salaries for OCONUS personnel—which were more than twice those proposed for CONUS personnel—as evidence that it was offering both the higher hours and hardship and hazard pay, and argues that it should have been clear to the Army that the proposal was compliant with the terms of the solicitation. *Id.* In addition, the protester argues that the agency's adjustment of the OCONUS salaries led to an

“absurd” result, whereby the evaluated salaries for OCONUS personnel were two to three times higher than proposed, and more than five times higher than it proposed for CONUS personnel.

To the extent the protester argues that the agency should have understood or inferred that the higher salaries were intended to reflect the protester intention to propose 80 hour workweeks for OCONUS personnel, we disagree. The protester’s proposal, on its face, listed salaries and labor rates for OCONUS personnel, but indicated that those rates and salaries applied to 40 hour workweeks. The protester does not argue, and the record does not show, that the proposal explained that the higher salaries for OCONUS personnel were intended to reflect 80 hour workweeks or hazard and hardship pay.

Moreover, we do not agree with the protester’s contention that the salaries proposed for OCONUS personnel clearly demonstrate that the protester intended for the higher salaries to cover 80 hour workweeks and hazard and hardship pay. In this regard, the data provided in FedSys’ cost proposal were internally consistent, that is, both the hourly rate and the salaries for employees were consistent with 40 hour workweeks. Thus, even if, as the protester contends, its proposed salaries are correct and its proposal erroneously listed [deleted] instead of [deleted] hours, the protester would also have had to change the labor rates proposed for each position.

Further, while the salaries proposed by FedSys for its OCONUS employees were more than twice those proposed for its CONUS personnel, this was not the case for its subcontractor, O’Gara. In this regard, the salaries proposed by FedSys for OCONUS personnel for 40 hour workweeks ranged from [deleted] to [deleted] times higher than those proposed for CONUS personnel for 40 hour workweeks. AR, Tab 15, FedSys Cost Proposal, Schedule 1 (FedSys Direct Labor). In contrast, O’Gara’s proposed OCONUS salaries were only [deleted] to [deleted] times as high as those it proposed for CONUS personnel. Id., Schedule 2 (O’Gara Direct Labor). If FedSys’ argument were correct—i.e., that the proposed salaries were accurate and were intended to reflect 80 hour workweeks plus hazard and hardship pay—O’Gara would be paying its OCONUS personnel less per hour than its CONUS personnel.

Under the circumstances, we think the Army was required to address the shortfall between the 40 hour workweeks proposed by the FedSys, and the 80 hour workweeks required by the RFP. We do not think that the record here shows that the agency should have understood the protester’s proposal to have included all of the required hours as well as hazard and hardship pay for OCONUS personnel. As a result, we think that the agency’s cost realism adjustment was reasonable.²

² FedSys does not dispute that the Army made award without discussions, nor does the protester argue that the agency was required to conduct discussions. Instead, the protester argues that the agency should have asked the protester to clarify whether the proposal for OCONUS personnel to perform 40 hour workweeks was in
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Second, while FedSys again concedes that it failed to propose any travel costs for OCONUS personnel, as required by the RFP, it argues that the independent government cost estimate (IGCE) for the travel costs used by the agency in its adjustment (\$408,522 per year) was too high. An agency may reasonably use an IGCE or its past experience in assessing the realism of an offeror's approach, and we will not sustain a protest of an agency's cost estimate where the protester does not show that the agency's estimates are unreasonable. Pueblo Envtl. Solution, LLC, B-291487, B- 291487.2, Dec. 16, 2002, 2003 CPD ¶ 14 at 13-14.

Here, FedSys omitted the necessary costs from its proposal and presents—in the course of its comments on this protest—certain “assumptions” about those costs that it argues demonstrates that the agency's IGCE was unreasonable. While we have reviewed the FedSys' contentions, the protester does not explain or provide any support for its assumptions regarding the travel costs, and we see nothing in this record to lead us to conclude that the agency's estimate was unreasonable. See NAC Int'l, Inc., B-310065, Nov. 21, 2007, 2008 CPD ¶ 3 at 8 n.7 (protest is denied where protester does not provide any support for its calculations challenging agency cost analysis).

Technical Evaluation

Next, FedSys contends that the Army unreasonably found two minor weaknesses in its technical proposal; these weaknesses were assessed under the subfactors of management capability and approach, and recruitment/retention and key personnel. As discussed below, we agree with the protester that the minor weakness regarding the recruitment/retention and key personnel subfactor was unreasonable. We

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error. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated. FAR § 15.306(a). Agencies have broad discretion as to whether to seek clarifications from offerors, and offerors have no automatic right to clarifications regarding proposals. See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6. In any event, we are not convinced that the agency's adjustment to the protester's OCONUS labor costs could have been addressed through clarifications because, as discussed above, the proposed labor hours and hourly rates for OCONUS personnel both reflected 40 hour workweeks, and because correction of the hours would reduce the proposed salaries for O'Gara's OCONUS personnel to levels lower than those it proposed for CONUS personnel, when viewed on an hourly basis. Under these circumstances, it appears more likely that a material revision to FedSys' cost proposal would have been required to resolve the agency's concerns here; such a revision would have required discussions, rather than clarifications. See DynCorp Int'l LLC, B-294232, B-294232.2, Sept. 13, 2004, 2004 CPD ¶ 187 at 9.

conclude, however, that this error did not cause any competitive prejudice to the protester, and therefore find no basis to sustain the protest.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

First, with regard to the management capability and approach subfactor, the agency assessed a minor weakness in the protester's proposal for its lack of details regarding search/tactical site exploitation (TSE) requirements. The RFP required offerors to address their understanding of the contract requirements in their written and oral proposals. RFP § L, Subfactor 1A. For search/TSE training, the SOW required offerors to provide the following: "High Risk Search, Search Advisor, and Search Coordinator will be provided as separate courses and as required by the [CO's technical representative]." SOW ¶ 3.5.6.

The PEB evaluation assessed a minor weakness to FedSys' proposal under this subfactor based on the following finding:

FedSys proposal addresses only part of the Search/TSE requirement and doesn't address Search nor does it address High Risk Search, Search Advisor, or Search Coordinator. During [its] Oral Presentation . . . FedSys made specific statements which indicate their lack of full understanding of the Search/TSE requirements.

AR, Tab 8, PEB Report, at 5. These concerns were also reflected by the CO in the SSDD. AR, Tab 11, SSDD, at 5. In addition, the CO states that during the oral presentation, the protester did not demonstrate an awareness that the High Risk Search, Search Advisor, and Search Coordinator requirements were to address in separate courses, as opposed to a single course, as indicated in FedSys' proposal. Supp. CO Statement at 3.

FedSys argues that it met all of the requirements in the SOW, because it confirmed that the training topics would be addressed "as required." In response, the agency argues, and we agree, that FedSys' proposal to provide the requirements "as required" did not provide any details regarding how the requirements will be met. Furthermore, the protester does not dispute that its proposal indicated that the requirements would be addressed in a single course, as opposed to separate courses as required by the SOW. On this

record, we think it was reasonable for the agency to assess a minor weakness under this subfactor.³

On the other hand, with regard to the recruitment/retention and key personnel subfactor, we agree with FedSys. In its evaluation, the PEB found that “FedSys did not explain their means to meet the requirement for the requisite [subject matter expert (SME)] to cover Search/TSE.” AR, Tab 8, PEB Report, at 6. Similarly, the selection decision stated that “FedSys did not propose a key person for the Search TSE Subject Matter Expert (SME), while ATS proposed all key personnel that were required of the SOW.” AR, Tab 11, SSDD, at 5.

FedSys argues that assessing a minor weakness in this area was not reasonable because the RFP did not state that the search/TSE SME was a key personnel position or that offerors were required to specifically identify an individual for that position in their proposals. Instead, the RFP stated that offerors were required to identify key personnel and to provide resumes and letters of intent for those individuals. RFP § L, Subfactor 1B. The RFP stated that key personnel “may include but [are] not limited to program management, program element leads, engineers, logisticians and instructors.” *Id.* The SOW stated that offerors were required to “identify the number of Program Management personnel to coordinate and manage the JATAC training teams and program activities,” and stated that “[o]ne Program Manager is required at Ft Irwin, CA, to support the Search/TSE program.” SOW ¶ 2.1.2.

We agree with the protester that the RFP did not clearly state that SMEs were required to be designated as key personnel. The RFP instruction that key personnel “may include but [are] not limited to” a list of designated positions was unclear as to whether the designation of the enumerated personnel was mandatory or at the discretion of the offeror, and may not have reasonably advised offerors of their obligations regarding key personnel.⁴ In any event, the list of positions did not specifically identify SMEs, and nothing in the RFP defines the position of an SME in a way that would clearly identify it as a position covered by the list of designated key personnel.

³ FedSys also argues that the agency should have viewed the two minor strengths identified in its proposal as major strengths. Again, however, the protester’s argument merely disagrees with the agency’s judgment, and does not demonstrate why the assessment of minor, as opposed to major strengths, was unreasonable. See VT Griffin Servs., Inc., supra.

⁴ To the extent this RFP provision is ambiguous, we think it is latently so, and that this protest argument was timely filed. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), (2) (2009). In this regard, the ambiguity was not glaring or obvious, but was instead a more subtle ambiguity that emerged in the course of the agency’s evaluation of proposals. See Singleton Enters., B-298576, Oct. 30, 2006, 2006 CPD ¶ 157 at 5.

Notwithstanding our view that the agency's assessment of a minor weakness here was in error, we do not think that the protester was prejudiced by this error. In this regard, our Office will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also, Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996).

As discussed above, the recruitment/retention and key personnel subfactor was one of three equally-weighted subfactors which, when combined, were of equal importance to the management capability and approach subfactor. Even if the minor weakness were removed from the evaluation, FedSys would be left with two minor strengths under the recruitment/retention and key personnel subfactor—an improvement that might improve the protester's score to a "good" rating, but would not likely improve the rating to the "excellent" score received by ATS for this subfactor.⁵ Thus, removal of the minor weakness would not change the fact that ATS was rated equal to FedSys under the engineering subfactor, and higher than the protester on all other evaluation subfactors—including the most important, management capability. Moreover, the SSDD identifies 10 other reasons why the CO viewed ATS's proposal as superior to FedSys' proposal, and 15 additional reasons why ATS's proposal was superior to all other offerors, including FedSys—reasons that, as discussed below, we have no reason to question. AR, Tab 11, SSDD, at 5-7.

On this record, we conclude that there is no reason to believe that removal of the minor weakness here would have any material effect on the protester's competitive position. Under these circumstances, we think the potential prejudice to FedSys from the agency's error is too remote to warrant sustaining the protest. See TELESIS Corp., B-299804, Aug. 27, 2007, 2007 CPD ¶ 150 at 7.

Selection Decision

Finally, FedSys argues that the selection decision was based on unreasonable findings by the CO. As reflected in her contemporaneous documentation, the CO found that there were 11 areas in which ATS's proposal was superior to FedSys' proposal. In its comments on the agency report, the protester raised a supplemental challenge to 5 of the CO's 11 findings. The agency responded to these challenges in

⁵ In this regard, the RFP's evaluation scheme stated that an "average" rating reflects a proposal that "may contain weaknesses and offers little or no significant strengths"; a "good" rating reflects a proposal that "offers a major strength or numerous minor strengths, which are not offset by weaknesses"; and an excellent rating reflects a proposal that "offers numerous major strengths, which are not offset by weaknesses." RFP § M, Factor 1 - Technical.

its supplemental report on the protest, but the protester did not address the agency's supplemental report in its supplemental comments. Thus, we consider these protest arguments abandoned. Dependable Disposal and Recycling, B-400929, Feb. 3, 2009, 2009 CPD ¶ 69 at 3.

In any event, we find that none of the five challenges has merit.⁶ For example, one of the discriminators in favor of ATS's proposal was that "FedSys did not provide a list of data deliverables, while ATS provided a complete list of data deliverables for the JATAC IED training program." AR, Tab 11, SSDD, at 5. The management capability and approach subfactor required offerors' proposals to include the following information:

(11) Data Deliverables for all courses provided under this contract.
These deliverables will be incorporated in the resulting contract award.
The data deliverables shall include, but not limited to, the following:
Course Curriculum, Program of Instruction, Instructional Material, etc.

RFP § L, Subfactor 1A.

The protester argues that "because FedSys is not the incumbent, it could not provide a precise list of data deliverables, as ATS could." Protester's Comments on AR, at 11. As discussed above, however, the RFP specifically required offerors to include a list of deliverables for the training programs. Furthermore, the CO stated that other non-incumbent offerors were able to list the specific data deliverables specific to their course offerings. Supp. CO Statement at 8. To the extent that the protester believes that a non-incumbent offeror could not comply with the solicitation requirement to provide a list of deliverables because of a lack of information, this argument is an

⁶ FedSys also argues that the CO's conclusions were unreasonable because they were not specifically identified in the PEB report. The CO states, however, that she independently reviewed the offerors' proposals, and that the additional conclusions were based on that review. Supp. CO Statement at 7. We find nothing objectionable in the CO's evaluation, as a CO or SSA is permitted to make an independent evaluation of offerors' proposals, and may disagree with or expand upon the findings of lower-level evaluators provided, as here, the basis for the evaluation is reasonable and documented in the contemporaneous record. KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 13.

untimely challenge to the terms of the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). In sum, we find no basis to sustain the protest.⁷

The protest is denied.

Daniel I. Gordon
Acting General Counsel

⁷ The protester also raises other collateral issues. For example, the protester argues that the record does not contain adequate documentation of the agency's evaluation and the rationale for the selection decision. We have reviewed the record and find that all of the evaluation documents adequately detail the contemporaneous judgments of the evaluators and the CO, as relevant to this protest. We have reviewed all of the protester's remaining arguments, and conclude that none provides a basis for sustaining the protest.