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Matter of: Powersolv, Inc.

B-402534, B-402534.2

Comptroller General of the United States

2010 U.S. Comp. Gen. LEXIS 234

June 1, 2010

CORE TERMS: offeror, protester, project manager, manager, hosting, protest, proposed project, fixed-price, revised, evaluated, tradeoff, contemporaneous, deleted, contractor, personnel, price-technical, outage, certification, weakness, analyst, senior, servers, unbalanced, infrastructure, qualifications, relocation, evaluators', subfactor, non-price, variance

CONTRACT:

[*1] RFP No. DTFR53-09-R-00013

HEADNOTES:

1. Protest challenging the agency's evaluation of the protester's proposed project manager is sustained where the agency's evaluation was inconsistent with the solicitation.
2. **Protest** challenging the agency's selection decision is **sustained** where the contemporaneous record does not show that the agency meaningfully considered price in the decision, and the agency's arguments in support of its decision are neither supported by the record nor reasonable.

COUNSEL:

Timothy Sullivan, Esq., Katherine S. Nucci, Esq., and Scott F. Lane, Esq., Thompson Coburn LLP, for the protester.

J. Scott Hommer III, Esq., Paul A. Debolt, Esq., Maria A. del-Cerro, Esq., and Jeffrey M. Chiow, Esq., Venable LLP, for ActioNet, Inc., the intervenor.

John A. Kern, Esq., Federal Railroad Administration, Department of Transportation, for the agency.

Jonathan L. Kang, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

OPINION BY: GIBSON

OPINION:

DECISION

Powersolv, Inc., of Reston, Virginia, protests the award of a contract to ActioNet, Inc., of Vienna, Virginia, under request for proposals (RFP) No. DTFR53-09-R-00013, issued by the Department of Transportation, Federal Railroad Administration (FRA), for support of the Railroad Safety Information System (RSIS). Powersolv challenges FRA's evaluation of proposals and award decision.

We sustain the protest.

BACKGROUND

The RFP, issued as an 8(a) small disadvantaged business set-aside, sought proposals to provide support for the RSIS, which is the FRA's repository for data relating to railroad accidents [*2] and incidents, inspections, highway rail crossings, and other rail safety information. The solicitation provided for the award of a fixed-price contract, with two cost-reimbursement contract line item numbers (CLINs), for a base year and four option years. The RFP also provided for an optional award fee based upon performance standards stated in the contractor's quality assurance surveillance plan. RFP § C.9.

Detailed performance specifications were provided that described the required support for the RSIS. RFP § C. Among other things, the contractor would be required to be responsible for managing daily business activities, system development and maintenance, and infrastructure management. Id. § C.3. The contractor was also responsible for managing the RSIS hosting environment. Offerors were informed that the RSIS was currently hosted at an FRA contractor's facility in Arlington, Virginia, and that all servers, workstations, storage devices and network/security appliances were owned by FRA. The RFP further informed offerors that, due to on-going consolidation efforts within the agency, the agency reserved the right to relocate the RSIS production and disaster recovery [*3] components, and if these components were relocated the agency would renegotiate the contractor's fixed-price. Id. § C.5.

The RFP advised offerors that award would be made on a best value basis, considering price and the following three equally weighted non-price factors: technical approach, corporate capability, and experience. The non-price factors, when combined, were significantly more important than price. Id. § M.2(b).

The technical approach factor had six equally-weighted subfactors: (1) overall understanding of the RSIS; (2) understanding of the technical requirements for system maintenance; (3) ability to perform data management services; (4) response plan for non-routine maintenance, system development, and enhancement efforts; (5) risk management plan; and (6) quality assurance surveillance plan. Id. § M.3.1. The experience factor had four subfactors: (1) similar experience; (2) past performance; (3) program management; and (4) key personnel. n1 Id. § M.3.3.

n1 The RFP identified the following labor categories as key personnel: project manager, deputy project manager, lead developer, systems/network manager, and senior systems analyst. RFP § B.3, at 14-15. [*4]

Offerors were required to submit proposed prices for four fixed-price CLINs. The two cost-reimbursement CLINs were: indefinite-delivery/indefinite-quantity (ID/IQ) CLIN 004 for non-routine maintenance, system development, and enhancement efforts, under which task orders would be negotiated based on the contractor's proposed labor rates; and CLIN 005 for other direct costs. Id. §§ B.1, B.3. The RFP did not provide for the evaluation of these two CLINs, but instead provided minimum and maximum costs. n2 For example, with respect to ID/IQ CLIN 004, the RFP identified a minimum cost of \$ 10 thousand and a not-to-exceed cost of \$ 1 million. The RFP also identified required labor categories under CLIN 0004, for which offerors were required to provide labor rates. The RFP provided that price would be evaluated for completeness, reasonableness, and affordability. Id. § M.4. FRA received proposals from six offerors, including Powersolv and ActioNet, which were evaluated by the agency's technical evaluation board (TEB) and cost evaluation team (CET). The TEB assigned adjectival ratings for each non-price evaluation factor, but did not separately score the subfactors. n3 See [*5] Agency Report (AR), Tab 11, TEB Consensus Report, at 3. The agency's source selection evaluation board (SSEB) reviewed the consensus evaluations of the TEB and CET and recommended that the proposals of the three highest-rated offerors, including ActioNet and Powersolv, be included in the competitive range. Id., Tab 11, SSEB Competitive Range Briefing to the Source Selection Official (SSO), at 7.

n2 The RFP described the minimum and maximum costs for performance of these CLINs as not-to-exceed requirements.

n3 Proposals could be rated outstanding, better, acceptable, marginal, or unacceptable. AR, Tab 8, Source Selection Plan, at 9-10.

Discussions were conducted with the three competitive range offerors. As relevant here, FRA asked Powersolv to address questions regarding two proposed key personnel: the project manager and the senior systems analyst. AR, Tab 14, Powersolv Discussions Questions, at 1-2. The agency also asked Powersolv to provide additional information regarding its proposed hosting solution for the RSIS servers, and the risks identified by the protester in its technical proposal concerning a potential power failure. Id. at 2.

ActioNet's [*6] and Powersolv's revised proposals were evaluated as follows:

	ACTIONET	POWERSOLV
Technical Score	Outstanding	Better
Technical Approach	Outstanding	Better
Corporate Capability and Management Plan	Outstanding	Better
Experience	Outstanding	Better
Proposed Price n4	\$ 10,221,789	\$ 9,301,769

n4 Although the RFP provided for the evaluation of the firms' proposed fixed-prices, see RFP § M.4, the agency did not evaluate the firms' proposed prices for all the fixed-price CLINs. Rather, the agency only considered the firms' proposed prices for CLINs 0001, 0002, and 0003. See AR, Tab 20(d), Contracting Officer's (CO's) Final Evaluation of Revised Proposals, at 3. This was not protested.

AR, Tab 20(c), SSEB Final Consensus Report, at 3. ActioNet's outstanding rating reflected the evaluators' judgment that the firm had provided an excellent proposal demonstrating, among other things, superior understanding of RSIS technical requirements and offering an excellent team. In this regard, the evaluators noted that ActioNet's proposed project manager and deputy project manager were program management professional (PMP) certified. [*7] See id., Tab 11, TEB Consensus Report, at 4.

Powersolv's better rating reflected the evaluators' judgment that, although the firm had

provided a proposal demonstrating exceptional knowledge and understanding of the RSIS environment, the proposal contained some weaknesses. For example, the evaluators were concerned that Powersolv proposed to keep the production hosting environment at its current location in Arlington, Virginia, despite acknowledging power outage concerns and proposed to consider moving this hosting function after award as a task under cost reimbursement CLIN 0004. The evaluators also expressed concerns with Powersolv's proposed project manager. Id., Tab 20(c), SSEB Final Consensus Report, at 2.

FRA also conducted what it called a "should cost" analysis of the offerors' proposed labor rates. The agency's analysis concluded that ActioNet's proposed labor rates were realistic, but that Powersolv's proposed rates were "underpriced," and that the protester's rates posed a risk that the protester would not be able to "retain qualified, skilled personnel to perform the services in accordance with industry standards." AR, Tab 20(b), Price Analysis Report, [*8] at 1.

The SSEB recommended award to ActioNet, based on the conclusion that its proposal had "solidified their top rated position and created further distance between them and the other two competitors." AR, Tab 20(c), SSEB Final Consensus Report, at 1. The SSO concurred with the SSEB's award recommendation. Id. at 5. Following a debriefing, Powersolv protested to our Office.

DISCUSSION

Powersolv argues that FRA's evaluations of its technical and price proposals were unreasonable, and that the agency failed to perform a price-technical tradeoff in selecting ActioNet's higher-priced, higher-rated proposal for award.

Our discussion of several of the issues necessarily addresses differences between the agency's contemporaneous record and its arguments in response to the protest. While we consider the entire record in determining whether an agency's selection decision is supportable, including statements and arguments in response to a protest, we accord greater weight to contemporaneous evaluation and source selection materials than to arguments and documents prepared in response to protest contentions. Boeing Sikorsky Aircraft Support, B-277263.2 [*9] , B-277263.3, Sept. 29, 1997, 97-2 CPD P 91 at 15. As discussed below, several of the agency's responses to this protest are not supported by the contemporaneous record.

Project Manager Evaluation

Powersolv complains that FRA unreasonably assigned a weakness for its proposed project manager under the key personnel subfactor of the experience factor.

As noted above, the position of project manager was one of five key personnel positions identified by the RFP. In this regard, the RFP stated that the project manager was "responsible for oversight of RSIS development, data management and IT infrastructure and services operations," and is also "responsible for developing project plans on the RSIS program." RFP § B.3, at 14. The solicitation stated that "[t]he Government anticipates that this will be a half-time position (1/2 FTE)." Id. The RFP advised offerors that key personnel would be evaluated as follows: "Key Personnel. The Government will evaluate information contained in the resumes for potential staff members submitted with the proposals and their qualifications." RFP § M.3.3.

FRA's evaluation of Powersolv's initial [*10] proposal assessed weaknesses under the experience factor with respect to two of the protester's key personnel: its proposed project manager, who was an executive vice president for the protester; and its proposed senior systems analyst. Specifically, with respect to the project manager, the agency stated that it was unclear as to the value of proposing an executive vice president as a program manager, see AR, Tab 11, TEB Consensus Report, at 4; that the ability of the executive vice president to handle the program management responsibilities was questionable; and that he "[d]oes not

appear PMP certified." n5 Id., Tab 11, SSEB Evaluation Matrix, at 1. With respect to the senior systems analyst, the agency was concerned that the proposed individual did not have relevant domain experience.

n5 PMP certification is a credential provided by the Project Management Institute (PMI), which is a non-profit association that provides training to professional project managers. See PMI Website, available at:
<http://www.pmi.org/CareerDevelopment/Pages/PMICredentialOverview.aspx>.

The agency's discussions questions regarding these individuals were as follows:

a. **[*11]** The Labor Categories Section on pages 14-16 of the RFP describes what FRA expects from the PM position. Since your proposed PM currently serves as your company's Executive Vice-President, please provide a brief discussion of how you envision he will be able to balance the time required to effectively oversee the RSIS effort with his overall corporate obligations.

b. Your proposal states that [deleted] is being proposed at "no direct cost to FRA" and Section 4.0, Cost Details in your Cost Proposal, shows no Unit Price or Labor Rate for the PM position. Are we correct to interpret that for any additional tasking issued under CLIN 004 no additional PM time will be proposed? Can you also confirm that should there be a change in PM during the life of the contract, the PM position will continue to remain at no cost to FRA.

AR, Tab 14, Powersolv Discussions Questions, at 1-2.

In the SSEB final consensus evaluation of the protester's revised proposal, which was the basis for the SSO's award decision, the agency identified continuing concerns regarding the qualifications of Powersolv's proposed project manager, but did not discuss the senior systems analyst. AR, Tab 20(c), **[*12]** SSEB Final Consensus Report, at 2. The SSEB noted that the board remained concerned with the protester's "decision not to staff this critical position with a more technical and 'hands-on' manager." Id. at 2.

Powersolv contends that FRA's evaluation of the firm's project manager is unreasonable. First, Powersolv contends that the RFP did not require that the project manager have a PMP certification, and disputes that its proposed project manager is not qualified, noting that this individual's resume demonstrates his involvement in all aspects of program management. Powersolv also disputes that its project manager would not devote adequate time to the contract. In addition, Powersolv complains that the agency's concerns regarding the project manager's experience were not raised during discussions.

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 P 90 at 7, 13. In reviewing a protest against an agency's evaluation of an offeror's proposal, our Office will not reevaluate the proposal but instead will examine **[*13]** 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 P 169 at 3.

In its response to the protest, the agency denies that it downgraded the protester's proposal because "FRA desired a non-executive level individual with technical expertise" or a program manager with a PMP certificate. AR at 2. Instead, the agency argues that its evaluators "viewed some risk from the fact that [the PM] was proposed at 'no cost', and that he lacked recent experience in or exposure to the current technical disciplines of the FRA's [RSIS]." Id. The agency does not contend that the RFP required that the proposed project manager must have a

PMP certification. n6

n6 We agree with Powersolv that PMP certification was not required by the solicitation. Thus, any weakness assessed with regard to a lack of PMP certification would constitute the improper application of an unstated evaluation criterion. See Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD P 146 at 8. **[*14]**

The record, however, does not support FRA's contentions. As noted above, the agency's evaluation of Powersolv's initial proposal specifically questioned the ability of the firm's proposed project manager and noted that he did not have a PMP certification. See AR, Tab 11, SSEB Evaluation Matrix, at 1; see also id., Tab 12, Pre-Negotiation Memorandum, at 10. Although the agency's evaluation of Powersolv's revised proposal does not specifically mention PMP certification, the CO in his statement in response to the protest notes: "The proposed Powersolv Project Manager (PM) was given an ACCEPTABLE rating. Neither the proposed PM nor Deputy PM appeared to be PMP certified." CO's Statement at 7. Also, the agency in assigning an outstanding rating for ActioNet's proposal under the experience factor specifically noted that the awardee's proposed project manager was PMP certified. AR, Tab 11, TEB Consensus Report, at 4; SSEB Evaluation Matrix, at 1. On this record, we think that the agency's assessment of a weakness was based, in part, upon the failure of Powersolv's project manager to have PMP certification, which reflects the application of an unstated evaluation criterion.

In **[*15]** addition, contrary to the agency's argument in response to the protest, the record shows that the agency was concerned with the proposed project manager's role as a corporate officer. In the evaluation of Powersolv's initial proposal, the TEB specifically identified the following concern regarding the project manager's duties:

It was not however clear what value proposing an Executive Vice President as the Project Manager (PM) brought to their offer. This in fact raised more questions and perceived risks in that individual's ability to perform the duties and responsibilities of the PM as described in the RFP.

AR, Tab 11, TEB Consensus Report, at 4. The SSEB and CO both expressed the same concern, noting: "While good, the proposed PM is a high level corporate official who has been an Executive VP since [deleted]. His ability to handle the RSIS PM responsibilities is questionable." AR, Tab 11, SSEB Evaluation Matrix, at 1; Tab 12, Pre-Negotiation Memorandum, at 10. In its evaluation of Powersolv's revised proposal, the SSEB concluded that Powersolv's

reassurances that their proposed PM (their Exec VP) will be fully committed to the success of the RSIS did not **[*16]** change the original concerns of the SSEB regarding their decision not to staff this critical position with a more technical and 'hands on' manager.

AR, Tab 20(c), SSEB Final Consensus Report, at 2.

On this record, we conclude that the agency based its evaluation of Powersolv's proposed project manager, in part, on his role as a corporate officer. Moreover, the agency does not respond to the protester's argument that its revised proposal adequately explained how the project manager would be able to effectively manage his corporate duties and the half-time duties required by the RFP. See Protester's Comments at 13-17. Accordingly, we have no basis to find reasonable FRA's assignment of a weakness with respect to Powersolv's proposed project manager.

Moreover, the record shows that FRA did not conduct meaningful discussions with Powersolv

with regard to the qualifications of Powersolv's proposed project manager. When an agency engages in discussions with an offeror, the discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's [*17] potential for receiving the award. Federal Acquisition Regulation (FAR) § 15.306(d); Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD P 137 at 10-11. Specifically, an agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns; may not misinform the offeror concerning a problem with its proposal; and may not misinform the offeror about the government's requirements. Velos, Inc.; OmniComm Sys., Inc.; PercipEnz Techs., Inc., B-400500 et al., Nov. 28, 2008, 2010 CPD P 3 at 8.

Here, as discussed above, the agency raised two issues regarding the protester's project manager during discussions: the individual's ability to meet the required time commitment, in light of his role as a corporate officer, and a request to clarify the proposal to provide the project manager at no cost to the government. AR, Tab 14, Powersolv Discussions Questions, at 1-2. These discussions did not address the qualifications or experience of the project manager or whether [*18] he would be a "hands-on" manager. We conclude that the agency's discussions were not meaningful.

Finally, the record does not support the agency's argument in response to the protest that it assessed a performance risk in Powersolv's proposal arising from the fact that the project manager was proposed on a no-cost basis. Neither the TEB's nor the SSEB's evaluation of Powersolv's initial proposal notes a concern that the protester proposed its project manager on a no-cost basis. In this regard, the agency's discussions with Powersolv with respect to the proposal of this individual on a no-cost basis were limited to asking the protester whether the project manager would be provided at no cost under CLIN 004 and would remain at no cost in the event that he were replaced by a different individual. See AR, Tab 14, Powersolv Discussions Questions, at 1-2. Powersolv's revised proposal confirmed that the project manager would perform at no cost to the government. See AR, Tab 18, Powersolv Revised Proposal, at 2.

The only discussion of performance risk associated with the offer of Powersolv's project manager at no cost to the agency is found in the agency's response to the [*19] protest. See CO's Statement at 9; Supp. CO's Statement at 2; SSO Decl. at 1. Given the lack of documentation in the contemporaneous record supporting the agency's post-protest assertion in this regard, we do not think that the record supports the agency's argument that it viewed the no-cost proposal as a performance risk. Boeing Sikorsky Aircraft Support, supra. In sum, the record establishes that FRA's evaluation of Powersolv's proposed project manager was not reasonable. n7 Hosting Solution Evaluation

n7 The agency also states that it assigned a weakness based on inadequate documentation of the qualifications of Powersolv's proposed senior systems analyst. See AR at 2; AR, Tab 11, TEB Consensus Report, at 4-5; SSEB Evaluation Matrix, at 1. The protester does not challenge this assignment of a weakness for its proposed senior systems analyst. The agency argues in response to the protest that the evaluation of the protester under the key personnel subfactor "had less to do with the issue of the proposed [project manager] and everything to do with Powersolv's proposed Senior Systems Analyst." SAR at 6. This is not supported by the record, however, which shows that FRA's evaluation of Powersolv's revised proposal did not mention Powersolv's proposed senior systems analyst. Rather, the agency's evaluation of Powersolv's revised proposal only discusses the firm's proposed project manager. See Tab 20(c), SSEB Final Consensus Report, at 2. [*20]

Powersolv argues that the agency unreasonably evaluated its proposed approach to the hosting requirements for the RSIS servers.

As noted above, the contractor will be required to provide hosting services for the servers, workstations, storage devices, and related equipment for the RSIS. See RFP § C.5. The RSIS is currently hosted at the Arlington, Virginia, facilities of Creative Information Technology, Inc.

(CITI) under a contract with FRA. Powersolv proposed CITI as a subcontractor for this procurement. The RFP advised offerors that the agency might require the relocation of the production environment, i.e., the servers and related infrastructure, and, if it were relocated, the agency would "renegotiate" the contractor's fixed-price under CLIN 0003. Id.

Powersolv proposed to maintain hosting of the RSIS at CITI's facility. AR, Tab 5, Powersolv Initial Technical Proposal at 11-12. The protester noted, however, the following concerns with CITI's facility:

[The] [c]urrent hosting environment for the production systems are located in a facility that does not have a robust infrastructure as one would find in a datacenter to ensure high availability [*21] and to provide the desired cooling and power level. Consequently any power outage over a shorter duration causes FRA to fail over to the [disaster recovery] site, which does not provide support for development, and test environment or day to day operations.

Id. at 12.

The protester's initial proposal recommended that the agency consider moving the production environment to provide a "robust infrastructure for power, cooling, and space." Id. Powersolv stated that such a move could be achieved as an "enhancement" under the cost-reimbursement ID/IQ CLIN 004, which, as noted above, was not evaluated as part of the offerors' proposals.

During discussions, the agency asked the protester to clarify how it would address power outage concerns at the CITI facility. AR, Tab 14, Powersolv Discussions Questions, at 2. The protester's revised proposal stated it would employ risk mitigation strategies to minimize the risk of power outages. Powersolv Revised Technical Proposal at 11.

The FRA's evaluation of revised proposals found no basis to revise the protester's initial rating of better for the technical approach factor because

their clarifications to the [*22] "power outage" related questions did not provide any reassurance that they are adequately equipped to address what to do with the production data management staff in the event of a prolonged loss of power in the project facility.

AR, Tab 20(c), SSEB Final Consensus Report, at 2. The agency noted that although the protester's proposal stated that the incumbent contractor had not experienced a "long term power outage" over the preceding 5 years, the agency was aware of power outages that required staff to be sent home following a power outage. Id. In contrast, the agency evaluated ActioNet's proposal as outstanding under the technical approach factor because the awardee proposed to move the RSIS production servers and infrastructure from the CITI facility to a data center as part of its fixed-price proposal. AR, Tab 11, TEB Consensus Report, at 3; Tab 20 (c), SSEB Final Consensus Report, at 1.

Although the protester contends that it, like ActioNet, proposed to move the production servers to a data center that would have addressed the potential concerns regarding cooling and power outages, we find that the agency reasonably distinguished between the offerors' proposed [*23] approaches. As discussed above, the agency found that ActioNet's specific fixed-price proposal to relocate the production environment to a data center, was superior to Powersolv's proposal to potentially perform such a move, at the agency's direction, at some point in the future under a cost reimbursement CLIN. Notably, the protester explained that this alternative proposal would require various steps in the future to identify procedures and obtain

necessary equipment to perform the relocation of the production environment to a data center. See Powersolv Revised Technical Proposal at 1. On this record, we find reasonable the agency's evaluation of Powersolv's approach to the hosting requirements for the RSIS servers. n8

n8 As discussed below, however, we find that the agency unreasonably considered Powersolv's price with respect to its hosting solution in a way that materially affected the award.

Price-Technical Tradeoff

Powersolv contends that the agency did not make a price-technical tradeoff in making the selection decision, as required by the solicitation. The protester argues that, in effect, the agency made award to ActioNet based on its higher-rated proposal, [*24] without giving meaningful consideration to Powersolv's lower-proposed price. As discussed below, we conclude that the record does not show that the agency conducted a reasonable price-technical **tradeoff**. We also conclude that several additional arguments raised by the agency in support of the reasonableness of the award decision are not reflected in the contemporaneous record, and are also unreasonable.

In a "**best value**" procurement, it is the function of the source selection authority to perform a **tradeoff** between price and non-price factors, that is, to determine whether one proposal's superiority under the non-price factor is worth a higher price. Coastal Environments, Inc., B-401889, Dec. 18, 2009, 2009 CPD P 261 at 4. Even where, as here, price is stated to be of less importance than the non-price factors, an agency must meaningfully consider cost or price to the government in making its selection decision. e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD P 219 at 7. An award decision must be supported by a rational and adequately documented explanation of why the higher-rated proposal is, in fact, [*25] superior, and why its technical superiority warrants paying a price premium. FAR § 15.308; ACCESS Sys., Inc., B-400623.3, Mar. 4, 2009, 2009 CPD P 56 at 7. An agency that fails to adequately document its source selection decision bears the risk that our Office may be unable to determine whether the decision was proper. ACCESS Sys., Inc., supra.

As an initial matter, there is no specific document identified in the record as the SSO's source selection decision. We regard the SSEB final consensus report as the selection decision, given that this is the only document signed by the SSO and because it states as follows: "SSO Concurrence: I agree with the above recommendations of the SSEB." AR, Tab 20(c), SSEB Final Consensus Report, at 5. This document, however, does not describe or evidence a **tradeoff** between ActioNet's technical superiority and Powersolv's lower evaluated price; rather it merely identifies ActioNet's proposal as reflecting the **best value**.

During the course of this protest, FRA identified the following three other documents in the contemporaneous record that, in the agency's view, reflect [*26] a price-technical **tradeoff** in selecting ActioNet's proposal for award: (1) an email summarizing an SSEB member's evaluation of the offerors' revised proposals, AR, Tab 20(a), Email Summary of Proposal Revisions; (2) the CET's evaluation of the offerors' revised labor rates, id., Tab 20(b), Price Analysis Report; and (3) the CO's final evaluation of the offerors' proposals, id., Tab 20(d), CO's Evaluation of Revised Proposals. None of these documents contains an analysis describing why ActioNet's higher-rated proposal was believed to be worth the associated price premium. n9

n9 Moreover, none of the agency's pre-discussion documents evidence a tradeoff analysis, i.e., an explanation of what aspects of ActioNet's proposal were worth a price premium as compared to Powersolv's lower-priced proposal. See AR, Tab 11, TEB Consensus Report; SSEB Evaluation Matrix; SSEB Competitive Range Briefing to the SSO.

In addition to the lack of a meaningful price-technical tradeoff analysis, the agency's should-cost analysis reflects a flawed evaluation of the offerors' proposed labor rates that may have prejudiced the protester. We note for the record that the FRA states [*27] that its should-cost analysis was merely one of the price analysis techniques used to evaluate offerors' proposals,

and "had no significant impact on the selection decision." Supp. CO's Statement at 4. We think the record shows otherwise.

As discussed above, the RFP stated that FRA would place orders under ID/IQ CLIN 004 for non-routine maintenance, system development, and enhancement efforts. The orders would be negotiated with the contractor based on the rates proposed by offerors for the labor categories identified in the solicitation.

In its evaluation of offerors' overall proposed price, the agency also performed a should-cost analysis of each offeror's proposed price by calculating the average of an offeror's proposed labor rates, and then multiplying the average rate by the total estimated hours proposed for the fixed-price CLINs. AR, Tab 20(b), Price Analysis Report, at 1. The agency then compared each offeror's should cost amount to its proposed price to establish a "variance." Id. The agency concluded that a positive variance, that is, a higher proposed price as compared to the should cost amount, indicated that an offeror's price was realistic; a negative variance, [*28] that is, a lower proposed price as compared to the should cost amount, indicated that an offeror's price was unrealistic or underpriced. Id. FRA concluded that ActioNet's proposed price showed a positive variance, whereas Powersolv's proposed price showed a negative variance, which indicated "a risk to the Government for these offeror[s] to retain qualified, skilled personnel to perform the services in accordance with industry standards." Id.

We conclude that the agency's analysis is flawed because it simply averages all of the labor rates proposed by an offeror, and multiplies the average labor rate by the total number of hours proposed. This calculation treats each labor rate as equally weighted regardless of the number of hours that would be performed under each labor category. Without considering each offeror's unique approach to relying on the various labor categories in performing a fixed-price CLIN, this analysis does not reasonably inform the agency as to whether or not an offeror's fixed price for a particular CLIN reflects its underlying labor costs. In short, the asserted "variance" between an offeror's proposed price and its "should cost" price--as FRA uses [*29] that term--is meaningless.

FRA also contends that, although not documented in the contemporaneous record, it considered Powersolv's proposed price to be unbalanced and to constitute a below-cost "buy in." For this reason, the agency argues that the "true price differential between the ActioNet and Powersolv proposals was insignificant." Supp. CO's Statement at 1. As explained below, we find that these undocumented evaluation conclusions are unreasonable.

In response to Powersolv's supplemental protest--concerning the lack of a documented price-technical tradeoff--FRA contends that it viewed the "true" price difference between the offerors as less than the 9.8 percent difference indicated by their proposed prices. n10 In this regard, the agency states that "[a]lthough not clearly documented in the Agency Report, the true price differential between the ActioNet and Powersolv proposals was insignificant." Supp. CO's Statement at 1. In this regard, the SSO stated that

the price gap between Powersolv and the other two vendors was attributable to the 'unbalanced' pricing in their decision to provide a 'no cost' Project Manager and their recommendation to move RSIS to [*30] a data center as a future task whose cost was to be at the government's expense.

SSO Decl. at 1.

n10 The difference between the offerors' proposed prices was approximately \$ 920K, or 9.8 percent. CO's Statement at 10.

In a competition for a fixed-price contract, our Office has held that the fact that a firm, in its

business judgment, submits an offer that is priced lower than its cost does not render the firm ineligible for award. IBM Corp., B-299504; B-299504.2, June 4, 2007, 2007 CPD P 64 at 13 n.17. An agency may evaluate whether an offeror's proposed price is unrealistically low and thereby poses a risk of unsuccessful performance. FAR § 15.404-1(d)(3); IBM Corp., supra, at 11. This evaluation, however, is an assessment of the risks of the technical proposal; an agency may not adjust a proposed fixed price for purposes of evaluation. Id. An agency may also evaluate whether a fixed-price proposal presents a performance risk or a risk of unreasonably high prices because, despite an acceptable total evaluated price, the price of one or more contract [*31] line items is unbalanced, i.e., significantly overstated or understated. FAR § 15.404-1(g). Our Office has held that there is nothing improper in an offeror electing not to charge for certain items or services, thereby creating an "unbalanced" price, absent a specific risk identified by the agency. GTSI Corp., B-286979, Mar. 22, 2001, 2001 CPD P 55 at 6.

With regard to the hosting requirements, FRA argues that Powersolv's proposed price was unbalanced because it did not provide for moving the production environment to a data center. As discussed above, Powersolv's proposal stated that it would use the CITI facilities for the hosting solution required under CLIN 003, but also recommended that the agency consider moving the production environment to a data center, under ID/IQ CLIN 004, to reduce the risks of a power failure. The agency based its technical evaluation on the protester's proposal to provide hosting at the CITI facility; it does not appear, based on the record, that the agency evaluated the protester's proposal for the technical approach subfactor based on the recommendation for a possible future [*32] relocation of the production environment to a data center. See AR, Tab 20(c), SSEB Final Consensus Report, at 2.

The agency states that ActioNet's proposed hosting costs were approximately [deleted], while Powersolv's proposed hosting costs were approximately [deleted]. n11 Supp. AR at 4; Supp. CO's Statement at 1; Agency Response to GAO Questions at 5. The agency contends that because the protester did not include the costs of a data center relocation in its fixed price, those costs would be borne by the government. Id. The agency thus argues that the difference between the offerors' proposed hosting costs should be added to the protester's proposed price for purposes of evaluation. The agency contends that this adjustment reduces the difference in the offerors' overall evaluated prices to less than [deleted] percent, which the agency argues "is considered insignificant." n12 Supp. CO's Statement at 1.

n11 The basis for the agency's analysis here is unclear, in that the agency compares the cost for ActioNet's subcontractor to provide hosting services, which is a subset of the awardee's total price for CLIN 003, with the protester's total price for CLIN 003. Agency Response to GAO Questions at 5. [*33]

n12 The basis for the agency's calculation of a less than [deleted] percent difference is also unclear. In the CO's supplemental statement, the agency assumed that the protester's hosting costs were [deleted] as compared to the awardee's cost of [deleted]. Supp. CO's Statement at 1-2. In the agency's response to questions from our Office, however, the agency states that the protester's hosting costs were [deleted]. Agency Response to GAO Questions at 5. The first calculation yields a price difference of less than [deleted] percent, while the latter calculation yields a price difference of more than [deleted] percent.

The agency concedes that its argument concerning the costs of the data center relocation and hosting requirements, and their effect on the relative prices of the offerors, is not reflected in the contemporaneous record. Supp. CO's Statement at 1. We think that in the absence of any evidence that this analysis was relied upon by the agency during the evaluation of the offerors' proposals, it provides no basis to support the reasonableness of the award decision. Boeing Sikorsky Aircraft Support, supra.

More importantly, we think that the [*34] agency could not have reasonably relied on this analysis in its award decision. The agency's argument in response to the protest, in effect, assumes that the protester's technical approach will require the production environment to be

moved to a data center, and that the agency will be required to pay for this move under CLIN 004. We think that this assumption is not reasonable because the RFP did not require offerors to propose a move to a data center or to include costs for such a move in their fixed-price proposals, and because, as discussed above, the agency did not evaluate Powersolv's proposal on the basis of such a proposed move. See RFP § C.5; AR, Tab 11, TEB Consensus Report, at 4; Tab 20(c), SSEB Final Consensus Report, at 2.

Furthermore, we think that the agency's analysis unreasonably assumes that Powersolv's proposed price for data center relocation and hosting would be the same as ActioNet's. Because the agency did not request this type of pricing data from Powersolv, however, we do not think the agency could reasonably assume that both offerors would incur the same costs. On this record, we conclude that, even if the agency's analysis regarding the data center [*35] costs was a part of the agency's contemporaneous evaluation, the agency could not have relied upon it to explain away the difference between the offerors' proposed prices.

The agency also contends that Powersolv's proposal to provide its project manager at no cost shows that the protester's price was unbalanced. Here, also, the agency concedes that the contemporaneous record does not specifically show that the agency considered whether Powersolv's proposed price was unbalanced as part of its award decision. n13 Supp. CO's Statement at 1. Moreover, the record does not show that the agency evaluated whether the protester's other labor rates were materially overstated or understated.

n13 In response to a question from our Office, FRA notes that it raised a concern with Powersolv during discussions regarding its proposal to provide the project manager at no cost to the government. As discussed above, however, the discussions regarding the project manager sought to confirm that the individual would be provided at no cost for orders placed under CLIN 004 or in the event that the individual was replaced during performance. AR, Tab 14, Powersolv Discussions Questions, at 1-2. The discussions questions did not indicate that the agency had any performance risk concerns based on proposing the project manager on a no-cost basis, and the agency's evaluation of the protester's revised proposal did not address any such concerns. See id; AR, Tab 20(c), SSEB Final Consensus Report, at 2. [*36]

In sum, we think that the contemporaneous record does not show that the agency conducted a reasonable price-technical tradeoff. Further, we think that the agency's responses to the protest regarding price analyses that justify award to ActioNet do not provide a basis to conclude that the award decision was reasonable. On this record, we **sustain the protest.**

RECOMMENDATION

We recommend that FRA conduct a new evaluation of Powersolv's project manager and, to the extent that the agency has concerns regarding the qualifications of this individual, reopen discussions with the protester and make a new selection decision that adequately documents the basis for award, including any price-technical **tradeoffs**. If ActioNet is not found to offer the **best value** to the government, the agency should terminate ActioNet's contract for the convenience of the government. We also recommend that Powersolv be reimbursed the costs of filing and pursuing its protest, including reasonable attorney fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2010). Powersolv should submit its certified claims for costs, detailing the time expended and cost incurred, directly to [*37] the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The **protest is sustained.**

Lynn H. Gibson
Acting General Counsel

Source: [Legal > / . . . / > Public Contracts Decs From Comptroller General, BCAs, All Federal Courts](#) [1]

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