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Decision

Matter of: Nemean Solutions, LLC

File: B-422298; B-422298.2

Date: April 22, 2024

Christopher L. Lockwood, Esq., and Richard J.R. Raleigh, Jr., Esq., Womble Bond Dickinson (US) LLP, for the protester.

Erika Whelan-Retta, Esq., Colonel Patricia S. Wiegman-Lenz, and Lawrence M. Anderson, Esq., Department of the Air Force; and Dan Peterson, Esq., Department of the Army, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to perform a reasonable price realism analysis of the awardee's labor rates and fringe benefits is denied where the record shows that the agency evaluated elements of the awardee's proposed rates consistent with the solicitation by, among other things, comparing them to the average of all offerors' rates, and to the incumbent's rates, and made a reasonable judgment that the awardee's rates were realistic and did not pose a risk of unsuccessful performance.

2. Protest that agency misevaluated proposals and treated offerors unequally is denied where the record shows the evaluation was reasonable and consistent with the solicitation criteria, and where differences in the evaluation were based on differences in the proposals rather than unequal treatment.

DECISION

Nemean Solutions, LLC, of Sierra Vista, Arizona, a small business, protests the award of a contract to Nisga'a CIOPS LLC, of Chantilly, Virginia, also a small business, under request for proposals (RFP) No. H92239-23-R-0005, issued by the Department of the Army, Special Operations Command, for medical instruction support services for the joint special operations medical training center (JSOMTC) at the John F. Kennedy Special Warfare Center and School at Fort Liberty, North Carolina. Nemean argues that the Army failed to perform a reasonable price realism analysis of the awardee's proposal, failed to properly assess the risk of the awardee's proposed staffing approach,

and treated Nemean's proposal unequally, which then resulted in an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP, issued on August 17, 2023, sought proposals from participants in the Small Business Administration's section 8(a) program¹ to provide services for a base year and four option years on a fixed-price basis. The required services were described in an accompanying performance work statement (PWS). Agency Report (AR), Tab 12, Conformed RFP at 20. The PWS identified minimum qualifications for each of the three required job titles: advanced medical instructor-I (AMI I), advanced medical instructor-II (AMI II), and special operations forces medical instructor/technical writer/training developer (SOF-P).² Conformed RFP at 28-30. Additionally, the offeror was required to designate a senior instructor manager and an alternate, a contract manager, and an assistant contract manager. *Id.* at 31-32. The RFP incorporated by reference the clause at FAR 52.222-41, indicating the applicability of the Service Contract Act (SCA), and provided a wage determination for Cumberland and Hoke counties in North Carolina. *Id.* at 69, 109-119.

The contract was to be awarded to the offeror whose proposal was evaluated as "pass" under a set of qualifying criteria and provided the best value to the government under four factors: (1) technical knowledge of operational medical training; (2) staffing, retention, and management of personnel; (3) past and present performance; and (4) price/schedule. Of the four factors, the first two were more important than the third and, when combined, those three were more important than the price/schedule factor. Conformed RFP at 101-102.

As relevant to the protest, the evaluation under the staffing, retention, and management of personal factor was to assess whether the offeror had "successfully demonstrated its ability to staff, implement, and provide instructor support to JSOMTC." *Id.* at 104. In doing so, the RFP stated that the evaluation would consider the offeror's understanding of the contract requirements through identifying "proper roles, autonomy, lines of authority, and responsibilities," showing that its personnel had required knowledge,

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), commonly referred to as the 8(a) program, authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance of those contracts through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800.

² The PWS stated that the historical workforce indicated an estimated total of 52 full-time equivalents (FTE) were needed to perform the contract, of which 3 FTEs had AMI job titles, and 49 FTEs had the SOF-P job title. *Id.* at 57 (Technical Exhibit D: Historical Workload Data).

skills, and qualifications, and showing the firm's ability to support phase-in and full performance of contract requirements. Additionally, the agency would evaluate whether the offeror showed the ability recruit, compensate, and retain a workforce and avoid staff turnover and service degradation. *Id.*

The first two evaluation factors were to be rated using a color and adjectival rating: blue/outstanding, purple/good, green/acceptable, yellow/marginal, or red/unacceptable. *Id.* at 104. Additionally, a narrative evaluation would identify any significant strengths, strengths, weaknesses, significant weaknesses, and deficiencies in each offeror's proposal. *Id.* at 104-105. The past/present performance factor would be adjectivally rated as degrees of confidence: significant, satisfactory, neutral, limited, or no confidence. *Id.* at 105-106.

The price evaluation would assess whether each offeror's pricing was fair and reasonable, balanced (particularly as to option pricing), and realistic. *Id.* at 107. The RFP described the agency's price realism assessment thus:

[The agency would assess] the realism of the offeror[']s labor rates/salary and fringe benefits to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation. The compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep the highly qualified personnel to meet mission objectives. The salary rates or ranges must consider differences in skills, the complexity of various disciplines, and job difficulty. Additionally, proposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated based on of maintaining program continuity, uninterrupted high-quality work, and availability of required competent highly skilled service employees. Offerors are cautioned that lowered compensation for essentially the same work may indicate lack of sound management judgment and lack of understanding of the requirement.

Id.

The Army received proposals from eight offerors, including those from the awardee and the protester. Contracting Officer's Statement (COS) at 6. Under the first two factors, the agency rated Nemean's proposal purple/good for both, and the accompanying

narrative identified five strengths.³ AR, Tab 16, Source Selection Evaluation Board (SSEB) Report at 104. Of those, three strengths were under the technical knowledge of medical operations factor: one for having a team member that had direct experience with, and an understanding of, JSOMTC's curriculum, mission and operating procedures, another for the firm's understanding of the process of making changes to the formal program of instruction and satisfying related oversight requirements, and a third for having a team member with extensive knowledge of research and innovations in medical technologies and techniques that could be used to update the program of instruction and develop supplemental training. *Id.* at 105-106. Under the staffing, retention, and management of personnel factor, the strengths were for providing key personnel whose qualifications both exceeded the minimum requirements, and for using an approach designed to reduce instructor turnover and vacancies. *Id.* at 107. The agency assigned Nemean's proposal a rating of satisfactory confidence under the past and present performance factor and found the firm's price reasonable and realistic at a total evaluated price of \$39.4 million. *Id.* at 139; COS at 7.

The evaluation of the awardee's proposal also resulted in purple/good ratings under both the technical knowledge of medical operations factor and the staffing, retention, and the management of personnel factor. The evaluation identified five strengths for the awardee, with two under the first factor, and three under the second. The agency assigned the awardee's past and present performance a rating of satisfactory confidence and found the firm's price to be reasonable and realistic at a total evaluated price of \$33.6 million. AR, Tab 16, SSEB at 70; COS at 7.

The final adjectival ratings and price evaluations were as follows:

Offeror	Tech. Knowledge of Medical Operations	Staffing, Retention & Mgmt of Personnel	Past/Pres. Performance (confidence)	Total Eval'd Price (millions)
Nisga'a	Purple / Good	Purple / Good	Satisfactory	\$33.6
Offeror A	Purple / Good	Purple / Good	Substantial	\$37.7
Offeror B	Purple / Good	Purple / Good	Satisfactory	\$38.7 ⁴
Nemean	Purple / Good	Purple / Good	Satisfactory	\$39.4
Offeror C	Purple / Good	Purple / Good	Satisfactory	\$46.7
Offeror D	Purple / Good	Purple / Good	Satisfactory	\$49.7
Offeror E	Purple / Good	Purple / Good	Substantial	\$50.6
Offeror F	Red / Unacceptable	Red / Unacceptable	Limited	\$53.3

COS at 7.

³ This decision discusses only strengths because the evaluation identified no significant strengths, weaknesses, significant weaknesses, or deficiencies in either Nemean's or the awardee's proposal.

⁴ The record states that Offeror B's pricing was evaluated as not realistic.

The contracting officer, as the source selection authority, reviewed the evaluations and compared Nisga'a's proposal to those of other offerors individually, including to Nemean's. After reviewing the substance of the strengths for both offerors individually, the contracting officer concluded that under the first two factors, "nothing in either technical proposal . . . makes one superior to the other." AR, Tab 18, Source Selection Decision (SSD) at 7. The contracting officer expressly noted that Nemean's strength for being able to incorporate innovations into its courses was "impressive" but was nevertheless tempered by the need for those innovations to be funded by other commands and incorporated into the formal program of instruction. *Id.* Ultimately, the contracting officer stated that Nemean's proposal did not provide either a technical advantage or a past/present performance advantage that would be sufficient to justify paying an additional \$5.8 million over Nisga'a's evaluated price. *Id.* at 8.

The contracting officer also specifically noted that both firms' total compensation plans were acceptable, and that Nemean proposed higher direct rates⁵ for the [SOF-P] instructors, while Nisga'a's rates were higher for its [AMI-I and AMI-II] instructors. *Id.* Nevertheless, the contracting officer also observed that each of Nisga'a's rates was an increase over the incumbent's direct labor rates. *Id.* The contracting officer also presented a table comparing individual elements (overhead, "G&A" [general and administrative costs], profit/fee, G&A rate applied to travel costs, fringe benefits rate, and three direct rates for the three job titles) of each offeror's price. *Id.* The contracting officer compared those elements between Nemean and the awardee, noting that each of Nemean's rates was higher, except for two elements: its fringe benefits rate and its application of G&A to travel costs were both lower than the corresponding rates from Nisga'a's proposal. *Id.* The contracting officer also noted that Nemean's overhead and G&A rates were both significantly higher than Nisga'a's, but its pay rate for the SOF-P instructors was only \$2.89 higher compared to Nisga'a's. *Id.* Overall, the contracting officer concluded that Nemean presented no advantages in its technical or past performance to justify its higher price, whereas Nisga'a offered experience supporting JSOMTC, experience supporting military medical training, higher pay for the positions with AMI job titles, and a lower price, making Nisga'a's proposal a better value than Nemean's. *Id.*

After considering each of the other offerors in similar detail, the contracting officer decided that Nisga'a's proposal offered the best value and selected it for award. Following notice of the award and a debriefing, Nemean filed this protest.

DISCUSSION

Nemean contends that the agency unreasonably assessed the price realism of the awardee's proposal and, in a related argument, failed to reasonably evaluate the risk of the awardee's staffing approach. Additionally, Nemean argues that the technical evaluation assessed strengths unequally by assessing a single strength for Nemean but

⁵ The contracting officer uses the term "direct rate" for the offerors' hourly pay rate, which thus excludes fringe benefits and overhead, which were shown separately.

two strengths for the awardee, for equivalent aspects of their proposals. As explained below, our review of the record shows that the Army made a reasonable price realism evaluation of the awardee's proposal, reasonably considered risk in assessing its staffing approach, and did not engage in unequal treatment in assessing strengths.

Evaluation of Price Realism and Staffing Risk

Nemean raises two challenges based on its contention that the awardee has allegedly misclassified contract personnel as exempt employees under the SCA. Protest at 10. The protester asserts that employees in the SOF-P positions have long been categorized as nonexempt under the SCA, but the awardee's pricing is significantly lower than competing offerors because it is based on changing their classification to exempt, which Nemean argues is improper. The firm asserts that the awardee's approach will result in those employees being paid a salary and no overtime, in contrast to the current structure of hourly pay and eligibility for overtime.⁶ *Id.* at 2. The first of Nemean's arguments is that the Army's price realism evaluation should have deemed the awardee's pricing unrealistic due to what Nemean alleges is the firm's approach of treating SOF-P workers as exempt from the SCA.⁷ *Id.* at 13; AR, Tab 14, Nisga'a Proposal at 123 (SCA applicability for SOF-P labor category listed as "N/A"). The firm's second argument is that the Army miscalculated the awardee under the staffing, retention, and management of personnel factor by failing to recognize significant risks of poor performance that would result from the awardee's allegedly unreasonably low prices, particularly in relation to allegedly low pay and fringe benefits for the SOF-P positions. *Id.*

The Army argues that the evaluation was reasonable and, in fact, recognized that the awardee's price was low in certain respects, but that the evaluation reasonably analyzed and understood the pricing, assessed the pricing as realistic, and determined that the risks of Nisga'a's approach to staffing, retention, and management of personnel were low. The Army argues that the agency conducted an extensive and careful assessment that reasonably determined the awardee's prices were realistic. Memorandum of Law (MOL) at 10.

An agency may include a price realism analysis to assist in evaluation of proposals to determine whether prices are too low, which may pose a risk of poor performance. Our review of an agency's price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation. *Logistics 2020, Inc.*,

⁶ Nemean also contends that Nisga'a's proposal provides inadequate fringe benefits and indicates vacation and sick leave accrual at rates lower than those required by the SCA. Comments at 5.

⁷ The term "exempt" under Department of Labor regulations means an individual "employed in a bona fide executive, administrative, or professional capacity as those terms are defined in part 541 of title 29, Code of Federal Regulations." See 29 C.F.R. §§ 4.113, 4.156.

B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 8. The nature and extent of the price realism analysis are within the agency's discretion. *Id.* As quoted above, the RFP here provided for a price realism analysis focused on each offeror's labor rates/salary and fringe benefits.⁸ In addition, determining whether an offeror performs a contract in accordance with the SCA is a matter for the Department of Labor, which is responsible for the enforcement of the Act. *Taft Broad. Corp.*, B-222818, July 29, 1986, 86-2 CPD ¶ 125 at 4.

With respect to the protester's first argument challenging the price realism analysis, our review shows that the Army's price realism analysis was reasonable. To the extent the protester contends that Nisga'a proposed to treat SOF-P employees as not being covered by an SCA labor category or exempt from coverage, we express no view on whether the awardee's proposal violates the SCA. Our Office's role is to review violations of procurement statutes and regulations; in this regard, we review the reasonableness of the Army's price realism analysis.

With respect to the Army's price realism analysis, the record shows that the Army considered the realism of Nisga'a's pricing for the AMI I, AMI II, and SOF-P job titles individually. For each, the analysis compared Nisga'a's rates with those of the other offerors and the independent government estimate. AR, Tab 16, SSEB at 81-84. For the AMI I and AMI II job titles, the agency noted that Nisga'a's rates were the fifth and sixth highest, respectively, and the AMI I rate was 3.7 percent lower than the average of all offerors' rates for that job title but was higher than the incumbent's rate for the position, while its AMI II rate was 6.4 percent higher than the average, but there was no comparable incumbent position to compare. *Id.* at 82-83. For the SOF-P job title, the evaluation similarly compared Nisga'a's rates to the average, the government estimate, the average of all offerors, and the incumbent's rate. *Id.* at 83-84. The firm's SOF-P rate was 13.7 percent below the average of all offerors, but it nevertheless represented a 9.4 percent increase over the rate on the incumbent contract. *Id.* at 83. The evaluators also surveyed the firm's fringe benefits. *Id.* at 81. Ultimately, they concluded with respect to each job title that Nisga'a's rates were not too low for it to perform the contract and did not present any concerns over price realism. *Id.* at 82-84.⁹

⁸ The standard provision establishing a review of professional compensation (FAR 52.222-46) was not incorporated in the RFP, but we recognize some general similarity between that provision and the language of the RFP quoted above.

⁹ Furthermore, if the protester's assertion is correct that during performance of the contract Nisga'a may have to pay SOF-P positions SCA wages rather than a salary, in the Army's view, there is no price risk as alleged by the protester. According to the Army, this is because Nisga'a's proposed labor rates for the SOF-P positions are based on Nisga'a paying a salary that is higher than the corresponding SCA wages, assuming a 40-hour workweek. Supp. AR at 2 (arguing that Nisga'a's "hourly salary rate" would exceed the incumbent wage rate and the rate specified in the wage determination). Although Nemean still objects that the Army analysis overlooks important differences (lower leave accrual, differing fringe benefits, and potential absence of overtime pay),
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With respect to Nemean's second argument, challenging the evaluation of Nisga'a's proposal under the staffing, retention, and management of personnel factor, the evaluation considered multiple aspects of the firm's proposed approach, including touching briefly on the firm's "acceptable staffing, management, and compensation plan." *Id.* at 73. In the SSD, the contracting officer also specifically noted that Nisga'a's proposed labor rate was higher than the incumbent rate for all labor categories and explained that the firm's compensation would not result in diminished service quality and would instead have a positive impact on recruiting and retention. AR, Tab 18, SSD at 8.

Altogether, the record shows that the evaluators and the contracting officer understood the relationship of Nisga'a's rates to the other competitors and to the incumbent contract. They considered whether the awardee's proposed rate for the SOF-P positions, and the corresponding fringe benefits, would risk poor performance or would impair recruitment and retention of employees. They noted the differences in terms of pay and as a ranking and a percentage above or below the corresponding average of all offerors. Ultimately both the evaluators and the contracting officer found Nisga'a's rates realistic and as not posing a risk of unsuccessful performance. In the source selection decision, the contracting officer compared individual proposals to Nisga'a's and, while doing so, recognized that the direct rate for SOF-P instructors would influence recruiting and retention of employees. *Id.* at 19.

Our review shows those judgments were reasonable and based on appropriate analysis and data. The RFP did not identify SCA compliance as an element of the price realism analysis, but instead indicated a focus on such aspects as sound management approach, understanding of the contract requirements, ability to provide uninterrupted high-quality work, and its effect on recruiting and retention, realism, and consistency with the offeror's compensation plan. The staffing, retention, and management of personnel factor evaluation also did not identify SCA compliance as an element, but instead indicated that the agency would assess the offeror's understanding of the contract requirements by establishing organizational control, providing personnel with required knowledge, skills, and qualifications, and showing an ability recruit, compensate, and retain a workforce and avoid staff turnover and service degradation. The record confirms that the agency's evaluation was consistent with these criteria and reached reasonable evaluation judgments about Nisga'a's proposal. Accordingly, we deny Nemean's challenges to the price realism evaluation and the evaluation of the awardee's risk under the staffing, retention, and management of personnel factor.¹⁰

the Army's point is consistent with the evaluation judgment that Nisga'a's proposed labor rates for SOF-P employees did not represent a significant risk.

¹⁰ Although Nemean submitted declarations of incumbent employees about what they understand Nisga'a's approach to pay and fringe benefits will be and whether it is adequate, we do not find these declarations probative on the issues in the protest. The protester challenges the Army's evaluation of the proposals, and our review is therefore focused on the documentation of that evaluation in the record.

Unequal Evaluation

Nemean also contends that its proposal was misevaluated because the Army failed to assess an additional strength for an aspect of its staffing approach that was identified as a strength for the awardee, thereby treating the proposals unequally. The firm contends that assessing that strength would have provided Nemean three strengths under the staffing, retention, and management of personnel factor, and would have “turned the award in [Nemean’s] favor.” Comments & Supp. Protest at 14. Specifically, Nemean argues that Nisga’a’s proposal was assessed one strength for proposing two key personnel--a senior instructor manager (SIM) and a contract manager--both of whose qualifications exceeded the baseline, and a second strength for “propos[ing] to dual hat the SIM as the ACM [assistant contract manager].” *Id.* at 15 (quoting AR, Tab 16, SSEB at 73). Nemean contends that the evaluation did recognize that it also “propose[d] to dual hat the SIM as the Assistant Contract Manager,” but unlike with the evaluation of Nisga’a’s approach, the Army blended that aspect into a strength for proposing of highly qualified key personnel as both the contract manager and SIM. *Id.* (quoting AR, Tab 16, SSEB at 107).

The Army argues that the record demonstrates no unequal treatment. Instead, the agency contends, the narrative explanation of each strength shows that a different strength was assessed for Nemean than for Nisga’a. The Army contends that the strengths reflected unique qualities in the two firms’ proposals, even though both proposed to dual hat the SIM as the ACM. While Nemean argues that like Nisga’a, the Army also should have assigned its proposal a second strength, the agency responds that the second of Nisga’a’s two strengths was not present in Nemean’s proposal. That strength covered the awardee’s “explanation and utilization of division leaders” thorough delineation of responsibilities within its team, their roles, which the agency considered to be particularly suitable to accomplishing the work and ensuring good communication. Supp. MOL at 13-14. The agency argues that Nemean did not propose an approach that would merit a second strength under the staffing, retention, and management of personnel factor, and thus there was no unequal treatment.

The agency contends that there was no unequal treatment because Nemean cannot show an equivalent approach in its proposal. *Id.* at 15. The Army points to the RFP direction for offerors to provide an organizational chart and an explanation of the firm’s organizational structure that was to include “what parts of the organization are responsible for managing and accomplishing what work (identify each organizational element, i.e., **Division/Branch/Team**).” *Id.* (quoting Conformed RFP at 97). Even so, the Army argues, Nemean’s proposal “was silent regarding how it planned to utilize division leaders,” and merely made a general statement that its “*CM [contract manager] is prepared to designate division leaders aligning to the contract Basis of Estimate.*”¹¹ *Id.*; AR, Tab 13, Nemean Proposal at 49.

¹¹ In their narrative supporting the same strength for Nemean, the evaluators recognized that the firm had proposed that its contract manager would designate division leaders
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Agencies must even-handedly evaluate proposals against common requirements and evaluation criteria. *American Sys. Corp.*, B-420132 *et al.*, Dec. 13, 2021, 2021 CPD ¶ 387 at 5. Where a protester contends that the evaluation resulted from unequal treatment, the firm must show that the allegedly unequal ratings did not stem from differences between the offerors' proposals. *Red Gate Grp., Ltd.*, B-410466.8, May 12, 2017, 2017 CPD ¶ 169 at 6.

Our review of the record does not support Nemean's claim of unequal treatment. Instead, the record supports the reasonableness of the Army's evaluation of both firms with respect to the strengths that mention each firm proposing to dual hat its SIM to serve as the ACM. Other than the fact that both firms proposed that approach (which the evaluators accurately noted for each under the respective firm's staffing, retention, and management of personnel factor evaluation), the record does not show that Nemean's approach was equal to Nisga'a's. Nemean has not shown that its proposal should have received a strength for providing a thorough explanation of an approach to distributing work using division leaders, as the agency assessed for Nisga'a. The record thus confirms that Nemean's proposal differed significantly from Nisga'a's on the features identified in the second of the awardee's strengths under the staffing, retention, and management of personnel factor. We therefore deny this ground of protest.

The protest is denied.¹²

Edda Emmanuelli Perez
General Counsel

aligning to the contract basis of estimate by stating that being "prepared to appoint division leaders [wa]s viewed positively." Supp. MOL at 15 (quoting AR, Tab 16, SSEB at 107).

¹² Nemean also contends that its proposal should have received ratings of blue/outstanding under both technical factors because the evaluation assessed "multiple strengths and / or at least one significant strength, and [its] risk of unsuccessful performance is low," thereby meeting the definition of the blue/outstanding rating. Protest at 14. However, as discussed above, the record shows that the contracting officer compared the technical proposals on the substance of the evaluations under both factors rather than relying on adjectival ratings. So, any error in the selection of the adjectival ratings does not provide a basis to sustain the protest. Additionally, even if Nemean's contention were valid, it would apply equally to the awardee's ratings, which would likewise be blue/outstanding adjectival ratings.