



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: CDO Technologies, Inc.

File: B-416989

Date: November 1, 2018

Katherine S. Nucci, Esq., and Scott F. Lane, Esq., Thompson Coburn LLP, and Tara L. Ward, Esq., and William A. Roberts III, Esq., Wiley Rein LLP, for the protester. Lieutenant Colonel Kevin P. Stiens, Michelle Gregory, Esq., and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's price realism and technical risk evaluation is dismissed as untimely where the protester waited until more than a month after the close of its debriefing to receive confirming information to support its allegations which were knowable or should have been knowable at the time the protester received its debriefing.

DECISION

CDO Technologies, Inc., a small business, of Dayton, Ohio, protests the award of a task order to Atlantic CommTech Corporation (ACT), a small business, of Norfolk, Virginia, under Fair Opportunity Proposal Request (FOPR) No. FA4890-18-R-0011, which was issued by the Department of the Air Force, for communications engineering and installation (E&I) program support for the U.S. Air Force Central Command (USAFCENT). CDO alleges that the agency conducted an unreasonable price realism evaluation of ACT's proposal and failed to adequately assess the performance risk associated with ACT's unrealistic proposed price.

We dismiss the protest because it is untimely where it was filed more than 10 days after CDO knew or reasonably should have known the bases for its protest.

BACKGROUND

On March 30, 2018, the Air Force issued the FOPR in accordance with Federal Acquisition Regulation (FAR) § 16.505 procedures under the NETCENTS-2 Small

Business Pool NetOps indefinite-delivery, indefinite-quantity contract. FOPR at 1.¹ The FOPR sought proposals for communications E&I program support in the USAFCENT area of responsibility, which includes the United Arab Emirates, Kuwait, Jordan, Qatar, and other locations as necessary to meet mission requirements. Id. The FOPR contemplated the award of a hybrid fixed-price and cost-reimbursable type order, with a 90 day transition period, a 1-year base period, and four, 1-year option periods. Id., attach. No. 7, Contract Line Item Number (CLIN) Structure for E&I Base Year through Option Period 4.

Award was to be made on the basis of a best-value tradeoff, considering technical, past performance, and price. FOPR at 2. The technical factor included three equally-weighted subfactors: management plan and staffing approach; special projects; and transition plan. Id. The technical factor was more important than past performance, and past performance was more important than price. Id. The non-cost factors, when combined, were significantly more important than price. Id.

As relevant to the decision, the FOPR established that the Air Force would evaluate proposed prices for reasonableness, realism, and balance. Id. The FOPR included a fixed-price CLIN for transition, and six identical CLINs for each of the base and option periods. For example, for the base period the FOPR included a fixed-price CLIN for core labor, and five cost-reimbursable CLINs for travel, other direct costs, special projects, material/equipment, and future operational labor. For each of the five cost-reimbursable CLINs, the agency directed offerors to use plug numbers, which the agency provided. The same CLIN structure applied in the option periods. See id. at 10-11; attach. No. 7, CLIN Structure. With respect to the plug numbers provided, the FOPR explicitly advised that offerors were not to change or apply any fee to the pre-established not-to-exceed amounts. FOPR at 10-11. Thus, offerors only provided independent prices for the fixed-price CLINs for transition and core labor. The FOPR provided that an offeror's total evaluated price would be calculated by summing: (1) the fixed-price CLIN for the transition; (2) the fixed-price CLINs for core labor for all base and option periods; (3) the total not-to-exceed plug numbers for the base and option periods; and (4) half of the last option year price to cover the option to extend services period in accordance with FAR clause 52.217-8. Id. at 11.

The Air Force received three proposals in response to the FOPR, including from CDO and ACT. RFD, attach. No. 4, Unsuccessful Offeror Notice, at 1. On August 27, the Air Force notified CDO that its proposal was not selected for award, and disclosed the evaluation results for the protester and the awardee, which were as follows:

¹ References herein are to the FOPR as amended. Additionally, references to page numbers are to the Bates numbering provided in the agency's request for dismissal (RFD).

	Technical	Past Performance	Price
ACT	Good / Low Risk	Satisfactory Confidence	\$89,995,770
CDO	Acceptable / Low Risk	Satisfactory Confidence	\$106,178,945

Id.

The unsuccessful offeror notice further advised CDO that it was entitled to request a debriefing in accordance with the procedures of FAR § 16.505(b)(6). Id. at 2. CDO promptly requested a debriefing. On August 29, the Air Force provided CDO a debriefing, which again disclosed ACT's price and technical and past performance ratings. RFD, attach. No. 5, CDO Debriefing, at 37. At the agency's invitation, the protester submitted additional debriefing questions after the conclusion of the oral debriefing. On September 5, the agency responded to the additional questions in writing. RFD, attach. No. 6, Email Correspondence.

Relevant here, CDO asked a number of questions pertaining to the agency's price realism evaluation. First, CDO inquired whether it was the government's intent for offerors to propose a total of 40 full-time equivalents (FTE) for the core labor CLIN, and if offerors were allowed to propose less than the 40 FTE. The Air Force confirmed that it was the agency's intention for offerors to propose 40 FTEs for the core labor CLIN, and that no offeror took exception to the requirement. Id. at 6. CDO then inquired regarding whether the agency had prepared an independent government cost estimate (IGCE), and how the winning price compared to the IGCE. In this regard, the protester, whose team includes the incumbent, argued that it appeared that the awardee's total proposed price was unrealistically low and would likely result in significant compensation reductions for incumbent personnel. Specifically, CDO's questions stated:

We know actual salaries and benefits required (being paid today) to maintain the current staff in country and with our [general and administrative (G&A)] and fee we were at \$42.5M while [ACT] appears to have proposed \$26.4M when all plug numbers are removed. That is a difference of \$16.1M or \$3.2M a year in salaries on a [fixed-price CLIN]. If we removed all G&A and profit/fee we would be \$[DELETED] which equates to a difference of \$[DELETED] or [\$] [DELETED] a year. If you take away any G&A and fee/profit from [ACT] their actual salaries drop even farther. Keeping in mind the G&A helps defray in country expenses working with host nation providers.

Based on these numbers and knowing forty (40) FTE are required how can they possibly execute other than reducing staff to Thirty-Five (35) FTE which equates to approximately \$3M a year?

Does the government not see these salary numbers as a Risk/Weakness that puts your program at risk? This clearly shows the current staff will

take a significant decrease in pay and benefits most likely leading to staff quickly departing the program and returning to the states.

Id. at 2.

Beyond explaining that the Air Force could not disclose the awardee's technical and pricing strategies to CDO as part of the debriefing, the agency confirmed that it had conducted a price realism analysis in accordance with the FOPR and determined that ACT's labor rates and total evaluated price did not pose an unacceptable risk. Id. at 6. The agency's written questions further provided that the debriefing was closed. Id. at 1.

On October 2, or approximately one month after the debriefing was closed, CDO alleges that ACT contacted several incumbent personnel regarding employment on the follow-on contract. The protester alleges that some of ACT's offers represented a decrease in compensation of nearly 25 percent as compared to the affected employees' compensation on the incumbent contract. See, e.g., Protest at 2. On October 10, CDO filed this protest with our Office alleging that the Air Force's award to ACT was flawed because the agency failed to reasonably assess ACT's price for realism, and that the agency failed to reasonably assess ACT's technical proposal, and overall risk, given the awardee's low price and "rock-bottom labor rates." Id. at 13.

DISCUSSION

The Air Force requests dismissal of the protest as untimely because it was filed more than 10 days after the September 5 conclusion of CDO's debriefing. The agency argues that CDO knew or reasonably should have known of its basis of protest, namely that ACT's low overall proposed price was unrealistic and presented a flawed and risky technical approach, at the time the agency disclosed ACT's total evaluated price. In this regard, the Air Force notes that the FOPR's pricing required offerors to price only two unique CLINs, transition and core labor. In light of CDO's knowledge of the incumbent rates, as reflected in its debriefing questions, the agency argues that the protester knew or reasonably should have known that the material difference between the offerors' total proposed prices had to be related to the core labor CLIN.

CDO opposes dismissal, arguing that its protest is timely. The protester contends that ACT's total evaluated price alone was insufficient to inform its bases of protest because it would have had to have speculated regarding the basis for the difference in the proposed prices. In this regard, CDO contends that it would have been "impermissibly speculative" to file a protest without knowing the specific basis for the difference in the proposed prices, and that information was not reasonably knowable to the protester until incumbent personnel received allegedly low proposed compensation packages from ACT. For the reasons that follow, we agree with the Air Force that CDO knew or reasonably should have known of the basis of its protest at the close of the debriefing, and therefore this protest filed over a month after the close of the debriefing is untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, with an exception for protests that challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested is required. 4 C.F.R. § 21.2(a)(2). In such cases, protests must be filed not later than 10 days after the date on which the debriefing is held. Id. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Although the protester is generally correct that our Office will not consider purely speculative protest arguments, that does not mean that our Office will not consider--and a protester should not timely allege--protest grounds that are based on reasonable and credible inferences based on the information available to the protester. Indeed, the requirements of 4 C.F.R. §§ 21.1(c)(4) and (f) that a protest include a detailed statement of the legal and factual grounds of protest require either evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

It is apparent that CDO's protest is based on a comparative assessment of the awardee's price to its own--information which CDO knew from the award notice. See IR Techs., B-414430 et al., June 6, 2017, 2017 CPD ¶ 162 at 5-6. Indeed, contrary to its position in its opposition to the request for dismissal that it could not reasonably have anticipated that the difference in the proposed prices was the result of differences in proposed employee compensation under the core labor CLIN, CDO's debriefing questions unequivocally demonstrate that it was aware that the likely difference in the proposals' respective prices related to the offerors' proposed compensation for core labor. CDO specifically suggested to the agency that ACT's likely lower proposed compensation would present staffing and related performance risks. To the extent the post-award employment offers cited by CDO may have provided further support for this basis of protest, CDO nevertheless knew or reasonably should have known of its bases for protest at the conclusion of the debriefing. We have recognized that a firm may not delay filing a protest until it is certain that it is in a position to detail all of the possible separate grounds of protest. Litton Sys., Inc., Data Sys. Div., B-262099, Nov. 17, 1995, 95-2 CPD ¶ 261 at 5 n.5. Thus, this protest, which was filed more than a month after the debriefing closed, is untimely, and therefore it is dismissed.

The protest is dismissed.

Thomas H. Armstrong
General Counsel