



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Optimum Technology, Inc.

File: B-266339.2

Date: April 16, 1996

John R. Tolle, Esq., and William T. Welch, Esq., Barton, Mountain & Tolle, for the protester.

Virginia G. Farrier, Esq., Defense Information Systems Agency, for the agency.

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DIGEST

1. Prior performance of similar requirements by awardee's subcontractor does not give rise to prohibited organizational conflict of interest or provide an unfair competitive advantage where subcontractor's prior work did not affect the requirements being solicited and any advantage accruing is merely that of an incumbent contractor.
 2. Agency's equal weighting of certain evaluation factors under solicitation which stated that lower-listed factors would be afforded less weight does not provide basis to sustain protest where record clearly establishes that protester was not prejudiced as a result.
 3. Where solicitation stated that evaluation factors were listed in descending order of importance, actual weighing of the factors applied by the agency is unobjectionable where it reflected a reasonable downward progression.
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DECISION

Optimum Technology, Inc. protests the award of a contract to Excel Management, Inc. under request for proposals (RFP) No. DCA100-95-R-0051, issued by the Defense Information Systems Agency (DISA). Optimum asserts that Excel should have been excluded from the competition because the prior contract performance of one of its proposed subcontractors created an impermissible organizational conflict of interest, and that the award was otherwise improper because the agency failed to follow the RFP's stated evaluation scheme.

We deny the protest.

On April 5, 1995, the agency issued the RFP at issue (hereafter referred to as "-0051") as a competitive set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994). The solicitation contemplated the award of a firm, fixed-price contract to design and install an Integrated Network Management System (INMS) for the DISA Columbus Regional Control Center (RCC). The system is intended to provide the capability to interface with a variety of network element management systems and contains options for the management of classified networks and maintenance. The solicitation stated that award would be made on the basis of cost, technical, and management factors, with technical and management factors more important than cost.¹

On April 24, the agency conducted a site visit to provide potential offerors an opportunity to receive a detailed technical briefing regarding the existing systems. On April 25 and 26, potential offerors were given guided tours through the Columbus facility to see the operational areas and physically review the systems. On or before the June 19 closing date, proposals were submitted by several offerors including Optimum and Excel. All of the offerors proposed various subcontractors that offered some familiarity with the INMS environment at the Columbus facility. Excel's proposal stated that Excel intended to use I-Net, Inc. as a subcontractor; I-Net had previously provided INMS services for several DISA sites including the Columbus facility.

Upon evaluation of the proposals, the agency established a competitive range which included the Optimum and Excel proposals and thereafter conducted discussions and requested best and final offers (BAFOs), which were submitted on September 5. Optimum's BAFO received a technical/management rating of 9.38; Excel's BAFO received a technical/management rating of 9.33.² Excel's and Optimum's BAFOs

¹Section M also stated that, between technical and management, technical was more important and that technical evaluation factors would be valued at approximately 60 percent of the technical/management score, while management factors would be valued at approximately 40 percent of the score.

²The agency used an adjectival and numerical rating system. Proposals were given scores ranging from 1 to 10 under each evaluation factor and subfactor. Scores of 9-10 were considered "excellent," reflecting a proposal that was comprehensive and complete, met or exceeded all requirements, and demonstrated in detail how to accomplish the task with minimum risk. Scores of 7-8 were considered "good," reflecting a proposal that generally met or exceeded requirements, demonstrating a feasible approach with little risk. Scores of 5-6 were considered "adequate," reflecting a proposal which minimally met requirements and provided minimal detail regarding feasibility of approach. Scores of 3-4 were considered "marginal,"

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were both rated "excellent" and were considered to be technically equal. However, Excel's proposed price was approximately 20 percent lower than Optimum's. Excel's proposal was selected for award on the basis of its lower price, and this protest followed.

ALLEGED REQUIREMENT TO EXCLUDE EXCEL'S PROPOSAL

Conflict of Interest

Optimum asserts that performance of a prior contract for INMS services by I-Net, Excel's proposed subcontractor, created a prohibited organizational conflict of interest that required the agency to exclude Excel's proposal from consideration. We disagree.

On February 26, 1993, I-Net was awarded contract No. DCA200-93-D-0024 (hereafter referred to as "-0024") under the 8(a) set-aside program. That contract called for I-Net to provide network management and related systems engineering services to support DISA throughout the world; performance of individual tasking requirements under this contract were generally authorized through issuance of delivery orders.³ Ten delivery orders were ultimately issued under the contract, several of which reflected DISA's long range intent to "operate and maintain a worldwide communication architecture to support network management functions at all the DISA network management centers." Specifically, under delivery orders 001 and 005, I-Net provided INMS services at DISA Headquarters in Virginia; under delivery orders 002 and 006, I-Net provided INMS services at the DISA Europe RCC in Germany; and under delivery order 004, I-Net provided INMS services at the DISA Pacific RCC in Hawaii.

Task order 009 was verbally issued on May 18, 1994, and contemplated "the orderly implementation of integrated commercial-off-the-shelf (COTS) hardware and software that will test . . . system and network management at the Columbus System/Network Management Center."⁴

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reflecting a proposal with correctable defects. Scores below 3 were considered unacceptable with defects requiring major revision.

³Each delivery order incorporated one or more task orders.

⁴Task order 009 was confirmed in writing on June 7, 1994, through the issuance of delivery order 007.

On July 11, 1994, another contractor filed an agency-level protest challenging the issuance of task order 009.⁵ That protest was based on allegations that the task order was outside the scope of contract No. -0024 and that I-Net had graduated from the 8(a) program prior to the task order's issuance. By letter dated August 20, 1994, the contracting officer denied the protest, but also stated that task order 009 was being terminated for the convenience of the government.⁶ At the time task order 009 was terminated, I-Net had conducted a site survey,⁷ performed a requirements analysis,⁸ and prepared a cost proposal⁹ pursuant to that order.

The agency subsequently issued RFP No. -0051, the solicitation at issue here. The work statement included in RFP No. -0051 contained requirements similar to those in task order 009. In this regard, the agency states:

"The essential difference between the SOW for solicitation DCA 100-95-R-0051 and Task Order 009 . . . is the scope of work to be performed at the Columbus RCC. Task Order 009 had a wider scope and included in the functions of the then IS/NMS to manage control of computer applications and communication devices on the Defense Logistic[s] Agency (DLA) Base at Columbus in addition to the management of DISA communication networks. The SOW for [RFP No. -0051] focus[es] only on the capability of the INMS to manage and control DISA communication networks."

⁵That protester is not a party to this matter.

⁶The protest was denied on the basis that task order 009 was within the scope of contract No. -0024 and that I-Net "exited the Small Business Program effective June 16, 1994."

⁷I-Net's site survey report reflected technical information that I-Net had gathered on the systems that were being managed by Columbus along with information about the Columbus facility including space, power, wiring, and other environmental factors, and installation/deinstallation considerations.

⁸I-Net's requirement analysis essentially reviewed the requirements that were stated in the government's work statement, followed by I-Net's proposed solution to meet those requirements.

⁹I-Net's cost proposal consisted of various elements including the hardware and software required to implement the system, support service including maintenance and training, and other costs such as labor and travel. More specifically, the cost proposal reflected I-Net's vendor arrangements and labor costs.

Optimum protests that I-Net's partial performance of task order 009 "placed I-Net in a conflict of interest as defined by FAR [Federal Acquisition Regulation] 9.505-2(b)(1)." That section of the FAR states:

"If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system, or the services unless [exceptions omitted]."¹⁰

The FAR provides that the responsibility for identifying and resolving organizational conflicts of interest is that of the contracting officer, who in doing so is admonished to exercise "common sense, good judgment and sound discretion." FAR §§ 9.504, 9.505. Our Office will not disturb a contracting officer's determination regarding an organizational conflict of interest unless it is shown to be unreasonable. ICF, Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124.

In its response to Optimum's protest, the agency provided a detailed chronology regarding the development of the work statement contained in RFP No. -0051. Specifically, the record shows that, in March 1993, personnel from the Columbus RCC and DISA Headquarters collaborated on the development of an INMS requirement document that established DISA's functional requirements for network management. This document, referred to as the "functional requirements specification" or "FRS," was relied on by DISA for various INMS procurements and was ultimately incorporated into RFP No. -0051, specifying the requirements the awardee must perform.

The record contains multiple affidavits from various government personnel who developed the work statement in RFP No. -0051; each of the affidavits state that the government's requirements under RFP No. -0051 were developed without input from any outside entity. The individual primarily responsible for drafting the functional requirements specification explicitly states: "no contractor help was used in developing the specification," and, more specifically, "[t]he FRS used in this solicitation [RFP No. -0051] was not developed using information obtained from

¹⁰This FAR provision is intended to avoid a situation in which a contractor favors its own products or capabilities in preparing the work statement. FAR § 9.505-2(b)(2). There is no basis to distinguish such potential conflicts of interests involving prime contractors from those involving subcontractors. See The Pragma Corp., B-255236 et al., Feb. 18, 1994, 94-1 CPD ¶ 124; Medical Service Corp. Int'l., B-255205.2, Apr. 4, 1994, 94-1 CPD ¶ 305.

I-Net." Along with the affidavits, the record contains multiple documents tracking the development process, including preliminary requirements specifications.¹¹

While Optimum expresses disagreement with the agency's representations, its conclusory allegation that I-Net's prior performance "could not have been disregarded" when the solicitation was drafted is not supported by the record. In fact, the record shows that the requirements in RFP No. -0051 were substantially established prior to I-Net's performance of task order 009 and were incorporated in that task order—not that the requirements in RFP No. -0051 were created as a result of I-Net's performance of task order 009. Optimum effectively concedes this to be the case by stating in its protest that: "[t]he RFP here [No. -0051] is a direct re-do of I-Net's earlier contract [task order 009]." Further, the INMS requirements in task order 009 were similar to the INMS requirements of the delivery orders previously issued to I-Net. Again, Optimum's own statements acknowledge this fact. Specifically, after reviewing I-Net's various delivery orders under contract No. -0024, Optimum notes, "the I-Net delivery orders . . . all bore a striking similarity to one another."

On this record, it is clear that the requirements contained in RFP -0051 were substantially established by the government prior to I-Net's performance of task order 009. Accordingly, since I-Net's performance of task order 009 neither involved preparation of the work statement in RFP No. -0051 nor led directly to the development of that statement, Optimum's contention that the awardee should have been excluded from the competition because of an organizational conflict of interest proscribed by FAR § 9.505-2(b)(1) is without merit.

Unfair Competitive Advantage

Optimum also argues that Excel's proposal should have been excluded from consideration on the basis that I-Net's prior activities under contract No. -0024 provided it with an unfair competitive advantage. Optimum complains that it was not provided with the same level of information in order to prepare its proposal that I-Net was able to provide Excel, and that Optimum was not given the same opportunity as I-Net, through its prior contract, to familiarize itself with the Columbus facility or "benefit from an open dialogue" with DISA personnel.¹²

¹¹Although Optimum initially requested a hearing in this matter, after receipt of the agency record it expressly withdrew that request on the basis that "the case can be decided based upon the written filings the parties have made." Accordingly, our Office did not hold a hearing in this matter.

¹²To the extent Optimum's protest is now challenging the adequacy of the
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The agency responds that it did everything it could to provide potential offerors with all relevant information that was not proprietary. In this regard, the agency provided offerors with all of the information from I-Net's performance of task order 009 which was not considered proprietary to I-Net.¹³

The mere existence of a prior or current contractual relationship between a contracting agency and firm does not create an unfair competitive advantage, see ETEK, Inc., B-234709, July 11, 1989, 89-2 CPD ¶ 29, nor is an agency required to compensate for every competitive advantage inherently gleaned by a potential offeror's prior performance of a particular requirement. Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230. For example, an incumbent contractor's acquired technical expertise or firsthand knowledge of the costs related to a requirement's complexity are not generally considered to constitute unfair advantages the procuring agency must eliminate. Id.; Delta Oaktree Prods., B-248903, Oct. 7, 1992, 92-2 CPD ¶ 230; Rolm Corp., B-214052, Sept. 11, 1984, 84-2 CPD ¶ 280.

Here, I-Net's status with regard to the protested procurement is essentially that of an incumbent contractor. As discussed above, Optimum acknowledges the similarity between the requirements of contracts previously performed by I-Net, including task order 009, and the requirements contained in RFP No. -0051. Optimum's allegation, that it did not have access to the same type of information as I-Net provided Excel, is essentially nothing more than a complaint that its contract performance experience is not the same as I-Net's. There is no basis to object to an offeror's advantage unless it is created by improper preference or other unfair action by the procuring agency. Versar, Inc., supra; Delta Oaktree Prods., supra; Rolm Corp., supra. On the contrary, incumbent contractors with good performance records can offer real advantages to the government and proposal strengths flowing from a firm's prior experience are proper considerations in selecting an awardee.

¹²(...continued)

information provided with the solicitation, the issue is not timely raised. Bid Protest Regulations, § 21.2(a)(1), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(1)).

¹³Procuring agencies have an obligation to protect the proprietary information of a contractor or offeror. See Information Ventures, Inc., B-240925; B-240925.2, Jan. 15, 1991, 91-1 CPD ¶ 39 (withholding of proprietary information proper due to the protections afforded under the Trade Secrets Act, 18 U.S.C. § 1905); 49 Comp. Gen. 28 (1969) (when government's use of proprietary or confidential data or trade secrets in a solicitation violates a firm's proprietary rights, our Office may recommend that the contracting agency either make a sole source award to the entity whose data was compromised or, if possible, cancel the solicitation and resolicit without using the proprietary data).

Sabreliner Corp., B-242023; B-242023.2, Mar. 25, 1991, 91-1 CPD ¶ 326; Benchmark Sec., Inc., B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133. Here, the record provides no indication of improper preference or other unfair action by the agency. Moreover, the agency took reasonable measures to provide all potential offerors with all of the legally disclosable relevant information flowing from the terminated predecessor task order. Under these circumstances, there is no basis to require the exclusion of Excel from the competition because of its proposed use of I-Net as a subcontractor.

EVALUATION OF PROPOSALS

Optimum also protests that the agency failed to follow the evaluation scheme established in the solicitation. In this regard, section M of the RFP identified the following technical and management evaluation factors, and stated that they were listed in descending order of importance:

Technical

- Engineering/Technical Approach
- Understanding of the INMS Network Management Requirements
- Clear Understanding of the Problem
- System Performance
- Security

Management

- Relevance of Past Experience and Performance
- Risk Management
- Program Management, Organization Structure and Personnel
- Management Services

After reviewing the agency's evaluation documents,¹⁴ Optimum filed a supplemental protest alleging that the agency failed to follow the evaluation scheme established in the solicitation, first asserting that "the agency weighed some subfactors that were listed after other factors more than the preceding factors." This allegation is based on Optimum's misunderstanding of the relationship between raw points and weighted scores.

¹⁴In response to Optimum's initial protest, which included various allegations regarding the agency's allegedly improper evaluation of proposals, the agency provided Optimum's counsel with various evaluation documents, subject to the terms and conditions of this Office's protective order. By letter dated December 5, 1995, Optimum withdrew its initial allegations except for the alleged conflict of interest, discussed above.

The record shows that the agency assigned the following weights to the evaluation factors:

<u>Technical</u>	<u>Weight</u>
Engineering/Technical Approach	20
Understanding of the INMS Network Management Requirements	15
Clear Understanding of the Problem	10
System Performance	10
Security	5
 <u>Management</u>	 <u>Weight</u>
Relevance of Past Experience/Performance	20
Risk Management	10
Program Management, Organization Structure and Personnel	5
Management Services	5

In evaluating proposals, the agency first assigned raw point scores between 1 and 10 to each of several subfactors associated with the various evaluation factors.¹⁵ The number of subfactors varied from factor to factor and the total raw point scores associated with each evaluation factor did not reflect the total points available for each factor under the RFP's weighing scheme. In order to achieve the specified weighing, the agency properly divided the raw score for each evaluation factor by the number of subfactors, then multiplied by the appropriate weighing factor. In short, the record is clear that the agency did not accord greater weight to a lower-listed evaluation factor then it accorded to a higher-listed evaluation factor.

Next, Optimum complains that, although offerors were advised that the evaluation factors were listed in descending order of importance, in fact, two technical factors ("Clear Understanding of the Problem" and "System Performance") and two management factors ("Program Management" and "Management Services") were improperly accorded equal weight.

It is true that the agency failed to explicitly follow the stated evaluation scheme; that is, the agency should have afforded somewhat greater weight to the technical evaluation factor "Clear Understanding of the Problem" than it afforded to "System Performance" and similarly, should have afforded somewhat greater weight to the

¹⁵The solicitation identified the various subfactors, but did not indicate an order of importance for them. Accordingly, the agency gave the subfactors equal weight.

management evaluation factor "Program Management" than it afforded to "Management Services." However, it is manifestly clear that Optimum was not prejudiced by the agency's failure to do so. Specifically, Excel's score under the technical factor "Clear Understanding" was higher than Optimum's; accordingly, giving greater weight to this factor would have benefited Excel. Although Optimum's score under the management factor "Program Management" was slightly higher than Excel's, the RFP provided that technical factors were more important than management factors. In short, the record shows that appropriate application of somewhat greater weight to the higher-listed of the two equally weighted pairs of factors would have benefited Excel rather than Optimum.

Prejudice is an essential element of every viable protest, and we will not disturb an agency's award decision even where the record reflects some minor error in the evaluation of proposals, so long as the error does not prejudicially affect the protester. See, e.g., Mesa, Inc., B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62. Since the net effect of the agency's action was a benefit to Optimum, the company was not prejudiced by DISA's evaluation approach.

Finally, Optimum protests that, because the RFP stated that factors would be scored in descending order of importance, "no single subfactor should have been weighed much more than any other one." Optimum maintains that the weighing scheme identified above was improper because the difference between the first and last subfactors was "significant," noting that "[t]he first [factor] is worth four times the last."

The Competition in Contracting Act of 1984 (CICA) requires contracting agencies to set forth in the solicitation all significant evaluation factors that the agency expects to consider and their relative importance. 10 U.S.C. § 2305(a)(2) (1994); H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203. A solicitation which lists evaluation factors in descending order of importance generally meets CICA's requirements unless one factor has a disproportionately high value relative to the others. See, e.g., BDM Servs. Co., B-180245, May 9, 1974, 74-1 CPD ¶ 237. In short, when a solicitation states that evaluation factors are listed in descending order of importance, offerors are on notice that the evaluation criteria listing reflects a reasonable downward progression of relative weights. General Exhibits, Inc., 56 Comp. Gen. 882 (1977), 77-2 CPD ¶ 101.

Here, the evaluation scheme which the agency employed reflects a reasonable downward progression of evaluation weights. No single factor was unusually significant or unusually insignificant. See Raytheon Support Servs. Co., B-219389; B-219389.2, Oct. 31, 1985, 85-2 CPD ¶ 495 (agency's evaluation was proper where solicitation stated listed three factors in descending order of importance and employed a scheme where first factor was worth 75 percent, second factor was worth 15 percent, and third factor was worth 10 percent); cf. BDM Servs. Co., supra

(where solicitation listed 5 evaluation factors and most important factor was 6 times the weight of the second factor and 24 times the weight of the fifth factor, predominant value accorded first factor should have been disclosed); Coastal Science and Eng'g, Inc., 69 Comp. Gen. 66 (1989), 89-2 CPD ¶ 436 (where solicitation stated that technical was more important than cost, the fact that technical was 9 times more important than cost should have been disclosed). Accordingly, the agency's evaluation scheme was not unreasonable.

The protest is denied.

Comptroller General
of the United States