



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: USATREX International, Inc.

File: B-275592; B-275592.2

Date: March 6, 1997

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Dennis J. Gallagher, Esq., Department of State, for the agency.

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DIGEST

1. Agency's failure to consider proposed subcontractors' experience under a past performance/relevant experience criterion is denied where circumstances warranted limiting such consideration to the past performance/experience of the offeror only.
2. Protest against conduct of improper post-best and final offer discussions is denied where, although such discussions occurred, the record conclusively shows that they were not prejudicial to the protester.
3. Allegation that awardee engaged in prohibited "bait and switch" tactic is denied where there is no showing that the offeror did not intend to provide those employees offered in its proposal, and personnel substitutions are adequately explained by the record and permissible under the contract.

DECISION

USATREX International, Inc. protests the award of a contract to Century Technologies, Inc. (Centech) under request for proposals (RFP) No. S-DTSPO-96-R-3007, issued by the Department of State (DOS) for technical support services in connection with the agency's telecommunications program to link offices and embassies worldwide. USATREX maintains that the agency misevaluated proposals and improperly engaged in discussions with Centech after the submission of best and final offers (BAFO), and that Centech engaged in an improper "bait and switch" of personnel.

We deny the protest.

BACKGROUND

The solicitation contemplated the award of a fixed-price, indefinite delivery, indefinite quantity contract against which delivery orders could be placed; the acquisition was conducted as a competitive set aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994).¹ Offerors were required to submit prices based on fixed, fully burdened hourly rates for 69 discrete classes of employees. Offerors also were to submit detailed technical proposals that included information relating to the firm's management approach and its performance on ongoing or prior contracts, a package of 86 resumes for employees proposed to perform the contract, along with letters of commitment, and a detailed response to a sample task outlined in the RFP.

The RFP advised offerors that the agency intended to make award to the firm whose proposal represented the best overall value to the government considering various technical evaluation criteria and price; offerors were specifically advised that the agency would assign numeric point scores to both the technical and price proposals, and that award would be made to the firm whose proposal received the highest overall numeric score based on a 100-point scale. The technical evaluation criteria were worth up to 70 points and price 30 points. There were three technical evaluation criteria: qualifications and experience of proposed staff (35 possible points); past performance/relevant experience on similar projects (25 points); and management approach (including the sample task) (10 points). Price points were to be assigned based on the relationship among the competing offerors' prices, with the lowest-priced proposal receiving the maximum of 30 points, and the remaining proposals receiving proportionally fewer points.

The agency received three timely initial proposals, all of which were evaluated as technically acceptable. The agency concluded that it was unnecessary to engage in technical discussions with the offerors and, accordingly, simply provided the firms

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged business concerns. Federal Acquisition Regulation § 19.805 and 13 C.F.R. § 124.311 (1996) provide for and govern competitively awarded contracts set aside for firms qualified under section 8(a). Innovative Technology Sys., Inc., B-260074, May 24, 1995, 95-1 CPD ¶ 258.

an opportunity to submit revised pricing in their BAFOs. After receiving and evaluating the BAFOs, the agency scored the proposals as follows:

	CENTECH	USATREX	OFFEROR "C"
Qualif./Exp. of Proposed Staff	32.35	33.58	32.19
Past Perf./ Relevant Exp.	21.67	15	21.67
Management Approach	5	5	10
Cost/Price	30	25.72	21.05
Total Points	89.02	79.30	84.91

On the basis of these evaluation results, DOS made award to Centech as the firm whose proposal offered the greatest overall value to the government.

TECHNICAL EVALUATION

Past Performance/Relevant Experience

USATREX contends that the agency's evaluation of past performance/relevant experience was improper and inconsistent with the requirements of the RFP. The record shows that all of the offerors submitted information in the form of "extracts" relating to numerous prior contracts performed either by the offeror or one of its subcontractors. (For example, USATREX submitted information relating to 11 contracts; it was the prime contractor on 4, and its proposed subcontractors had been the prime contractors on the others.) USATREX maintains that the agency improperly failed to score all of the extracts, instead selecting only a limited number to evaluate, notwithstanding that the RFP provided that "each extract will be assigned a rating." USATREX maintains that, had the agency done this, it would have received a better past performance rating because it would have received evaluation credit for prior contracts performed by its subcontractors.

Where a solicitation requires an evaluation of offerors' past performance, the agency has discretion to determine the scope of the offerors' performance history to be considered, provided all proposals are evaluated on the same basis and the evaluation is consistent with the terms of the RFP. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124; see also Federal Envtl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398. Moreover, where the record shows that the agency in fact considered all information included in the proposals, the mere fact that the evaluators did not assign a discrete score to each proposal element does not provide a basis for sustaining a protest, provided all proposals were evaluated in the same manner and agency's actions were not prejudicial. See Wilcox Elec., Inc., B-270097, Jan. 11, 1996, 96-1 CPD ¶ 82.

The past performance evaluation was reasonable. First, while the RFP stated that each extract would be rated, it did not state that this rating would be in the form of a formal numeric score. The agency explains that each evaluator separately reviewed all of the prior contract extracts submitted by the offerors and then selected those contracts which, in the evaluator's judgment, were most relevant for purposes of arriving at the numeric scores. (These same prior contracts were also used by the evaluators for purposes of independently inquiring--through contacting the appropriate contracting officials--about the offeror's performance during the prior or ongoing contract.) Thus, the agency's ratings here simply were in the form of subjective relevance determinations; contract extracts were rated either "relevant" or "not relevant" for purposes of the past performance/relevant experience evaluation. This satisfied the requirement of the solicitation that each extract be assigned a rating.

Further, the agency's determination of relevance among the extracts was unobjectionable. The extracts were selected based primarily on two considerations: (1) whether the offeror had performed as a prime contractor; and (2) whether the prior contract was of a scope and magnitude similar to the requirements of this solicitation. This was reasonable in light of the terms of the RFP, which limited competition to firms qualifying under section 8(a) of the Small Business Act and included the limitation on subcontracting clause at FAR § 52.219-14. While agencies may, in the absence of a solicitation provision to the contrary, consider the prior relevant experience and performance of subcontractors, FMC Corp., B-252941, July 29, 1993, 93-2 CPD ¶ 71, in appropriate circumstances they need not do so. Jim Welch Co., Inc., B-233925.2, July 12, 1989, 89-2 CPD ¶ 34. In this regard, where the solicitation contemplates award of a service contract to a firm qualifying under section 8(a) of the Small Business Act, and includes the provision at FAR § 52.219-14, the agency may properly limit its consideration to the offeror's prime contractor experience. Innovative Technology Sys., Inc., *supra*. Accordingly, we see no basis to object to the agency's evaluation approach.

We also have no basis to object to the substance of the evaluation. The agency's evaluators assigned USATREX an acceptable (albeit relatively lower) score under this criterion as compared to the other two firms because USATREX did not have as much prior experience acting as a prime contractor on requirements that were similar in scope and complexity. USATREX does not challenge this conclusion, but insists only that it would have received a more favorable rating if all of the experience of both it and its subcontractors had been reviewed. Again, however, we find that the agency's focus on information relating to similar contracts where the offeror was the prime contractor was reasonable. Innovative Technology Sys., Inc., *supra*.

Management Approach

USATREX contends that the agency improperly evaluated Centech's management proposal. According to the protester, the agency improperly assigned Centech's management proposal a score of 5 points, despite the fact that its response to the sample task requirement was viewed as unacceptable by the evaluators. USATREX maintains that the RFP required the agency to assign Centech's management proposal a score of 1 point, which was the score mandated for management proposals deemed technically unacceptable.

We find no merit to this allegation. Initially, we point out that the evaluators identified deficiencies in both firms' responses to the sample task. Centech's response was deemed "incomplete," while USATREX's response to a portion of the sample task was found not to meet the delivery schedule requirements outlined in the solicitation (offerors were required to detail how they would accomplish staffing a 24-hour per-day "network management center" within 30 days after the issuance of a delivery order, and USATREX's response showed that it would accomplish the task within 90 days). By USATREX's logic, its proposal also should have received a management approach score of only 1 point because its response varied from the requirements of the RFP sample task.²

More fundamentally, the record shows that the agency viewed both the USATREX and Centech management proposals technically acceptable overall, albeit with some minor deficiencies. USATREX's proposed management approach was viewed by the agency as generally "weak" because it failed to address all of the areas requested by the RFP. Centech, on the other hand, was found to have proposed a strong substantive management plan, but to have submitted an incomplete response to the sample task. The agency therefore assigned both proposals a score of only 5 points, which reflected the unanimous judgment of all three evaluators that, despite the minor weaknesses identified, both proposals were technically acceptable. Of significance, in our view, is a series of memoranda exchanged between the contracting officer and the chairman of the evaluation team after the evaluators prepared their final report. During this exchange, the contracting officer asked the evaluators whether any of the weaknesses identified in any proposal rendered the proposal technically unacceptable; the memorandum cites numerous examples on which the contracting officer sought clarification, including the evaluators' comment that the Centech sample task response was incomplete. In

²The scoring also appears reasonable in light of the relative weight of the two subfactors--management approach and sample task response--under the management approach criterion. Since the RFP did not specify the relative weight of these two subfactors, each subfactor was worth approximately 5 points. The score assigned to the Centech proposal reflects the evaluators' judgment regarding the relative inadequacy of the firm's response to the sample task.

response, the chairman of the evaluation team noted that the examples identified in the contracting officer's memorandum (such as Centech's response to the sample task) were deemed by the evaluation team to be acceptable and would not impact the ability of the offerors to perform under the contract. He continues by stating:

"Factor . . . C [the management approach evaluation criterion] had minor deficiencies, but none were deemed significant enough to warrant clarification or discussion with the offerors. The team panels met and held discussions [in response to the contracting officer's memorandum requesting clarification of the technical evaluation results] . . . to validate the scores of each team member to ensure all areas of the evaluation were properly addressed."

We conclude that the evaluation of Centech's proposal in the management area was reasonable.

PRICE EVALUATION

USATREX challenges the agency's evaluation of Centech's price proposal on several grounds. These arguments are without merit.

Unbalanced Offer

USATREX alleges that Centech's prices are improperly unbalanced, and that the proposal therefore could not be accepted for award, because Centech proposed [DELETED]; according to USATREX, the rates offered by Centech for its entry-level employees [DELETED].

The concept of unbalancing has only limited application in the context of a negotiated procurement where the government's primary objective is not with obtaining a contract at the lowest overall cost. Human Resource Sys., Inc.; Health Staffers, Inc., B-262254.3 et al., Dec. 21, 1995, 96-1 CPD ¶ 35. While award here ultimately was made to the low offeror, the RFP provided that technical factors were more than twice as important as price, and thus allowed for award to other than the low offeror. In addition, there is no indication that cost was the determinative consideration in DOS' award decision. Since technical considerations were more important than cost or price, and since ultimately price was not the determinative consideration for award purposes, the concept of unbalancing is not applicable. Id. In any case, an offer can be rejected as materially unbalanced only where it is found to be mathematically unbalanced; this requires a showing that certain line items are priced significantly lower than the cost of those items, and that other line item prices are significantly overstated. Federal Acquisition Regulation (FAR) § 15.814 (FAC 90-37). As USATREX has alleged only that the prices for certain line items are [DELETED], and there is no evidence of overstated prices, the offer is not mathematically unbalanced and therefore could not be

rejected as materially unbalanced. Ogden Gov't Servs., B-253350, Sept. 14, 1993, 93-2 CPD ¶ 161.³

Price Reasonableness

Regarding price reasonableness, the purpose of a price reasonableness review is to determine whether the prices offered are higher--as opposed to lower--than warranted. McDonnell Douglas Corp., B-259694.2; B-259694.3, June 16, 1995, 95-2 CPD ¶ 51. Since USATREX asserts that Centech's prices are too low, not too high, (and since Centech's price in fact is lower than USATREX's), there is no reason to question Centech's prices on the basis of price reasonableness. To the extent that agencies may wish to review the offerors' pricing to ensure that it is not too low within the context of a fixed-price contract setting, they do so through the application of cost realism evaluation methods, but only for limited purposes, such as assessing an offeror's understanding of the RFP's technical requirements. PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 *et al.*, May 4, 1993, 93-1 CPD ¶ 366. However, the RFP here did not provide for a realism analysis.⁴

Professional Employee Compensation

USATREX argues that Centech's [DELETED] entry-level position prices render its professional employee compensation inadequate. However, the record shows that the agency sought and obtained information from Centech relating to its compensation and employee advancement/promotion plan; Centech's response, as well as other proposal information, led the agency to conclude that its professional employee compensation plan was adequate. The agency ultimately concluded that, to the extent Centech's compensation for certain categories was [DELETED], this was due in large part to the firm's superior experience in controlling costs in contracts of this magnitude and complexity. USATREX has submitted no evidence--for example, information relating to its understanding of the prevailing wages for entry-level employees in the field--that brings into question the reasonableness of the agency's conclusion regarding the adequacy of Centech's professional employee

³USATREX also maintains that Centech's pricing violates the RFP's "Integrity of Unit Prices" clause, FAR § 52.215-26. However, that provision, by its terms, applies only to supply contracts; the RFP here contemplated award of a contract for technical support services, not supplies.

⁴In any case, the record shows that the agency was well aware that Centech had offered prices for its entry-level personnel that were [DELETED] which, as discussed, led the agency to seek further information from Centech concerning this area. Centech's explanation was satisfactory to the agency.

compensation levels. We therefore have no reason to question the agency's conclusions in this area. See RGI, Inc., B-243387, July 23, 1991, 91-2 CPD ¶ 86.

DISCUSSIONS

USATREX argues that the agency engaged in improper post-BAFO discussions with Centech. The protester's allegation centers around an exchange of correspondence between the agency and Centech after the submission of BAFOs, during which the subject of Centech's cost proposal was addressed. In essence, the agency was concerned that Centech had proposed [DELETED], and also that the firm might have trouble [DELETED]; the agency requested that Centech provide verification of [DELETED]. In response to the agency's inquiry, Centech submitted a three-page letter explaining--apparently to the satisfaction of the agency--its [DELETED]. USATREX argues that this exchange constituted improper post-BAFO discussions and contends that it should also have been afforded an opportunity to engage in substantive discussions with the agency. In this latter regard, USATREX specifically maintains that it should have been afforded discussions with respect to its management proposal which received a score of only 5 points out of a possible 10 and was considered "weak" by the agency's evaluators.

The record clearly shows that the information furnished by Centech in response to the agency's inquiry was central to the agency's award decision. The agency report includes a document entitled "deliberations" in which the contracting officer discusses the relative merits of the proposals; this document clearly relies on the information furnished by Centech to explain and ameliorate the concerns previously advanced by the agency evaluators regarding the terms of Centech's cost proposal. Since the information provided by Centech clearly affected the agency's evaluation conclusions regarding the acceptability of the Centech cost proposal, the exchange constituted discussions. Federal Acquisition Regulation (FAR) § 15.601 (discussions occur where communications between the government and the offeror involve information essential for determining the acceptability of a proposal, or where the offeror is provided an opportunity to revise or modify its proposal).

Despite the above conclusion, we nonetheless have no basis to sustain USATREX's protest on this ground. Even where, as here, an agency engages in improper post-BAFO discussions with an offeror, we will not object to its actions where the record shows that they were not prejudicial. EastCo Bldg. Servs., Inc., B-275334; B-275334.2, Feb. 10, 1997, 97-1 CPD ¶ 83. For the reasons discussed below, we conclude that USATREX was not prejudiced by the agency's actions.

The RFP provided for award to the firm whose proposal received the highest combined cost and technical score, and the agency not only made award on this basis, but has argued strenuously in its submissions to our Office that this was the required basis for award. USATREX's pleadings in this case state unequivocally that the agency's failure to engage in discussions caused it competitive harm solely

because it was not afforded an opportunity to improve its management proposal, which had received only 5 out of a possible 10 points. Thus, even assuming that the protester could have improved its management score in response to discussions in this area, this would only add an additional 5 points to USATREX's cumulative score which, under the terms of the RFP, would not place the firm in line for award. We therefore conclude that the agency's improper post-BAFO discussions with Centech did not competitively prejudice USATREX.⁵

BAIT AND SWITCH

USATREX maintains that Centech engaged in an impermissible "bait and switch" tactic, whereby the firm offered numerous personnel in its proposal that it never intended to provide in performing the contract. (As noted earlier, offerors were required to submit resumes for 86 required employees.) Centech has substituted a large number of employees for those it originally proposed, and USATREX argues that this level of substitution evidences Centech's intent at the time it submitted its proposal to furnish employees other than those proposed.⁶

To establish an improper "bait and switch," a protester must show that the firm in question either knowingly or negligently made a misrepresentation regarding

⁵USATREX also suggests that Centech's [DELETED] improperly inflated its price score. As discussed above, we find nothing improper with Centech's pricing. In any case, any scoring advantage related to Centech's pricing was not prejudicial to USATREX. In an effort to assess the potential impact that Centech's [DELETED] might have had on the outcome of the competition, the agency calculated the offerors' prices exclusive of the [DELETED] and assigned revised numeric price scores to the proposals. The record shows that, even exclusive of the [DELETED], USATREX's proposal was still higher priced than Centech's and that, although USATREX would have received a slightly better price score if the [DELETED] were eliminated (27.94 price points rather than the 25.72 points actually assigned), this score was insufficient to place the firm in line for award--even with the addition of 5 points under the management plan evaluation criterion discussed above. (USATREX maintains that its price score should have been 29.25 points; even with this score, however, USATREX's total score would have been lower than Centech's.)

⁶USATREX also takes issue with the terms of the letters of commitment provided by Centech, maintaining that because the letters stated that they did not amount to binding employment contracts, Centech failed to provide the "unequivocal" letters of commitment required by the RFP. There is no merit to this contention. The solicitation did not require binding bilateral employment agreements, but rather, only letters that clearly showed the intent on the part of the signator to work for the offeror; the letters submitted by Centech met this requirement. Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267.

employees that it does not expect to furnish during contract performance, that the misrepresentation was relied upon by the agency in the evaluation, and that this had a material impact on the evaluation results. Intermetrics, Inc., B-259254.2, Apr. 3, 1995, 95-1 CPD ¶ 215; CBIS Fed., Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308.

There is no evidence of a prohibited bait and switch here. While there has been a substitution of employees, there is no basis for concluding that Centech knowingly or negligently misrepresented its intent to furnish the employees specified in its proposal. USATREX would have our Office infer simply from the number of substitutions that the awardee never intended to furnish the proposed employees. However, we think the record adequately shows that the substitutions were not related to a misrepresentation. In this regard, Centech explains that it identified the proposed employees through a [DELETED] selection process and confirmed prior to BAFOs that the selected employees remained available. Centech also explains the reasons for the substitutions. First, Centech's proposal indicated its intent to recruit as many of the incumbent staff as possible, and a large portion of the substitutions were incumbent personnel; there is nothing improper in such substitutions where the awardee's proposal advised the agency of its intent. Ebon Research Sys., B-261403.2, Sept. 28, 1995, 95-2 CPD ¶ 152. As for the vast majority of the remaining substitutions, Centech explains--on an employee-by-employee basis--that the substituted personnel were better or equally qualified, and more conveniently located for contract performance, than those proposed, and that these individuals only became available for performance after award.⁷ Given that the solicitation permitted personnel substitutions with the agency's permission, we see nothing improper in Centech's furnishing substitute personnel under these circumstances; the agency advises that the substituted personnel are at least as qualified as those originally proposed, and USATREX has not argued otherwise. We therefore have no basis to object to these substitutions. See CHP Int'l Inc., B-266053.2, Apr. 29, 1996, 96-2 CPD ¶ 142.

The protest is denied.

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⁷By way of example, Centech reports, as to one of its "new" hires, that the individual became available after proposal submission and that "this person had outstanding qualifications meeting/exceeding those of the individuals whose resumes were submitted with the proposal. . . ."