



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Calian Technology (US) Ltd.

File: B-284814

Date: May 22, 2000

Milton C. Johns, Esq., for the protester.

Laura K. Kennedy, Esq., and Geoffrey A. Barrow, Esq., Jenner & Block, for Kay and Associates, Inc., the intervenor.

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Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that the agency improperly evaluated its proposal is denied where the record shows that the agency evaluated in accordance with the criteria announced in the solicitation, and the record reasonably supports the lower ratings assigned protester's proposal.
2. Allegations that awardee lacks necessary facility security clearances and is not registered to do business in the states where services are to be provided concern the awardee's responsibility, the affirmative determination of which is not for review by General Accounting Office absent evidence of fraud, bad faith or failure to meet definitive responsibility criteria.

DECISION

Calian Technology (US) Ltd. protests the award of a contract to Kay and Associates, Inc. (KAI), the incumbent, under request for proposals (RFP) No. N00421-99-R-1506, issued by the Department of the Navy, Naval Air Systems Command, for administrative, financial, and technical support services for the Kuwait Air Force Liaison Office. Calian primarily challenges the evaluation of its proposal.

We deny the protest.

BACKGROUND

Foreign countries that have purchased the Navy's F/A-18 fighter aircraft for their national air forces require U.S.-based assistance to address issues related to the maintenance and upgrade of the aircraft. Agency Report (AR) at 1. Calian and KAI currently provide these support services to various countries. KAI has been providing these services to the government of Kuwait under a contract scheduled to expire in 2000. AR, exh. 14. The agency issued the instant RFP to continue providing these services.

The RFP, issued August 26, 1999, contemplated the award of an indefinite-delivery/indefinite-quantity, time and materials-type contract with reimbursable line items for travel and material. RFP § L, § 52.216-1, at 111. The solicitation contemplated the award of one contract for a base year with up to four 1-year option periods. Id. at 2. The RFP required offerors to provide the support services at three locations as follows: administrative, financial, and technical support at the Washington, D.C./Northern Virginia office; and logistical and administrative support at the Philadelphia, Pennsylvania, and San Antonio, Texas offices. Id. § B. Section M of the RFP listed the following evaluation factors: personnel, technical, management, past performance, and cost/price. The RFP stated that the personnel area was to be considered the most important, while the technical, management, and past performance areas were of equal importance. The RFP stated that cost/price would be considered the least important factor. Award was to be made to the offeror whose proposal was determined to be most advantageous to the government. Id. § M.

Three firms, including the protester and the awardee, responded to the RFP by the time set on October 5 for receipt of proposals. Separate teams of agency personnel evaluated initial proposals by assigning adjectival ratings (unsatisfactory, marginal, satisfactory, highly satisfactory, or outstanding) and risk ratings (low, medium, or high) under each technical evaluation factor. The past performance area was assigned only a risk rating (ranging from "unknown" to "very high"). The evaluation teams then met as a group to arrive at the following consensus ratings for each proposal for the three offerors:

	Personnel	Tech.	Mgmt.	Past Perf. (Risk)	Total Cost/Price
Calian	Low/ Satisfactory	Low/ Satisfactory	Medium/ Satisfactory	Very Low	\$4,966,740
Offeror B	Medium/ Marginal	High/ Marginal	Medium/ Satisfactory	Low	\$4,742,320
KAI	Low/Highly Satisfactory	Low/Highly Satisfactory	Low/Highly Satisfactory	Very Low	\$4,215,680

AR, exh. 8, Competitive Award Panel Proposal Analysis Report/Minutes, Jan. 11, 2000, at 2.

Based on these results, a competitive award panel (CAP) recommended to the source selection authority (SSA) that the contract be awarded to KAI. AR, exh. 8. The SSA agreed with that recommendation. AR, exh. 9, SSA Decision Memorandum, Jan. 14, 2000. Accordingly, on February 11, the contracting officer awarded KAI the contract. This protest followed a debriefing by the agency.

PROTEST ISSUES

Calian primarily challenges the evaluation of its proposal in the management, technical, and personnel areas. Calian also maintains that KAI failed to comply with certain security provisions included in its current contract, which were also included in the instant RFP. The protester further contends that KAI gained an unfair cost/price advantage in the competition.¹

EVALUATION OF CALIAN'S PROPOSAL

Our Office will not engage in an independent evaluation of proposals nor make an independent determination of their relative merits. Litton Sys., Inc., B- 239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 9. Rather, we review the agency's evaluation only to ensure that it was reasonable and consistent with applicable statutes and regulations as well as with the terms of the solicitation. Sensis Corp., B-265790.2, Jan. 17, 1996, 96-1 CPD ¶ 77 at 6. A protester's mere disagreement with the agency's conclusions

¹ KAI argues that the protest should be dismissed because Calian is not an "interested party" under our Bid Protest Regulations to maintain the protest. 4 C.F.R. § 21.0(a) (2000). In this regard, KAI points out that since Calian submitted the highest cost/price proposal, it would not be in line for award because there is a third, intervening offeror (Offeror B), that submitted a lower cost/price proposal and thus "could be next in line for award" if KAI's contract were terminated. KAI Comments, Apr. 18, 2000, at 10. KAI's argument overlooks the substance of Calian's challenge--that the agency improperly evaluated its proposal in several areas. Specifically, Calian argues that had the agency conducted a proper evaluation of its proposal under the technical, management, and personnel factors, its proposal would have received higher technical ratings, and it could have been selected as offering the best value to the government. Thus, if we found that Calian's arguments had merit and sustained its protest, it is possible that upon reevaluation, the agency would determine that Calian's proposal exceeded the RFP requirements, and contained "enhancing features" (i.e., criteria for earning a rating of "Outstanding" under the technical factors) that could reasonably justify paying a premium for Calian's proposal. We therefore consider Calian an interested party to maintain the protest. See Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446 at 6.

does not render the evaluation unreasonable. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Based on our review of the record, we conclude that the evaluation of Calian's proposal is reasonably supported. Below, we discuss some of the more significant findings of the evaluators in support of our conclusion.

Management

Calian complains that the evaluators unreasonably assigned its proposal a weakness in the management area because all of its proposed employees were contingent hires.

Under the management evaluation factor, the RFP listed two subfactors--management plan and manpower utilization matrix. With respect to the evaluation under the management plan subfactor, the RFP explained as follows:

Evaluation Subfactors:

(1) Management Plan: Evaluation of the management plan will be based on a demonstration of sound business practices in response to the requirements of Section L.

A poorly defined management approach regarding the proposed subcontractors, a poorly defined integration of a large number of subcontractors, a poorly structured partnership/joint venture, a high proportion of contingency hires, a poor staffing plan, or poor augmentation plan will result in the assessment of increased proposal risk and/or a reduced qualitative rating.

RFP § M, at 135 (emphasis added).

The evaluators assigned Calian's proposal an adjectival rating of "satisfactory" with "medium" risk under the management area. The consensus rating report reveals that the evaluators were concerned that Calian proposed virtually all of its personnel, including key personnel, as contingent hires. AR, exh. 7, Caucus Rating & Rationale Summary, Feb. 14, 2000. Although the evaluators recognized that Calian has experience with foreign military sales aircraft, especially the F/A-18 program, they found Calian's approach to filling key positions was a limiting factor in assigning its proposal a rating better than "satisfactory" in this area. In addition, the evaluators found that "[s]ince Calian did not provide any letters of intent for the proposed employees, it is hard to determine whether or not they will remain on this program should Calian receive award." Id., at 2 The evaluators further concluded that Calian's approach potentially could result in some disruption of schedule, increase in cost, or disruption of performance, especially if some of KAI's employees elected not to work for the protester if it were awarded the contract. Id.

Calian argues that it was unfair for the evaluators to downgrade its proposal for failure to provide letters of commitment because the RFP did not require offerors to provide such letters. The protester also maintains that the evaluators unreasonably assumed that the incumbent employees would remain performing the contract if employed by KAI, but might leave if employed by Calian. Calian further argues that if Calian had submitted letters for all of its proposed employees, the proposal would have violated the RFP's page limitations, pointing out that, in any event, all of the resumes contained the original signatures of each candidate. Calian's arguments are without merit.

Although the RFP did not explicitly require the submission of letters of intent² from proposed key personnel, section M of the RFP clearly placed offerors on notice that in responding to section L of the RFP, they were expected to demonstrate "sound business practices." In addition, section M was clear that proposing "a high proportion of contingency hires," among other things, would result in the assignment of higher risk and/or a lower adjectival rating to the proposal. In our view, in light of the RFP's specific warnings, and given Calian's approach in proposing all of its key personnel as contingent hires, it was not unreasonable for the evaluators to expect that to demonstrate sound business judgment, Calian would have provided reliable assurances regarding its proposal to hire and retain incumbent personnel. Contrary to the protester's position, although the resumes it provided with its proposal may have contained original signatures of the candidates for each key position, the resumes, standing alone, did not provide the agency with any assurances that the individuals proposed, in fact, intended to work for Calian if awarded the contract. Further, there is no reason to conclude that Calian could not have made the appropriate adjustments to its proposal to include the necessary assurances to allay the agency's concerns, without exceeding the RFP's page limitations. Since Calian's proposal provided no such assurances, the evaluators reasonably identified this as a weakness.

The evaluators also assigned a weakness to Calian's proposal under the management area in connection with the firm's apparent lack of understanding of the RFP's security requirements related to generating and handling classified materials. Calian argues that the agency included security requirements in the solicitation without fully understanding those requirements. For instance, in its protest, Calian attempts to explain how, based on its own prior experience, it believes that the RFP's security requirements are not the best approach for the contemplated contract. Calian further objects that the "Defense Security Service. . . was not consulted for input or review" of the RFP. Protest at 2. These allegations are untimely.

² Letters of intent provide agencies with assurances that the key personnel proposed by offerors are, in fact, intending to work for the offeror proposing them. See, e.g., Essex Corp., B-246536.3, June 25, 1992, 92-2 CPD ¶ 170 at 8.

To be timely under our Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1). Accordingly, if Calian believed that the RFP's security requirements were overstated or inappropriate for the required services, it was required to raise its objections either with the agency or with our Office before the time set on October 5, 1999, for receipt of proposals. Since Calian did not file its protest until March 2, 2000, well after closing, these allegations are untimely, and will not be considered.

Technical

Calian argues that the evaluators improperly assigned weaknesses to its proposal in this area because they misunderstood or misread at least one sentence in the proposal.

This area contained the following subfactor:

Technical Approach: The Government will evaluate each Offeror's overall understanding of all the details regarding the methodology used in performing the required tasks in the Statement of Work (SOW) and how to approach them based on their clearly written answers. Offerors will be evaluated on their demonstrated understanding of the SOW functions, such as operating environment, configurations and engineering problems inherent to this type of effort.

In making this evaluation, the Government will consider an Offeror's knowledge of the content of the work in terms of its activities, their inputs and outputs, and their interrelationships. Recognition of appropriate sequence and realistic duration of the work activities; knowledge of the appropriate types of resources required to perform the work and of their appropriate allocation to the work activities.

Familiarity with the difficulties, uncertainties, and risks associated with the work, and knowledge of the personnel and subcontractor qualifications necessary to the performance of the work.

RFP § M, at 133-34.

The evaluators assigned Calian's proposal one strength and three weaknesses in this area. AR, exh. 7, Approved Strengths and Weaknesses, Feb. 14, 2000 at 4. In support of one weakness, the evaluators noted that Calian made inaccurate references to the role of Lackland Air Force Base (AFB) in San Antonio, Texas, stating in its proposal that Calian would have relationships with the U.S. Air Force for both F/A-18 issues and training issues at Lackland AFB. Calian essentially maintains that the evaluators misread its proposal.

The evaluators found that Calian's interpretation of the required tasks raised questions about the firm's knowledge of the role the Air Force plays in training Kuwaiti students. In this regard, the agency explains that Lackland is the site of the Defense Language Institute and that the only function that Lackland serves in the effort for the Kuwait Air Force is to provide English language training to members of the Kuwait Air Force. In short, there are no "F/A-18 issues" or "training issues" addressed at Lackland. Memorandum of Law, Apr. 7, 2000, at 10. In fact, the RFP clearly required the contractor to "[f]urnish administrative and logistic support to the Liaison Office Defense Language Institute, English Learning Center for the Kuwait Air Force (KAF) in San Antonio, TX in accordance with Section C" of the RFP. Section C of the RFP describes the functions of the personnel required at Lackland and none of those functions relates in any way to the F/A-18 aircraft or training.

In addition, the evaluators assigned a weakness in this area for Calian's failure to address a "clear understanding of policy decisions for release of price and availability data, technologies, equipment, etc." AR, exh. 7, Approved Strengths and Weaknesses, Feb. 14, 2000, at 4. In our view, the evaluators were reasonably concerned that, based on Calian's interpretation of the tasks in its proposal, the firm lacked an overall understanding of all the details regarding the required tasks. In addition, the evaluators could reasonably conclude that Calian had not fully demonstrated a clear understanding of the various functions described in the RFP's SOW. Calian does not take issue with this aspect of the evaluation.

In sum, since Calian's proposal did not clearly demonstrate the firm's knowledge of the content of the work to be performed at Lackland AFB and failed to address certain policy decisions, the evaluators reasonably assigned two weaknesses to Calian's proposal in this area, and were justified in assigning Calian's proposal a "satisfactory" rating under this factor.³

³ The evaluators also assigned Calian's proposal a weakness for making inaccurate references to the Kuwait F/A-18 aircraft baseline. According to the evaluation documents, Calian referred to the aircraft baseline as "Lot 13," which led the evaluators to question Calian's knowledge of the correct aircraft configuration. In its agency report, the agency concedes that the technical evaluators incorrectly downgraded Calian's proposal for the stated reason and withdrew this weakness. AR at 13. In view of the remaining two weaknesses in this area as discussed above, however, and in view of the fact that the evaluators found that Calian's proposal did not exceed any of the RFP requirements in any area and failed to offer any "enhancing features," the impact of withdrawing this weakness on the overall ratings Calian's proposal earned in this area is de minimis. Further, throughout its submissions, Calian suggests that the evaluation of its proposal shows bad faith. However, to show bad faith there must be a showing that the agency intended to

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Personnel

The record shows that both Calian and KAI proposed identical personnel, yet Calian's proposal was downgraded in this area, receiving a rating of only satisfactory while KAI's proposal was rated "highly satisfactory" under the personnel subfactor. The evaluators assigned a weakness to Calian's proposal under this factor primarily because it failed to address the proposed employees' citizenship status and lacked details concerning training and experience as required by the RFP.

Calian relies on several decisions of our Office to argue that since it proposed the same key personnel that KAI has employed for performing the current contract, the agency evaluators either knew or should have known that Calian's proposed employees had the same qualifications, training, experience, citizenship, and clearances as KAI's key personnel.⁴ Calian thus maintains that it was unreasonable for the agency to evaluate the firms' proposals differently in this area. As explained below, we need not resolve this issue since it is clear that the agency's action did not prejudice Calian.

Prejudice to the protester is critical to our decisionmaking, since our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). For the agency's actions to be prejudicial here, there must be some showing that had the agency in the evaluation assigned a higher rating to Calian's proposal in the personnel area, its proposal would have received a

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harm the protester. Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 4. Calian made no such showing here, and we see no evidence to support Calian's allegation of bad faith.

⁴ Calian cites to Consolidated Eng'g Servs., Inc., B-279565.2, B-279565.3, June 26, 1998, 99-1 CPD ¶ 75 (protest sustained where, since protester and awardee proposed same subcontractor, they should have received the same score for subcontractor's experience); GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 (protest sustained where agency improperly ignored relevant past performance information that was personally known to one of the evaluators, and the agency failed to comply with the solicitation's evaluation criteria with respect to the past performance evaluation); and International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 (protest sustained where the agency failed to consider the protester's past performance on a contract involving the same agency, the same services, and the same contracting officer because an individual in the agency did not complete and return the past performance evaluation materials).

better overall assessment and reasonably could have been selected for award. There is no such showing in the record.

Even assuming that the evaluators had assigned Calian's proposal the same rating as KAI's proposal in the personnel area (highly satisfactory), that rating alone would not be sufficient to overcome the lower adjectival and risk ratings its proposal received in the technical and management areas. Moreover, given KAI's proposal's higher ratings and several enhancing features identified by the evaluators under those two areas (technical and management), as well as its significantly lower cost/price, there is no basis to conclude that assigning a higher rating to Calian's proposal in the personnel area could have materially affected the award decision.

Calian further contends that the award was improper because KAI lacks facility security clearances; in support of this contention, Calian asserts that under its existing contract KAI has not operated its Arlington facility in accordance with government security regulations.

The RFP did not require proof of security clearances prior to award. Rather, the RFP required only that the awardee develop, implement, and maintain a program under the relevant regulations to protect classified and sensitive information to be held at the contractor's facilities during contract performance. RFP § C.4.8. To the extent that Calian challenges the evaluation of KAI's proposal regarding compliance with the RFP's security requirements, the record shows that the evaluators specifically noted that KAI's proposal did not mention how it proposed to satisfy the RFP's requirements concerning the handling of classified or sensitive information, and assigned the proposal a weakness under the management factor. The evaluators noted, however, that this weakness "can be overcome with extra contractor effort and close government oversight, specifically some training and orientation for contractor personnel in the OPSEC process and the actions required of them under the contract." AR, exh. 7, Approved Strengths and Weaknesses, Feb. 25, 2000, at 3. The record thus shows that, contrary to Calian's suggestion, the agency took this weakness into account in the overall evaluation of KAI's proposal.

Calian also points to its allegation that KAI does not operate its Arlington facility in accordance with government security regulations under the current contract as evidence that the agency could not reasonably conclude that KAI could perform in accordance with the security requirements under the current RFP. As a preliminary matter, the agency takes the position that Calian's allegation is not factually correct. The Navy states that it is not aware of any instance where KAI has needed to receive or store classified documents in the Arlington office. The agency further explains that when KAI employees need to use classified information under the current contract, they use facilities that are cleared to hold classified information. In addition, the intervenor explains that its contract did not require the Arlington office to handle or store classified information, and that consequently, under applicable regulations, KAI was neither required to obtain nor eligible to receive a facility clearance license for the Arlington office.

In any event, Calian's assertion regarding KAI's alleged failure to meet security requirements under its existing contract relates to KAI's ability to perform, and thus concerns a matter of responsibility. See Ktech Corp.; Physical Research, Inc., B-241808, B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237 at 3 (whether a prospective contractor has the ability to obtain any necessary security clearances concerns the firm's ability to perform and is therefore a matter of responsibility). The contracting officer has concluded that KAI is responsible, that is, the firm is capable of satisfactory performance, including meeting the requirements for obtaining the required security clearances. This Office does not review an agency's affirmative determination of responsibility unless the protester shows either that the determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.5(c). There is no evidence of fraud or bad faith on the part of the contracting officer, and the requirements contained in the RFP for providing protection for handling classified and sensitive information did not constitute definitive responsibility criteria since they were not required prior to award. See Telos Field Eng'g, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238 at 5-6. Accordingly, we have no basis to object to the contracting officer's affirmative determination of responsibility.

ALLEGED IMPROPER COST/PRICE ADVANTAGE

The protester also argues that the awardee is not registered to do business in any of the states where it proposes to perform the contract. According to Calian, if the awardee is not registered to do business in those states, it is possible that KAI is not paying applicable state and local taxes, thus allowing the firm to gain an unfair advantage in preparing its cost/price proposal.

Although Calian characterizes its argument in terms of KAI's alleged unfair advantage in preparing its cost/price, the premise underlying Calian's argument is Calian's assertion that KAI is not licensed to do business in the states where the contract is to be performed. Although a contracting officer may determine that the absence of an appropriate business license renders an offeror nonresponsible, compliance with state or local requirements is generally a matter between the contractor and the issuing authority, and will not be a bar to contract award absent a specific requirement in the solicitation. See Technology Advancement Group, B-238273, B-238358, May 1, 1990, 90-1 CPD ¶ 439 at 2. Here, the RFP did not contain any specific requirement for offerors to have a business license of any kind to be eligible for award. In any event, if KAI does not comply with applicable state or local laws and, as a result of enforcement action by the cognizant authorities, KAI chooses

to not perform the contract or is enjoined from doing so, the contract may be properly terminated for default. See Mark Dunning Indus., Inc., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226 at 6; Lewis & Michael, Inc.; Stark Van Lines of Columbus, Inc.--Recon., B-215134.2, B-215134.3, June 26, 1984, 84-1 CPD ¶ 673 at 1-2.

The protest is denied.

Comptroller General
of the United States