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Decision

Matter of: Accurate Automation Corporation

File: B-292403; B-292403.2

Date: September 10, 2003

Tenley A. Carp, Esq., and Karen Yankosky, Esq., McGuireWoods, for the protester. Mark D. Colley, Esq., Christopher R. Yukins, Esq., Caitlin K. Cloonan, Esq., and Stuart Turner, Esq., Holland & Knight, for Raytheon Company, an intervenor. Barry L. Williams, Esq., Department of the Air Force, for the agency. Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under unrestricted solicitation that called for full and open competition with no provision for award under small business innovation research (SBIR) program or for any other small business preference, there was no basis for agency to afford special assistance or differential treatment to small business offeror, notwithstanding offeror's erroneous assertion in its proposal that it could be awarded an SBIR contract for the requirement.
2. Agency reasonably evaluated protester's past performance as neutral under subcontractor management subfactor where protester lacked relevant subcontractor management experience; the proposed large business subcontractor's past performance record in managing subcontractors cannot reasonably be credited to small business protester as the prime contractor, notwithstanding alleged mentor/protégé agreement between the two, since the evaluation subfactor is intended to assess the prime contractor's ability to supervise and control that mentor's performance as a major subcontractor.
3. Agency reasonably determined that the significantly reduced technical and past performance risk offered by technically superior proposal warranted the payment of the associated evaluated cost premium under a solicitation for a cost reimbursement contract for a complex system development program which provided that the technical factors were significantly more important than cost.
4. Award determination, as well as underlying cost/technical tradeoff vis-à-vis protester, is unobjectionable even though focused on comparison between

awardee's proposal and that of the next highest technically rated proposal where, notwithstanding protester's low evaluated cost, record establishes propriety of evaluated technical superiority of awardee's proposal, and the protester's proposal was reasonably evaluated as a distant third.

DECISION

Accurate Automation Corporation protests the award of a cost reimbursement contract to Raytheon Company under request for proposals (RFP) No. F08635-03-R-0002, issued by the Department of the Air Force for the system development and demonstration (including low rate initial production (LRIP)) of the miniature air launched decoy (MALD).¹ Accurate asserts that its proposal was evaluated improperly and that the agency's determination to award to Raytheon is arbitrary and unreasonable.

We deny the protest.

BACKGROUND

The solicitation was issued on January 14, 2003, with an amended February 25 closing date for receipt of initial proposals, on the basis of full and open competition with award to be made to the offeror whose proposal presented the "best value." The RFP stated that non-cost factors combined were significantly more important than cost. The RFP set forth four evaluation factors, consisting of past performance and proposal risk, which were equal in importance, and each of which was of greater importance than the mission capability and "affordability" (cost) factors, which were also equal in importance to each other.

¹ The MALD, which weighs on the order of 200 pounds and is approximately the size of a typical air-to-air missile, is intended to be carried on F-16, B-52 and other aircraft and to be launched while airborne in order to create the impression that the decoy is a fighter or bomber aircraft. The MALD is intended to provoke a response which will reveal or occupy enemy air defenses and enable the Air Force to saturate and suppress an integrated air defense system without exposing real aircraft to detection and attack. Contracting Officer's Statement at 1; Agency Report (AR), Memorandum of Law, at 2. As part of the agency's identification of requirements for the MALD effort, prior to issuing the RFP it awarded five air-launched vehicle investigation (ALVIN) contracts to five separate contractors, including Raytheon and Accurate, to perform 90-day studies of "cost as an independent variable" tradeoffs within the existing requirements and to clarify the industry's capabilities; the Air Force used the results of these studies to help determine what was possible and at what potential cost. Contracting Officer's Statement at 1; Hearing Transcript (Tr.) at 70.

The solicitation also reserved the agency's right to give evaluation credit for proposed features better than stated desires or goals, and to award to other than lowest price offeror. RFP § M-2(b).

The agency received four proposals including ones from [deleted] plus those submitted by Accurate and Raytheon. After performing initial evaluations, the agency conducted discussions with all offerors during which each offeror was provided with its past performance evaluations for all of the programs that it had identified and any additional programs that the performance risk assessment group (PRAG) had identified. Each offeror was also provided a complete copy of the interim assessment of its past performance and asked to respond. Contracting Officer's Statement at 2. Subsequently, requests for final proposal revisions (FPR) were sent to each offeror, and FPRs were required by May 1. After a final evaluation was conducted by the evaluation team, each offeror was proffered an opportunity (of which Accurate elected to avail itself) to discuss its evaluation with the source selection authority (SSA) prior to the source selection decision. The agency made the award to Raytheon on May 21.

The evaluated probable total cost for the relevant proposals was: Accurate: \$206,939,884; [deleted]; and Raytheon: \$238,349,737.² Raytheon's proposal received a final evaluation of exceptional/high confidence (the highest possible assessment) under each of the three past performance subfactors that were set forth in the RFP. In this regard, Accurate's proposal was evaluated as neutral/unknown confidence under subcontractor management, which the RFP specified as the most important subfactor, and satisfactory/confidence under the other two past performance subfactors. Under proposal risk, for which there were three equally important subfactors, Raytheon's proposal was evaluated as low risk under all three. Accurate's proposal was evaluated as low risk under two of the factors and moderate risk under the third factor, "point of departure design," based on "the lack of legacy and maturity of the [proposed] engine, payload and wing and tail folding/lock mechanism." AR, Tab 6, Source Selection Decision, at 6-7. Under mission capability,

² Accurate has not questioned the agency's probable cost determination. In performing its probable cost calculations, as explained by the SSA (and consistent with the record) the agency did not make any adjustments for anticipated delays or other additional costs associated with performance risk. As the SSA testified, the agency's probable cost estimate "assumes that the program is going to go as the contractor proposed," Tr. at 273, and "assumes that all goes as planned in the program." Tr. at 237-38. However, both the chief of the technical evaluation team and the SSA explained that they believed that the relatively greater evaluated risk specifically associated with the Accurate proposal, particularly with respect to its partially untested proposed engine, was likely to result in additional flight testing and delays that would increase the actual performance cost under Accurate's proposal by many millions of dollars. Tr. at 161, 273, and 274.

for which there were three equally important subfactors, Raytheon's proposal was evaluated as blue/exceptional (the highest available rating) under two and green/acceptable (the next highest rating available) under the third. Accurate's proposal was evaluated as blue/exceptional under one subfactor and green/acceptable under the other two. However, the SSA determined with respect to the one blue rating that the evaluation team had given Accurate's proposal under the point of departure design subfactor, that Accurate's proposal did not provide the additional benefits offered by either the Raytheon or the [deleted] proposals, which derived from the additional threat coverage offered by the [deleted] proposal, and the significant reduction in logistic footprint, and the increased operational utility and minimal development needed for enhancement to a specifically contemplated jammer variant of the MALD which was offered by the Raytheon proposal. Id. at 9.

The SSA performed a detailed comparison between the past performance, risk and technical differences between the Raytheon and [deleted] proposals, which had received close evaluation scores,³ and determined to award to Raytheon on the basis that the Raytheon proposal provides "value in Past Performance, Proposal Risk and Mission Capability, which far exceeds the \$15.5M [total cost] difference between [deleted] and Raytheon and the \$31M [total cost] difference between Accurate and Raytheon." Id. at 13. While the SSA specifically determined that the technical superiority associated with Raytheon's higher evaluated past performance, proposal risk and mission capability was worth the \$31 million cost premium associated with the Raytheon proposal in comparison with the Accurate proposal, because of the closeness of the Raytheon and [deleted] proposals, the SSA focused his award determination on a comparison between the Raytheon and [deleted] proposals. The SSA explained this focus on the basis that while all four proposals were technically acceptable, the Raytheon and [deleted] proposals were so superior and close as to make the final selection decision essentially a "two-horse race," in which, despite its evaluated low cost, Accurate's proposal was "trailing the pack," and out of the "photofinish." Tr. at 236. After receiving a debriefing on May 27, Accurate filed this protest with our Office on June 6, and subsequently supplemented its protest on July 21.

Accurate alleges primarily that the agency failed to give it any evaluation credit to which it is allegedly entitled by virtue of its small business status; that the past performance of Accurate's team was misevaluated; and that the agency's cost/technical tradeoff and award determination was arbitrary and irrational.

³ [Deleted] overall proposal risk and mission capability evaluations were substantially equal to Raytheon's; its past performance subfactor evaluations were slightly lower, consisting of very good/significant confidence under subcontractor management and exceptional under the other two subfactors.

SMALL BUSINESS PREFERENCE

Accurate first contends that it was entitled to special “assistance” (that is, an evaluation preference) because of its status as a small business competing against large aerospace conglomerates under a solicitation for a development program. Protester’s Comments at 3, 15. Accurate further asserts that cognizant Air Force officials orally assured Accurate that it would receive such assistance by promising that the agency would “level the playing field for a small business like Accurate.” Tr. at 78. In this regard, Accurate also points to language in the Small Business Innovative Development Act, 15 U.S.C. § 638(a) (2000) (the Act), stating that it is congressional policy “that assistance be given to small business concerns to enable them to undertake and to obtain the benefits of research and development in order to maintain and strengthen the competitive free enterprise system and the national economy.” Protester’s Comments at 3-4. Accurate points out that it stated in its proposal that it sought the award as a phase III contract under the small business innovation research (SBIR) program.

SBIR Program

Accurate takes the position that the above-stated policy that assistance be given to small businesses creates an overarching requirement that procuring agencies favor small business competitors for research and development contracts, and that this policy applies to the procurement at issue. This premise is misplaced. The cited policy statement provides the rationale for the establishment by the Act of the SBIR program, under which certain federal agencies are required to reserve a portion of their research and development funds for awards to small businesses. As part of its SBIR program, DOD issues an SBIR solicitation twice a year listing the research topics for which it will consider SBIR program admission. Firms first apply for a 6-month phase I award to test the scientific, technical, and commercial merit and feasibility of a certain concept. If phase I is successful, the firm may be invited to apply for a 2-year phase II award to further develop the concept. After the completion of phase II, firms are expected to obtain funding from the private sector and/or non-SBIR government sources to develop the concept into a product for sale in private sector and/or military markets. See DOD’s SBIR website, <<http://www.acq.osd/mil/sadbu/sbir/overview.html>>; R&D Dynamics Corp., B-285979.3, Dec. 11, 2000, 2000 CPD ¶ 201 at 2. Where an agency is conducting an SBIR procurement, it has the discretion to determine which proposals it will fund. Microexpert Sys., Inc., B-233892, Apr. 13, 1989, 89-1 CPD ¶ 378 at 2.

Here, while Accurate’s proposal indicates that it was under the mistaken impression that the RFP was subject to an SBIR award, the simple answer is that it was not; the RFP explicitly provided for full and open competition and neither contemplated nor made reference to any possible SBIR award. The antecedent ALVIN contracts were also awarded on the basis of full and open competition, not under the SBIR program. The statutory policy statement cited by Accurate does not provide an independent

basis to make an SBIR award under this procurement; to the extent that Accurate believes that the procurement should have been conducted under the SBIR program, the protest is untimely since it constitutes an alleged solicitation impropriety which, under our Bid Protest Regulations, is required to be filed prior to the initial closing time. 4 C.F.R. § 21.2(a)(1) (2003). Accordingly, this protest basis is without merit.

“Level Playing Field”

With respect to the Air Force’s alleged assurances that it would “level the playing field for a small business like Accurate,” in the first instance, the named Air Force officials all specifically deny having made such assurances. Thus, for example, the source selection evaluation team chair testified: “And I do remember telling all of the teams that we expected this source selection to have a level playing field, not that we would level the playing field. And by saying level playing field, we meant that everybody would be treated equally according to the [solicitation] criteria.” Tr. at 78.

Based on the affidavits presented and the testimony at the hearing, we find it more credible that Air Force personnel advised Accurate that the evaluation would be conducted on a level playing field, and that Accurate representatives naively understood this to mean that the Air Force would afford it some sort of small business preference in order to “level the playing field.” However, there is no need to resolve this difference in understanding of the particular language used or the intentions of the Air Force procurement officials. Regardless of what any Air Force official may have said, the RFP did not call for any small business preference, or for any particular manner of evaluation of small businesses different than the evaluation of large businesses. Accordingly, any verbal assurances that Accurate believes it received in this regard are without effect. The unambiguous terms of the solicitation control, even if we assume, arguendo, that agency officials provided conflicting oral advice; such oral advice is not binding on the government, and an offeror relies on it at its own risk. Diamond Aircraft Indus., Inc., B-289309, Feb. 4, 2002, 2002 CPD ¶ 35 at 2. In short, Accurate had no reasonable basis to believe that it would receive any assistance or evaluation preference by virtue of its small business status, and to the extent it believes that RFP should have so provided, the allegation is untimely.

PAST PERFORMANCE

The RFP provided that past performance on programs would be evaluated under three subfactors, subcontractor management, systems engineering performance, and integrated management, in descending order of importance.⁴ The RFP stated that the

⁴In explaining the rationale for his determination to have the RFP place the greatest weight on the subcontractor management subfactor, the SSA testified that the predecessor MALD program had been terminated because of failures that included

(continued...)

past performance evaluation would use the most recent and relevant performance data, and that the “offeror’s entire team will be evaluated, including teaming partners or major subcontractors.” RFP § M-1(3). The RFP sought input from the offerors in their past performance submissions, and also provided for evaluation from other sources such as contractor performance assessment reports (CPAR), Defense Contract Management Agency (DCMA) contracts, program offices and other service and/or commercial organizations. Id. The solicitation provided detailed and specific recency and relevance criteria. It also provided that each subfactor would receive a separate assessment of the offeror’s present and past work record to indicate the government’s confidence in the offeror’s ability to successfully perform, with a rating range from exceptional/high confidence down to unsatisfactory/no confidence, including the rating of neutral/unknown confidence where there was an insufficient performance record available. Additionally, the RFP provided that the government would complete an interim past performance evaluation that would be provided to each offeror, and that during the past performance discussions the offerors would have the opportunity to present information in response to the past performance evaluations. RFP §§ M-1(3)(g),(h). Accurate’s proposal was evaluated as neutral under the subcontractor management subfactor and satisfactory under the other two, while Raytheon’s proposal was evaluated as exceptional under all three.

Accurate contends that the agency failed to evaluate its “entire team,” as required by the RFP, and in particular that the agency failed to adequately consider the past performance record of General Dynamics, which Accurate proposed as its major subcontractor, and with whom Accurate has a mentor/protégé agreement.

Subcontractor Management

In evaluating the subcontractor management subfactor, the agency determined, and Accurate does not dispute, that only 8 percent of Accurate’s total efforts involved any subcontracting, which was usually performed by research institutions such as universities. AR, Tab 8, Proposal Analysis Report (PAR), at 18.⁵ The agency concluded that these efforts were not sufficient to warrant an assessment and

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large schedule slips and large cost overruns that had resulted in significant measure from poor management of subcontractors. Tr. at 211, 222-23.

⁵ Accurate submitted information concerning [deleted] SBIR contracts in its past performance volume. These contracts were relatively small in size and limited in scope, and did not qualify as programs eligible for past performance evaluation under the RFP. However, in an effort to ensure that Accurate received a fair evaluation, the PRAG bundled the 20 most relevant of these SBIR contracts together and considered them a “program” for evaluation purposes. Contracting Officer’s Statement at 6; Performance Evaluation Chief’s Testimony, Tr. at 296-97.

evaluated Accurate's subcontractor management as neutral. Accurate contends that the past performance of its proposed major subcontractor, General Dynamics, should have provided a sufficient basis for a substantive favorable evaluation under this subfactor, and was improperly ignored. The record shows that the Air Force did consider General Dynamics' past performance under three programs, one of which was considered relevant, and two of which were somewhat relevant. General Dynamics' subcontractor management was evaluated as neutral under two of these contracts, and as exceptional under one of the somewhat relevant programs, but the PRAG team concluded that this was not sufficient to warrant a team rating beyond neutral. This evaluation was presented to Accurate in the interim evaluation, and Accurate neither disputed it nor provided any additional past performance information to the agency in its FPR or in any other proposal submissions or discussions.

In questioning the neutral assessment, Accurate focuses on the RFP language that the entire team would be evaluated, and on its mentor/protégé agreement with General Dynamics. In our view, these arguments are misplaced. Here, because of its unsuccessful experience with the previous MALD program, the agency had placed substantial emphasis on the importance of the past performance subcontractor management subfactor, which was to assess "the offeror's performance on relevant efforts in relation to their management of subcontractors/suppliers and the impact that subcontractor management had upon the overall success of the program." RFP § M-1(f)(1). The purpose of this factor is to evaluate the offeror's likelihood of success as the prime contractor in managing subcontractors in order to keep the program on track. In these circumstances, the proposed role of the team member whose past performance is being assessed is relevant; it would be irrational and unreasonable to consider, much less place emphasis on, the subcontractor management experience of the very subcontractor whom the prime offeror will be required to manage in performing this contract, irrespective of any mentor/protégé arrangement. The fact that General Dynamics may have had successful, relevant past performance in managing subcontractors has no bearing on the performance risk associated with Accurate's management of General Dynamics as its subcontractor in performing this contract. Accordingly, the record provides no basis to object to the evaluation of Accurate's proposal as neutral under this subfactor.

Other Past Performance Subfactors

Accurate's proposal was evaluated as satisfactory under both systems engineering performance and integrated management performance, the other two past performance subfactors. The chief of the performance evaluation team explained that the agency's methodology was to first evaluate Accurate's past performance and arrive at an assessment, then to evaluate the past performance of its proposed subcontractors and determine what, if any, impact that assessment had on the overall team evaluation. Tr. at 319-20, 339-40. Accurate contends that the agency focused only on its past performance without affording appropriate consideration to

that of its proposed subcontractors/team members. Accurate variously asserts that it had been assured that subcontractor past performance would be considered equal in importance to that of the prime contractor in the evaluation, that the agency failed to take into account the relative percentage of work being performed by the subcontractors in performing its evaluation, and that the entire team was not evaluated.

It is not the function of our Office to evaluate past performance information de novo. Rather, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of offerors' past performance information is primarily a matter within the contracting agency's discretion. Pacific Ship Repair and Fabrication, Inc., B-279793, July 23, 1998, 98-2 CPD ¶ 29 at 3-4. Agencies are required to evaluate proposals consistent with the RFP's stated evaluation criteria, including considerations reasonably and logically encompassed by the stated factors. Gray Personnel Servs., Inc., B-285002, June 26, 2000, 2000 CPD ¶ 112 at 3. Here, as to the alleged verbal assurances that subcontractor past performance would be evaluated as equal in weight to that of the prime, the solicitation does not so provide and Accurate's argument in this regard fails for the same reason as is explained above with respect to its other contention regarding verbal assurances that are inconsistent with the RFP. With respect to the agency's methodology in evaluating the Accurate team and the specific assessments, as with the subcontractor subfactor past performance evaluation, consistent with the RFP terms (and with the agency's responsibilities under Federal Acquisition Regulation §§ 15.305 and 15.306), the entire past performance evaluation and the underlying rationale were presented to Accurate in full in the form of the interim and final evaluations. Thus, Accurate was provided ample opportunity to respond but failed to dispute the assessments or otherwise augment any past performance information. In these circumstances, Accurate's above-stated objections which were first raised after the award determination do not provide a meaningful basis to call into question the agency's past performance evaluation.

In its comments on the hearing, Accurate for the first time asserted that in its meeting with the SSA it did respond to the past performance evaluation "by describing the depth and breadth of individual experience of Accurate personnel in order to obtain a higher past performance score." Protester's Hearing Comments at 6. Although an agency properly may, in appropriate circumstances, consider the experience of supervisory personnel in evaluating the experience of a new business, there is no legal requirement for an agency to attribute employee experience to a contractor as an entity. The Project Mgmt. Group, Inc., B-284455, Apr. 14, 2000, 2000 CPD ¶ 66 at 4; Hard Bodies, Inc., B-279543, June 23, 1998, 98-1 CPD ¶ 172 at 4. In our view, the protester has not provided any meaningful basis to take exception to the agency's past performance evaluation.

COST/TECHNICAL TRADEOFF AND AWARD DETERMINATION

In the first instance, Accurate asserts that the agency failed to give sufficient weight to its proposed low cost, based on Accurate's alleged belief that cost would be the evaluation driver because of the ALVIN project's emphasis on cost savings. Protester's Comments at 14-15.

In deciding between competing proposals, cost/technical tradeoffs may be made, the propriety of which turns not on the difference in technical scores or ratings per se, but on whether the source selection official's judgment concerning the significance of the difference was reasonable and adequately justified in light of the RFP evaluation scheme. DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69 at 8. Even where a source selection official does not specifically discuss the cost/technical tradeoff in the source selection decision itself, we will not object if the tradeoff is otherwise reasonable based upon the record before us. Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 11-12. The primary emphasis that Accurate would have the agency place on cost is inconsistent with the RFP criteria here, which made cost one of the less important factors, and provided that technical considerations were substantially more important. Similarly, while Accurate objects that the agency placed great emphasis on past performance and risk, this emphasis is consistent with the RFP evaluation scheme which makes past performance and proposal risk the most important evaluation criteria. There is no basis to require the agency to afford greater weight to cost, or less weight to past performance or proposal risk than is provided for by the RFP evaluation criteria.

As detailed above, the SSA gave primary focus in his award determination and the underlying cost/technical tradeoff to a comparison between the Raytheon and [deleted] proposals because of the closeness of their evaluations, and the fact that Accurate's proposal was evaluated as a distant third. This documentation set forth specific examples of Raytheon's superiority under all of the non-cost factors and, consistent with the RFP, of offered features that exceeded the RFP's stated goals. The record also establishes that in addition to its lower past performance assessment, Accurate's proposal received a lower evaluation than Raytheon's under proposal risk, the other equally weighted most important evaluation factor. Raytheon's proposal received uniformly low risk evaluations under all three proposal risk subfactors. In this regard, the SSA explained that "one of the biggest risks we have in flight test is safe separation from the aircraft when its launched in jettison [and Raytheon] had proposed a [deleted] that was going to safely remove the MALD from near the aircraft in its deployment phase. And that would have really lowered our risk in flight test; to make sure this thing can safely get away from the airplane." Tr. at 233-34. Further, the engine design proposed by Raytheon had been successfully tested during such airborne deployment. In contrast, Accurate's proposal risk was evaluated as moderate under the point of departure design subfactor primarily because of its relatively new and partially untested engine design. Accurate's proposed engine had not been tested for airborne deployment,

and the agency's experience had been that a significant amount of testing was required to get the MALD engines to start at a high altitude for such deployment. Tr. at 191. Further, as noted above, the SSA determined that the need for additional testing and other likely delays associated with Accurate's proposed engine design raised a significant risk that Accurate's evaluated cost savings would be illusory. Accurate has not provided any credible basis to call into question this risk assessment. In sum, the record establishes that the cost/technical tradeoff and award determination are reasonable, consistent with the RFP evaluation criteria and adequately documented with respect to the Raytheon proposal vis-à-vis the Accurate proposal.

The protest is denied.⁶

Anthony H. Gamboa
General Counsel

⁶ This decision has addressed the primary arguments presented by Accurate's protest. In addition, Accurate raised a number of collateral issues that we have considered and find without merit, but which do not warrant detailed analysis or discussion.