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## Decision

**Matter of:** The MIL Corporation

**File:** B-294836

**Date:** December 30, 2004

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Paul F. Khoury, Esq., and Joseph E. Ashman, Esq., Wiley Rein & Fielding, for the protester.

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### DIGEST

1. Agency's unfavorable evaluation of protester's proposal under a past performance subfactor was improper where the effect of the low rating was to penalize the protester for a lack of past performance information that the agency deemed relevant to this subfactor.

2. Agency's "best value" (price/technical tradeoff) analysis in which minimal consideration was given to proposed prices is improper because it fails to consider price as a meaningful evaluation factor, as required by 41 U.S.C. § 253a(c)(1)(B) (2000) and the terms of the solicitation.

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### DECISION

The MIL Corporation protests the rejection of its proposal under request for proposals (RFP) No. CM1303-03-RP-0019, issued by the Department of Commerce, for the award of government-wide acquisition contracts, referred to as the Commerce Information Technology Solutions Next Generation (COMMITTS NexGen) program.<sup>1</sup>

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<sup>1</sup> This procurement is a follow-on to an earlier procurement, known as the Commerce Information Technology Solutions (COMMITTS) program. RFP § C.1; see Computer & Hi-Tech Mgmt, B-293235.4, Mar. 2, 2004, 2004 CPD ¶ 45; Kathpal Techs, Inc.; Computer & Hi-Tech Mgmt, Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6.

We sustain the protest.

The RFP, issued as a total set-aside for small businesses, provided for the award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts to provide certain information technology services. The RFP stated that “[w]hile no maximum number of contracts to be awarded has been determined, the Government will keep the number of awards to a reasonable amount” based upon the consideration of certain factors set forth in the solicitation.<sup>2</sup> RFP § M.1.

The RFP provided that the competition would be conducted in “multiple phases,” with the first phase being a “down-select[] process” during which offerors would respond to a “series of identified technical questions from the government as well as providing information on their experience and past performance references as well as pricing information.” RFP § L.11. The solicitation advised that “[o]nly those offerors deemed as most qualified [would] be invited to participate in the second phase.” Id.

The second phase of the procurement involved the selected offerors’ submission of written technical and price proposals.<sup>3</sup> RFP § L.11. Offerors were informed that during the second phase proposals would be evaluated and selected for award based upon the following evaluation factors and subfactors:

Mission Capability<sup>4</sup>

Use of innovative business practices

Experience in ID/IQ environment

Team arrangements with other Industry Entities

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<sup>2</sup> The solicitation also provided for a three-tier classification system for the submission and evaluation of offerors’ proposals as well as for task order competition among the ultimate contract awardees, with the tiers defined by the firms’ annual levels of revenue and the associated North American Industrial Classification System codes under which they qualified. RFP § C.2. That is, as specified in the RFP, each “tier” was evaluated independently, such that Tier II offerors were not, for example, evaluated against offerors from Tiers I or III. RFP § M.3. MIL competed under Tier II, and MIL’s protest involves only the evaluation and source selection under Tier II.

<sup>3</sup> The agency selected firms for award without conducting the optional third phase of the procurement, which provided for oral presentations. Agency Report (AR), Tab 11, Source Selection Decision, at 9; see RFP § L.11.

<sup>4</sup> The Mission Capability factor included a fourth evaluation subfactor (mentoring experience) that was applicable to Tier III firms only. RFP § M.3.1.

Past Performance

Awards

Past performance management

Successful relationships with Industry Entities

Price

RFP § M.3. The solicitation provided that in selecting proposals for award, the mission capability and past performance factors would be considered equal in importance, and each of these non-price factors would be considered more important than price. RFP § M.3.4. The subfactors within the mission capability and past performance factors were stated to be equal in importance with each other. RFP §§ M.3.1, M.3.2.

The agency received numerous submissions from Tier II offerors in response to the solicitation, and evaluated proposals from 44 Tier II offerors, including MIL, during the second phase of the procurement.<sup>5</sup> AR, Tab 7, COMMITS NexGen Phase 2, Tier II Evaluation. MIL's proposal was evaluated as "blue" under each of the subfactors comprising the mission capability factor, and "blue" overall under the mission capability factor. With respect to the past performance factor, MIL's proposal was evaluated as "red" under the awards subfactor (the rating at issue in this protest), "blue" under the past performance management and successful relationships with industry entities subfactors, and "green" overall. With regard to price, MIL's proposal received a "blue" rating. The agency evaluated MIL's proposal as "green" overall.<sup>6</sup> Id.

The agency ultimately selected 24 Tier II proposals for award, each of which had received a "blue" rating overall.<sup>7</sup> AR, Tab 10, Technical Evaluation Panel (TEP)

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<sup>5</sup> Although the record does not provide the number of responses received from Tier II offerors, it indicates that the agency received a total of 417 responses from offerors of all three tiers. AR, Tab 11, Source Selection Decision, at 3.

<sup>6</sup> The agency evaluated proposals as either "blue," "green," "yellow," or "red," under the mission capability and past performance factors, their respective subfactors, and the price factor. With regard to price, the agency explains that "[a]n average labor price . . . was developed for each tier," and that [a]ll Offerors within each tier were examined and compared against the average." A proposal received a "blue" rating under the price factor if its price was greater than 10 percent below than the average, a "green" rating if its price was within 10 percent of the average, a "yellow" rating if its price was greater than 10 percent but not more than 20 percent of the average, and a "red" rating if its price was greater than 20 percent of the average. AR, Tab 11, Source Selection Decision, at 9.

<sup>7</sup> Although the record includes an attachment that specifically lists by name 24 Tier II offerors recommended for award, we note that the source selection decision refers  
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Report, attach. 2. The proposals selected had all received “blue” ratings under the mission capability and past performance evaluation factors, and 12 of these proposals had also received “blue” ratings under the price evaluation factor. Of the remaining 12 Tier II proposals selected for award, six had received ratings of “green” and six had received ratings of “yellow” under the price evaluation factor. AR, Tab 7, COMMITTS NexGen Phase 2, Tier II Evaluation.

After requesting and receiving a debriefing, MIL filed this protest. MIL’s primary contentions are that the agency’s evaluation of its proposal as “red” under the awards subfactor to the past performance factor was improper and unreasonable, and that the “best value” decision to reject MIL’s proposal without regard to its low price was improper.

The RFP (at § M.3.2) provided as follows with regard to the awards subfactor to the past performance factor:

The Government will evaluate the quality of the award and certification received by the Offeror. This includes an examination of the relevancy and currency of the award and certification. Relevancy refers to how applicable the award and certification are to the work contemplated by COMMITTS NexGen as well as the character. Currency addresses the date the award or certification was received . . . .

In its proposal, MIL identified five awards. AR, Tab 5, MIL’s Phase II submission, at 18-22. The agency found in evaluating MIL’s proposal that four of the awards referenced by MIL had been made to entities other than MIL, and determined that the remaining award, of which MIL was the recipient, “was not relevant to the work required by COMMITTS NexGen.” AR, Tab 6, Statement of TEP Chair, at 2. The agency concluded that MIL had “[n]o awards relevant to COMMITTS NexGen,” and evaluated MIL as “red” under the awards subfactor to the past performance factor. AR, Tab 8, COMMITTS NexGen Evaluation, at 2; Tab 4, Proposal Evaluation Guide, at 8.

MIL protests that once the agency determined (improperly, in MIL’s view) that MIL lacked awards “relevant” to the work contemplated by the RFP here, the agency was not permitted to evaluate MIL’s proposal as “red” under the awards subfactor to the

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to “the recommended 25 Tier 2 awardees,” without identifying in any manner who the 25 recommended awardees are. AR, Tab 10, Technical Evaluation Panel (TEP) Report, attach. 2; Tab 11, Source Selection Statement at 13. The precise number of proposals selected for award has no bearing on our decision.

past performance factor, but rather, its proposal should have received a “neutral” rating. Protest at 7-8; Protester’s Comments at 15-17.

The evaluation of proposals, including the evaluation of past performance, is a matter largely within the contracting agency’s discretion. See DRA Software Training, B-289128, B-289128.2, Dec. 13, 2001, 2002 CPD ¶ 11 at 2. In reviewing an evaluation of past performance, we will not reevaluate proposals, but will examine the record of the evaluation to ensure that it was reasonable and in accordance with the stated evaluation criteria and applicable procurement statutes and regulations. Id. Under Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), an “offeror without a record of relevant past performance or for whom information on past performance is not available . . . may not be evaluated favorably or unfavorably on past performance.” See Kalman & Co., Inc., B-287442.2, Mar. 21, 2002, 2002 CPD ¶ 63 at 8 (agency reasonably evaluated a proposal under a past performance evaluation factor as “neutral” where it found that the offeror lacked relevant past performance).

The agency argues that a “neutral” rating under the awards subfactor would be inappropriate because it “is merely a subfactor in the protester’s overall rating for past performance and is not analogous to a circumstance in which an offeror has provided no relevant past performance information.”<sup>8</sup> AR at 13-14. The agency notes that the decisions of our Office interpreting FAR § 15.305(a)(2)(iv) “focus[] on the lack of relevant past performance information in general as opposed to evaluation of subfactors within the past performance factor.” AR at 13.

It is true that protests to our Office regarding past performance evaluations and FAR § 15.305(a)(2)(iv) have primarily involved the reasonableness of an agency’s determination as to whether a particular offeror had or lacked relevant past performance. See, e.g., MCS of Tampa, Inc., B-288271.5, Feb. 8, 2002, 2002 CPD ¶ 52 at 4-6; Kalman & Co., Inc., *supra*, at 8. However, we have also expressly found reasonable an agency’s assignment of a “neutral” rating to an offeror’s proposal under a past performance subfactor, where the agency reasonably determined that the offeror lacked relevant past performance under that subfactor, and even though the agency also determined that the same offeror presented relevant past performance that was evaluated favorably under other past performance subfactors. See Accurate Automation Corp., B-292403, B-292493.2, Sept. 10, 2003, 2003 CPD ¶ 186 at 3, 7-8; Maytag Aircraft Corp., B-287589, July 5, 2001, 2001 CPD ¶ 121 at 11. Accordingly, the agency’s argument that an agency may evaluate a lack of relevant past performance information unfavorably merely because the evaluation is being conducted under a subfactor to a past performance factor, rather than a past performance evaluation factor itself, is without merit.

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<sup>8</sup> This position is consistent with the agency’s source selection plan, which did not provide for a “neutral” rating under any of the three subfactors to the past performance factor. AR, Tab 4, Proposal Evaluation Guide, at 8.

The agency also contends that the assignment of a “neutral” rating to MIL’s proposal under the awards subfactor would be inappropriate because MIL did in fact “submit[] evidence of its experience in the form of its awards submission,” although, as noted above, the agency concluded that these awards were not relevant. Agency Supplemental Report at 3. This position is also without merit. The key consideration as to whether an offeror’s proposal should be assigned a “neutral” rating under a past performance factor or subfactor is not whether the offeror’s proposal included any information regarding past performance, but rather, whether it included past performance information that the agency deemed relevant. See FAR § 15.305(a)(2)(iv); Kalman & Co., Inc., supra, at 8.

In sum, having considered the circumstances here, including the agency’s explanations for its actions, we cannot find reasonable the agency’s evaluation of MIL’s proposal as “red” under the awards subfactor to the past performance factor.

MIL also argues that, contrary to the agency’s position, the information regarding the awards included in its proposal demonstrated that MIL had in fact received awards relevant to the work to be performed under the COMMITS NexGen solicitation. The agency responds that its determination that MIL lacked awards relevant to the COMMITS NexGen work was reasonable, and contends that in any event, if it had considered the award information included in MIL’s proposal as relevant to the COMMITS NexGen work, it would not have rated MIL’s proposal higher than “yellow” under the awards subfactor. AR at 15; Tab 6, Statement of TEP Chair, at 3. The agency adds that because MIL’s proposal would have received a “yellow” rating, its overall rating under the past performance factor would have remained “green,” and argues that MIL’s proposal still would not have been selected for an award.

We need not decide this aspect of MIL’s protest. As explained in the following paragraphs, we have concerns about the adequacy of the agency’s “best value” analysis, and we therefore conclude this decision with a recommendation that the agency perform a new best-value analysis consistent with the terms of the solicitation as well as statute and regulation. Moreover, and more specifically, if the agency was reasonable in finding that MIL’s proposal lacked information relevant to the awards subfactor, then, as explained above, the agency should have assigned a “neutral” rating to MIL’s proposal under that subfactor. The appropriate time for the agency to consider the impact of that change—from “red” to “neutral” under the awards subfactor—on MIL’s competitive standing is as part of its implementation of our recommendation, rather than during the heat of the adversarial process. Intellectual Properties, Inc., B-280803.2, May 10, 1999, 99-1 CPD ¶ 83 at 10; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Likewise, if the agency ultimately concludes that MIL’s proposal contained information relevant to the awards subfactor, the impact of that determination, that is, whether upon reevaluation MIL’s proposal should be assigned a rating under the awards subfactor other than “red,” and whether that rating should be “yellow,

“green,” or “blue,” as well as the effect of that rating on MIL’s competitive standing, should also to be considered outside of the adversarial process.<sup>9</sup>

In addition to its challenge to its “red” rating under the awards subfactor, MIL also protests that the agency’s determination not to select its proposal for award was unreasonable, arguing that the agency gave legally insufficient weight to price in performing its best-value analysis. Moreover, in MIL’s view, the agency improperly “relied solely on a mechanical application of a color-coded rating scheme.” Protester’s Comments at 18. We find that the record supports MIL on both points.

As explained above, the RFP identified price as one of three factors, albeit the one with the least weight, that would be considered in the award decision. Consistent with the evaluation scheme committing the agency to consider price in the source selection, the RFP requested that offerors “[c]omplete the pricing tables for designated standard labor categories” provided as an attachment to the solicitation, and explained that “[t]he purpose of the pricing tables is to allow the Government to compare pricing among all offerors.” RFP at L.11.2.1.2; see Attach. J-6.

MIL’s evaluated price was determined to be 22 percent below the Tier II average, and its proposal received a rating of “blue” under the price evaluation factor. AR, Tab 12, MIL’s Debriefing Slides; Protester’s Comments at 19. For five of the six technical (that is, nonprice) evaluation subfactors, MIL received the highest (“blue”) rating; the sixth subfactor was the awards subfactor of the past performance factor, for which MIL received the “red” rating discussed at length above, and it was apparently solely due to that “red” rating that MIL’s proposal was assigned a “green” overall rating.

As noted above, the agency assigned 12 of the Tier II proposals “blue” ratings under both the technical and the price factors, and those ratings were reasonably found to place those proposals in line for award ahead of MIL’s. The decision that 12 additional Tier II proposals were superior to MIL’s was not so straightforward. While all of that second group of 12 proposals had received “blue” ratings for the technical factors (mission capability and past performance), half of them had received “green” ratings for price, while the other half (6 proposals) had received “yellow” price ratings. The “yellow” rating for those 6 proposals reflected the agency’s determination that their proposed prices were between 10 and 20 percent higher than the Tier II average. AR, Tab 7, COMMITS NexGen Phase 2, Tier II Evaluation; Tab 11, Source Selection Decision, at 9. The decision to make award to

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<sup>9</sup> MIL also argues that the agency should have sought clarification from MIL regarding the past performance information set forth in MIL’s proposal. We need not decide this aspect of MIL’s protest, given our decision sustaining MIL’s protest, and our recommendation that the agency reconsider that firm’s proposal under the past performance factor and perform a new best-value analysis consistent with the terms of the solicitation as well as statute and regulation.

all 12 of the proposals that received less than a “blue” rating for price, and not to make award to MIL, despite its “blue” price rating (which meant that its price was more than 10 percent below the average), required a price/technical tradeoff analysis.

It is in this analysis that the agency erred, both in failing to document a rational basis for its tradeoff and in failing, as far as the documentation in the record indicates, to give meaningful consideration to price.

Where, as here, a solicitation provides that technical factors will be more important than price in source selection, selecting a technically superior, higher price proposal is proper where the agency reasonably concludes that the price premium is justified in light of the proposal’s technical superiority. The propriety of such a price/technical tradeoff decision turns not on the difference in the technical scores or ratings per se, but on whether the selection official’s judgment concerning the significance of the difference was reasonable and adequately justified in light of the RFP’s evaluation scheme. Shumaker Trucking and Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 6. The price/technical tradeoff decision must be documented, and the documentation must include the rationale for any tradeoffs made, including the benefits associated with additional costs. FAR § 15.308; Shumaker Trucking and Excavating Contractors, Inc., supra.

Instead of documenting a reasonable basis for the tradeoffs that the agency made in preferring the awardees’ proposals to MIL’s, the record indicates that the agency mechanically made award to all Tier II proposals that received “blue” ratings for two nonprice factors, and declined to make award to any Tier II proposal that did not receive a “blue” rating for those nonprice factors. This mechanical approach failed to make a qualitative assessment of the technical differences among the competing proposals to determine whether the perceived technical superiority of those proposals receiving “blue” ratings for all nonprice factors justified paying the evaluated price premium associated with those proposals that did not receive a “blue” price rating. See Opti-Lite Optical, B-281693, 99-1 CPD ¶ 61 at 4. In particular, neither in the contemporaneous record nor during the protest proceeding has the agency offered any plausible reason for finding that MIL’s lack of what the agency deemed to be relevant awards—the sole basis for MIL’s proposal not receiving a “blue” overall rating—justified the agency’s selection of proposals offering significantly above-average prices (earning “yellow” price ratings), rather than the below-average prices offered by MIL.

This brings us to the weight that the agency gave to price in the source selection process. The source selection statement provides that “[w]hile price was a consideration, it was not a major one” in determining which proposals should receive award. AR, Tab 11, Source Selection Statement, at 10. The source selection statement explains that as a general matter “each task order will be competed under the COMMITS Fair Opportunity competitive procedures,” and because of this,



“pricing becomes most important at the task order level where the ‘Fair Opportunity’ competitive procedures come into play.” Id. at 11. The selection statement continues by stating that “[i]t is within this context that the role of the pricing factor is apparent,” concluding here that “[p]rice must be examined to ensure reasonableness among all companies in contention for award.” Id.

The source selection statement concedes in this regard that the proposals selected for award that had received a “yellow” rating under the price factor “range[d] from 13% to 18% above the average,” and that the proposed rates were “unfavorable as compared to other Offerors”; the source selection statement finds, however, that those higher prices were “also considered realistic.” AR, Tab 11, Source Selection Statement, at 10. The source selection statement then reiterates that “[b]ecause pricing will be negotiated at the task order level, it played a lesser role than the non-price factors in this requirement.” Id.

The Competition in Contracting Act of 1984 (CICA) requires contracting agencies to include cost or price as a factor that must be considered in the evaluation of proposals. 41 U.S.C. § 253a(c)(1)(B) (2000); Electronic Design, Inc., B-279662.2 et al., Aug. 31, 1998, 98-2 CPD ¶ 69 at 8; see FAR § 15.605(b)(1)(i). An evaluation and source selection that fail to give meaningful consideration to cost or price is inconsistent with CICA and cannot serve as a reasonable basis for award. See Electronic Design, Inc., supra. Cost or price has not been accorded meaningful consideration if the agency’s evaluation and source selection decision so minimizes the potential impact of cost or price as to make it a nominal evaluation factor. See id.

In our view, the record in this case, particularly the source selection statement, demonstrates that the agency has failed to comply with the regulatory and statutory requirement that contracting agencies give cost or price meaningful consideration in source selections. Contrary to Commerce’s apparent belief, there is no exception to the requirement set forth in CICA that cost or price to the government be considered in selecting proposals for award because the selected awardees will be provided the opportunity to compete for task orders under the awarded contract. Specifically, the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. §§ 253h - 253k, which codified existing authority to award task and delivery order contracts, does not provide any exception to CICA’s requirement that cost or price be considered. To the contrary, FASA’s legislative history illuminates the need to comply with the CICA competition requirements in conducting acquisitions for multiple award contracts:

In addition, the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services. The conferees note that this provision is intended as a codification of existing authority to use such contractual vehicles. All otherwise applicable provisions of law would remain applicable to such

acquisitions, except to the extent specifically provided in this section. For example, the requirements of [CICA], although they would be inapplicable to the issuance of individual orders under task and delivery order contracts, would continue to apply to the solicitation and award of the contracts themselves.

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 103-712, at 181 (1994); see Department of the Army--Req. for Mod. of Recommendation, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 at 6.

Here, in performing its source selection, the agency minimized the potential impact of price because of the “context” of the procurement and effectively made price meaningless as a comparative evaluation factor. Specifically, as indicated above, the source selection statement reflects the agency’s view that the evaluation of pricing, although very important in the award of individual task orders, was limited in selecting proposals for award under the solicitation to a pass/fail review to ensure that the prices proposed were reasonable and realistic. At some point, the agency apparently decided to abandon the price evaluation scheme set out in the RFP; in this regard, we note that the source selection statement at one point declares that “hourly rates [the pricing framework requested of offerors by the RFP] used as a comparison are not meaningful in the competitive, solutions[-]based fair opportunity environment for task order awards.” AR, Tab 11, Source Selection Statement, at 14. In failing to consider the differences among the offerors’ proposed pricing--notwithstanding the agency’s evaluation and color-rating of those differences--the agency abandoned the RFP’s evaluation scheme and violated the legal requirement that price be given meaningful consideration as an evaluation factor for award.

The protest is sustained. We recommend that the agency review its determination that MIL lacked awards suitable for evaluation under the awards subfactor to the past performance factor. If the agency again determines that the awards described in MIL’s proposal are irrelevant to the COMMITS NexGen work, it should assign a “neutral” rating to MIL’s proposal under the awards subfactor, and consider the effect of this revised rating on MIL’s overall past performance rating as well as MIL’s overall competitive position. If the agency determines that the awards described in MIL’s proposal are relevant to the COMMITS NexGen work, it should assign a rating that is reasonable and in accordance with the solicitation to MIL’s proposal under the awards subfactor, and consider the effect of this revised rating on MIL’s overall past performance rating as well as MIL’s overall competitive position. In considering MIL’s overall competitive position, the agency should consider MIL’s evaluated price in a manner that is consistent with the terms of the solicitation, as well as statute and regulation. If a price/technical tradeoff analysis is necessary to decide whether MIL should receive award, that analysis should be documented, as required by FAR § 15.308. We also recommend that the agency reimburse the protester its costs of pursuing this protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d) (2004).

The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receipt of this decision.

Anthony H. Gamboa  
General Counsel