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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Earl F. Jones, Jr.

File: B-255045

Date: February 6, 1995

DIGEST

A transferred Navy employee's commanding officer initially authorized him two 30-day extensions of his initial 60-day temporary quarters period on the basis that he could not find existing housing to accommodate his wife's disability and was required to contract for a new house with a scheduled settlement date beyond the initial 60-day period. The agency's Personnel Support Activity disallowed payment of the employee's voucher for the extended period because the employee's wife's condition arose before the transfer and did not qualify as a circumstance occurring during the initial temporary quarters period, as required by 41 C.F.R. § 302-5.2(a)(2) (1994). However, since the General Accounting Office has held that under this regulation an extension may be given for a housing shortage that prevents an employee from locating an adequate residence during the initial period of temporary quarters, the matter is remanded to the agency to determine whether the employee should be granted the extensions.

DECISION

Mr. Earl F. Jones, Jr., is appealing our Claims Group's settlement Z-2868552, June 8, 1993. The settlement sustained the disallowance of his voucher claim for an additional 60 days of subsistence expenses while occupying temporary quarters incident to a permanent change of station in July 1992. We conclude that the case should be remanded to the agency for further consideration.

Mr. Jones, an employee of the Department of the Navy stationed in Keyport, Washington, was transferred to Charleston, South Carolina. He was authorized an initial 60 days subsistence expenses while occupying temporary quarters. His temporary quarters period began on July 6, 1992, the date he reported for duty in Charleston.

According to Mr. Jones, he began a search for permanent housing even before he reported for duty. Because his wife had a painful foot condition that arose during the year preceding the transfer, his search was limited to one-story housing. Mr. Jones states that he was in Charleston for a conference about 1 month before his transfer. He retained a realtor and inspected a dozen or so houses suggested by

the realtor, but found nothing in his price range that was suitable for his wife's medical condition. He returned to Charleston on the weekend of July 4, 1992, and looked at other houses found by the realtor. After he reported for duty on July 6, he continued to search for housing. During the second week, Mrs. Jones flew to Charleston and spent a few days looking for housing.

Based on those efforts, Mr. Jones concluded that no suitable housing in his price range was available. At that point, he found a builder who could deliver a new house to their specifications within the maximum 120-day temporary quarters period. Before he signed a contract to build, Mr. Jones informed his command at the Charleston Naval Weapons Station of his wife's disability, his problem in finding suitable housing, and the prospect of being able to build a home within 120 days. He requested an extension of his initial allowance to cover an additional period of temporary quarters occupancy. Based on those circumstances, his commanding officer approved the request. Mr. Jones and his wife signed a contract for the construction of a house on July 19, 1992, with settlement to occur on or before November 1, 1992. The house was completed on schedule and they moved in before the expiration of the second 60-day period.

Mr. Jones's claim voucher was submitted by his employing activity to the Navy Personnel Support Activity (PSA). The disbursing officer at PSA allowed the claim for the initial 60-day period, but denied the claim for the additional period of temporary quarters. The disbursing officer denied the extension because the contract of purchase indicated a settlement/occupancy date that was after the initial 60-day temporary quarters period.

Mr. Jones appealed the disbursing officer's denial to the Defense Finance and Accounting Service (DFAS), which also denied the claim. DFAS found that his wife had a pre-existing medical condition that directly affected his housing choices and that his contract to build a home stipulated a completion date a full 52 days after the initial temporary quarters period would expire. DFAS concluded, therefore, that the need to extend temporary quarters did not arise during the initial period and did not qualify as a circumstance that would permit an extension of the temporary quarters period, as required by 2 JTR para. C13004-1b. In support of this position, DFAS cited our decision in William M. Stoddard, B-248012, Aug. 25, 1992.

Section 5724a(a)(3) (1988) of title 5, United States Code, authorizes payment to transferred employees of subsistence expenses for a period of 60 days while occupying temporary quarters when the new official station is located within the United States or other specified locations. The statute provides that the period may be extended for an additional 60 days "if the head of the agency concerned or his designee determines that there are compelling reasons for the continued occupancy of temporary quarters." The implementing regulations are found in Part 302-5 of the Federal Travel Regulations (FTR).

The specific regulation governing extensions of temporary quarters beyond an initial 60-day period is FTR section 302-5.2(a)(2),[1] which allows an additional period not to exceed 60 consecutive days provided the head of the agency or his/her designee determines that there are compelling reasons for the continued occupancy of temporary quarters. The regulation further provides as follows:

> ". . . Extensions of the temporary quarters period may be authorized only in situations where there is a demonstrated need for additional time due to circumstances that have occurred during the initial 60-day period of occupancy that are determined to be beyond the employee's control and acceptable to the agency."

The examples used in this section to describe compelling reasons beyond the employee's control include but are not limited to ". . . (iii) Inability to locate permanent residence which is adequate for family needs because of housing conditions at the new official station." (Emphasis added.)[2] Section 302-5.1 of the FTR[3] provides that administrative determinations as to the necessity for temporary quarters occupancy and the length of time of that occupancy are to be made on an individual-case basis.

DFAS and the disbursing officer in the present case may have construed the governing regulations and our decisions too narrowly. The focus of FTR section 302-5.2(a) (2), supra, in referring to "circumstances which have occurred during the initial 60-day period," relates to actual situations arising in connection with the transferred employee's ability to find and occupy appropriate permanent housing at his new duty station. The regulation permits consideration of adverse housing conditions, though those conditions started before the employee's transfer began. Connie Tharp Holmquist, B-255603, Feb. 10, 1994.

Our decision in William M. Stoddard, B-248012, Aug. 25, 1992, cited by DFAS, is distinguishable. There, the employee experienced difficulties in closing on schedule because of problems in obtaining a mortgage and required appraisals, and he did not apply for an extension until after his initial 60 days had expired.

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[1]41 C.F.R. § 302-5.2(a)(2) (1993). The derivative administrative provisions for civilian employees of the Department of the Navy are found in 2 JTR, para. C13004-1b.

[2]41 C.F.R. § 302-5.2(a)(2)(iii) (1993).

[3]41 C.F.R. § 302-5.1 (1993).

Here, the threshold issue is whether Mr. Jones's failure to find existing housing at the new official station adequate to meet his family needs resulted from adverse housing conditions at his new official station. The record shows that Mr. Jones's wife needed to live in a one-story home because of his wife's disability. We agree with the commanding officer that it was appropriate for Mr. Jones to limit his search for one-story homes in light of this family need.

The record does not make clear, however, whether Mr. Jones's failure to find an existing one-story house was due to a shortage of such housing or to his own personal dissatisfaction with the available choices. The commanding officer's statement merely cites Mr. Jones's difficulty in obtaining suitable housing, "particularly considering the real estate conditions one faces when moving from a west coast area where homes are valued higher into the southeast." Mr. Jones refers to his failure to find existing suitable housing "in his price range." If, in fact, Mr. Jones's decision to build a home was based on personal choice and not caused by a lack of adequate one-story homes in the area, he would not be entitled to any extensions of his initial period of temporary quarters under the regulation.

As stated above, under FTR section 302-5.2(a)(2), Mr. Jones's agency is authorized to grant an extension to him if he is able to satisfy his agency that he made a reasonable effort to locate an existing one-story house but was unable to find one that was adequate for his family's needs. We will not overturn such an agency determination unless it is arbitrary, capricious, or contrary to law. Mark A. Wohlander, B-238300, Oct. 4, 1990, and decisions cited therein.

Accordingly, Mr. Jones's claim is remanded to the disbursing officer for further consideration in light of the criteria set forth above.

Seymour Efros

for Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eastern Computers, Inc.

File: B-258164.3; B-258164.4

Date: February 7, 1995

John F. Fugh, Esq., Charlotte R. Rosen, Esq., and Mary E. Albin, Esq., McGuire, Woods, Battle & Boothe, for the protester.
Thomas J. Madden, Esq., James F. Worrall, Esq., Fernand A. Lavallee, Esq., and Carla D. Craft, Esq., Venable, Baetjer, Howard & Civiletti, for Firearms Training Systems, Inc., an interested party.
Maj. Carol A. Kettenring, United States Marine Corps, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected protester's proposal as technically unacceptable where the solicitation required offerors to demonstrate simulated marksmanship trainers, and the protester, although afforded two opportunities almost 2 months apart, was able to satisfactorily demonstrate only 4 of the 11 required trainer weapons and was unable to demonstrate several required system capabilities.

2. Where a small business concern's proposal was found technically unacceptable based upon a comparative assessment under the stated evaluation criteria, including factors not related to responsibility as well as responsibility-related factors, the agency was not required to refer the matter to the Small Business Administration for a certificate of competency review.

DECISION

Eastern Computers, Inc. (ECI) protests the United States Marine Corps's award of a contract to Firearms Training Systems, Inc. (FATS), under request for proposals (RFP) No. M67854-94-R-2014, for the Indoor Simulated Marksmanship Trainer (ISMT) and associated Infantry Squad Trainer (IST). ECI challenges the agency's determination that its proposal was technically unacceptable.

We deny the protest.

BACKGROUND

The solicitation requested proposals for the design, production, testing, and delivery of two models of simulated marksmanship trainers for indoor use: the ISMT with 4 firing positions and the IST with 12 firing positions. Because the agency has an urgent need for the trainers, the solicitation required delivery to commence within 150 days after award. Each trainer was to consist of an instructor position, audiovisual system, and the firing positions. The purchase description specified the use of simulated weapons to fire upon simulated targets projected on a large screen display; an indication of the round fired was to be depicted on the screen, with the location of the round displayed to be consistent with the weapon's ballistics and the simulated distance of the target. The purchase description required that the rounds be coded to correspond to the firing position that fired the round; the trainer was to provide immediate feedback regarding aiming point, recoil, reaction time, impact, engagement time, rounds fired, and an indication of success or failure. In addition, the purchase description required the trainer to include the capability to incorporate a "shoot back" mode in which lasers placed on or near the screen would "shoot back" at the shooters to simulate enemy fire, with hits on the shooters to be registered by laser-sensing, Multiple Integrated Laser System (MILES) equipment.

The purchase description called for 11 simulated weapons, including the M-9 pistol, M-16A2 rifle, M-203 grenade launcher, Service Shotgun, MP-5 submachine gun, the M-2HB, M-240G and Mk-19 machine guns, M-249 squad automatic weapon, Mk-153 shoulder-launched assault weapon (SMAW), and M-136 AT4 anti-armor weapon. The simulated weapons were required to possess the same weight and weight distribution as the actual weapons (within a 5-percent tolerance), include all of the functional characteristics of the actual weapons, and generate simulated recoil with a force equal to 70 percent of the actual recoil force for the M-16A2, M-203, M-240G, M-249 and MP-5 weapons, and 15 percent for the other weapons.

The solicitation provided for award of a firm, fixed-price contract to the offeror whose proposal was most advantageous to the government under the stated evaluation factors. The RFP listed, in descending order of importance, seven evaluation factors: (1) product demonstration and performance, (2) system design, (3) integrated logistic support, (4) reliability and maintainability, (5) test and evaluation, (6) management, and (7) cost. The solicitation provided for the proposed trainers to undergo a live test

demonstration; offerors were "expected to demonstrate a system that shall physically and functionally present a 4-lane trainer and a 12-lane trainer." In particular, the RFP stated that:

"[i]n order to be evaluated as satisfactory or better, offerors' systems shall demonstrate answers to the following requirements:

Weapons

--Does the system utilize the required weapons?
--Do the weapons look and function realistically?
--Can numerous types of weapons fire simultaneously?
--Does the system have a supporting arms [forward observer] capability?
--Does the [forward observer] network with a fire direction center and a gun section?
--Does the system have a shoot back capability?"

If an offeror was unable to demonstrate one of the above "demonstration requirement[s]," the solicitation provided for possible consideration of the offer, stating that the "requirement must be addressed in the written technical proposal," and that "[i]n addressing this shortcoming, the offeror must stipulate when the capability shall be demonstrable."

Three proposals were received by the May 9, 1994, closing date. At the initial capability demonstration, FATS demonstrated 10 of the 11 required weapons, including at least 1 weapon incorporating government-furnished equipment, and received an overall satisfactory rating for the demonstration. In contrast, ECI initially demonstrated only 5 of the 11 required weapons, and significant weaknesses were found with respect to 3 of those--the M-16A2 rifle, M-9 pistol, and M-203 grenade launcher. As a result of these and other deficiencies, ECI received an overall marginal rating for the demonstration. During the subsequent discussions, the Marine Corps identified in writing the specific deficiencies in the weapons demonstrated by ECI and noted its failure to demonstrate six of the required weapons. The agency advised ECI that:

"[t]he offeror needs to provide a detailed plan on when each of the weapons could be demonstrated and when the M-16, M-9 and M-203 could be properly demonstrated. The plan needs to include identification of weapons experts, their background and qualifications and where the work will be accomplished."

The Marine Corps then afforded ECI and FATS the opportunity for another demonstration. ECI again received only a marginal rating; as discussed below, while this time ECI demonstrated nine weapons, the agency found only four of the nine to be satisfactory. (In contrast, FATS demonstrated 10 of the required 11 weapons, and its rating for the demonstration was increased to superior.) In addition, the Marine Corps found ECI's responses to the prior discussion questions to be informationally deficient; the agency generally cautioned ECI that its responses needed to be "more specific and in-depth." With respect to ECI's failure to satisfactorily demonstrate all of the required weapons, the agency specifically instructed ECI that:

> "[t]he offeror needs to provide a detailed plan and schedule for each of the required weapons as to when they would fully meet the [purchase description] requirements. The plan needs to specify what processes must be accomplished, testing, identification of weapons experts/technicians and their qualifications that will do the work, and where the work will be accomplished."

After concluding discussions with the offerors, the Marine Corps requested best and final offers (BAFO) from FATS and ECI. (The third offeror was not included in the competitive range.)

Based upon the Marine Corps's evaluation of BAFOs and the results of the second capability demonstration, the FATS proposal received an overall technical rating of superior. In contrast, the agency determined that ECI's proposal had not demonstrated the technical capability to satisfy the solicitation requirements for system performance, and that ECI therefore could not be considered for award. The agency noted in this regard that ECI demonstrated a system in the second capability demonstration, conducted nearly 2 months after the first, which still failed to comply with numerous specification requirements.

ECI's failure to satisfactorily demonstrate the M-16A2 rifle and the M-9 pistol were "of particular concern" to the agency since these weapons are the baseline for weapons training, and therefore are used most frequently and are expected to be purchased in the largest quantities. Specifically, ECI demonstrated an M-16A1 rifle with M-16A2 parts attached, rather than the required M-16A2. The M-16A2, however, has a different trigger pull than the M-16A1 demonstrated by ECI, requiring the shooter to squeeze the trigger harder on every third round fired. The M-16A2 also has different sights and a different method for zeroing the weapon than the demonstrated M-16A1. Further, the

demonstrated M-16A1 would not accept a magazine, and therefore did not have the same weight and balance as the weapon to be simulated, and also had an unrealistic recoil when fired. In this regard, while actual recoil causes the weapon to be pushed rearward and the muzzle to rise when fired, the recoil on the demonstrated weapon initially caused the weapon to be pushed forward and the muzzle to drop, before a secondary action caused the weapon to be pushed back (but without any muzzle rise). As for the M-9 pistol, the weapon presented in the first demonstration would not fire when the trigger was first pulled, and required the shooter to continue to pull the trigger (after the weapon should have fired). ECI did not correct this problem for the second demonstration.

Three of the remaining weapons demonstrated by ECI were also found unsatisfactory. The M-203 grenade launcher was supposed to be mounted on an M-16A2 rifle, but instead was mounted on an M-16A1 rifle. ECI used a modified M-2 machine gun to simulate the required Mk-19 grenade launcher, even though the M-2 differs in operation with respect to loading, cocking, and body position. ECI used a B-300 to simulate the required SMAW assault weapon even though the B-300 has a smaller caliber, shorter effective range, and less penetration, and also differs with respect to length, width, muzzle velocity, and sights. In addition, two of the required weapons--the M-240G machine gun and MP-5 submachine gun--were not demonstrated.

ECI's demonstrated system was found lacking in other regards as well. The purchase description required a 12-lane trainer IST that has "all of the same capabilities as, and meets the same requirements as, the ISMT in a manner that allows up to 12 trainees to use the trainer simultaneously," and that has a hit detection system "fully integrated for all lanes" such that a shooter firing from lane 1 can fire at a target in lane 12. In the initial demonstration, ECI demonstrated three ISMT screens networked as one, with the target able to move across all three screens, but the evaluators were unable to fire any weapons at the screen. Although in the second demonstration ECI demonstrated an 8-lane system (two ISMTs networked together) in which simulated weapons fire was possible, ECI did not demonstrate the required 12-lane IST system and the agency was unable to determine whether ECI's system could track and record 12 weapons (rather than only 8) firing simultaneously at targets anywhere on the screen. In addition, the purchase description required that the trainer provide "the capability to conduct forward observer procedures for mortars, artillery, and naval gunfire," including "the capability to link the FO [forward observer] with the . . . guns of the firing unit for indirect weapons (mortars and/or artillery) for crew training." Although ECI's system

possessed the capability to link the forward observer to a simulated fire direction center, it lacked the capability to link the forward observer directly to a gun section for gun crew training. In addition, ECI failed to demonstrate the required shoot-back capability--that is, the use of lasers placed on or near the screen to shoot back at shooters wearing laser-sensing equipment for detecting hits.

The agency also questioned ECI's ability to complete the development of its trainer system so as to remedy the numerous deficiencies in the system as demonstrated in time to comply with the delivery schedule. Agency evaluators found that ECI had failed to furnish the required plan for furnishing the weapons not satisfactorily demonstrated. The agency also found that, while ECI's proposal identified individuals as weapons experts, the claimed expertise was not evident at the demonstrations; ECI's weapons expert at the demonstrations was unable to satisfactorily address design, testing, or ballistics matters. Indeed, according to ECI's proposal, design and production of the required weapons was initially to be accomplished not by ECI, but by a foreign subcontractor; ECI did not possess the necessary rights to the weapons kits designs, and would have to acquire them in the future, along with the necessary work force, before it could take over production responsibilities. In view of ECI's apparent lack of weapons expertise, the Marine Corps concluded that there was a significant risk that ECI could not remedy the numerous deficiencies in its system in time to comply with the solicitation requirement to commence deliveries within 150 days after award.

Upon learning of the rejection of its proposal and the subsequent award to FATS, the only remaining offeror in the competitive range, ECI filed this protest with our Office.

The procuring agency has primary responsibility for evaluating the technical information supplied by an offeror and determining the technical acceptability of the offeror's item. Alpha Technical Servs., Inc., B-250878; B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104. Our Office will not question an agency's evaluation of proposals unless the agency deviated from the evaluation criteria or the evaluation was otherwise unreasonable. IDB Int'l, B-257086, July 15, 1994, 94-2 CPD ¶ 27. A protester's mere disagreement with the agency's technical judgment does not establish that it was unreasonable. See Diversified Technical Consultants, Ltd., B-250986, Feb. 22, 1993, 93-1 CPD ¶ 161.

EVALUATION OF ECI'S PROPOSED TRAINER

Forward Observer

ECI raises numerous arguments challenging the evaluation of proposals and conduct of the procurement. Our review of the record provides no basis to question the rejection of ECI's proposal and the award to FATS. We discuss several of the protester's arguments below.

As an initial matter, ECI disagrees with the Marine Corps's conclusion that ECI's proposal to link the forward observer to a simulated fire direction center, instead of directly to a gun section, was noncompliant with the RFP. ECI generally asserts that there was no requirement for linking the forward observer directly to a gun section. This argument is without merit. The purchase description required that the trainer provide the capability to conduct forward observer procedures, including "the capability to link the FO with the . . . guns of the firing unit for indirect weapons (mortars and/or artillery) for crew training." The protester does not explain how its approach of linking the forward observer to a fire direction center, which generates the simulated artillery/mortar fire, satisfies this express requirement to link the forward observer to the artillery/mortar firing unit and provide training for the artillery/mortar crew.

Demonstration Failure

ECI primarily argues that the Marine Corps placed undue emphasis on its failure to demonstrate a number of the required system capabilities. ECI claims that the agency essentially conducted an improper evaluation of proposals--instead of the best value evaluation called for in the RFP--based on the capability demonstration, finding a proposal unacceptable if the offeror could not demonstrate compliance with the purchase description by the time of the second demonstration.

As noted above, the solicitation did not require rejection of an offer submitted by an offeror that was unable to show in the capability demonstration compliance with all specification requirements. Instead, the solicitation provided for possible consideration of the offer where the offeror addressed the requirement not demonstrated in its written technical proposal and indicated "when the capability shall be demonstrable." In essence, the offeror was required to establish that the capability not demonstrated would be available in time for the contractor to meet the requirement for deliveries to commence within 150 days after award. The record shows that the agency followed this evaluation methodology, and did not simply

conduct a pass/fail evaluation of proposals based on the capability demonstration. Thus, although FATS ultimately failed to demonstrate 1 of the 11 required weapons--the SMAW assault weapon--its offer was not rejected as unacceptable; instead, the agency concluded that FATS had satisfactorily explained how it would develop a simulated SMAW in time to meet the required delivery schedule. In this regard, FATS submitted a written, detailed step-by-step description of its established weapons development process, which it proposed to apply to developing the SMAW. In addition, FATS made a written and oral presentation at the second operational demonstration in which it explained its approach to developing the SMAW and included drawings of the proposed simulated weapon.

ECI similarly was asked to provide "a detailed plan and schedule for each of the required weapons," specifying "what processes must be accomplished, testing, identification of weapons experts/technicians and their qualifications." ECI's proposal ultimately was rated unacceptable, not solely because of its demonstration failures, but because it furnished only a brief summary in response to the agency's information request, rather than the required detailed explanation. For instance, although ECI generally described how its laser shoot-back capability would operate, it did not explain how it would develop the required capability which it had failed to demonstrate. Further, while FATS proposed to develop and manufacture the simulated SMAW itself, ECI indicated that it was dependent upon a foreign subcontractor to design recoil and sensing mechanisms for the weapons and furnish "complete kits" to ECI for installation.

The protester contends that the agency failed to take into account the fact that the required modifications to its system did not involve any new or different technology. However, it is not clear from the record that all of the deficiencies in ECI's demonstrated system were easily remedied. For example, although ECI claims that it could furnish a 12-lane trainer simply by adding a 4-lane ISMT to the 2 networked ISMTs it demonstrated, the Marine Corps reports that effectively tracking and recording 12 shooters firing simultaneously is a very complex process which requires significantly more computer capability than is possessed by any individual ISMT system. Whether ECI or the agency is correct in its view of the level of difficulty involved in meeting the requirement, there certainly is no basis for us to question the rejection of ECI's proposal on this basis. In this regard, we agree with the agency that ECI's failure to remedy the numerous deficiencies in its system in the nearly 2 months between the first and second capability demonstrations provided a legitimate basis for the agency to conclude that the deficiencies would not be

easily correctable for ECI. The agency also reasonably could take into account the fact that ECI actually had been afforded an extended period within which to prepare its system. ECI was made aware of the government's general requirements for ISMT/IST systems by a December 1992 solicitation under which it competed (and under which no award was made), and was aware that there would be a demonstration requirement based on a meeting with contracting officials in October 1993, several months before the issuance of the current solicitation in March 1994.

Beyond the deficiencies which ECI questions, ECI's evaluation challenge overlooks a fundamental weakness in its proposed system. While FATS failed to demonstrate 1 of the 11 required weapons, ECI did not even attempt to demonstrate 2 of the weapons, failed to satisfactorily demonstrate 5 other weapons, including the 2 most important weapons (the M-16A2 rifle and M-9 pistol), failed to demonstrate the required shoot-back and forward observer/gun battery capabilities, and only demonstrated an 8-lane trainer, not the required 12-lane trainer. Given the numerous observed deficiencies in ECI's system as demonstrated, ECI's failure to remedy them in the nearly 2 months between capability demonstrations, and its failure to furnish the required detailed description as to how it would remedy them, the Marine Corps could reasonably determine that ECI had not demonstrated an acceptable technical approach to complying with the purchase description requirements in time to commence deliveries within the required 150 days after award.

FATS's COMPLIANCE WITH SPECIFICATIONS

ECI argues that FATS's proposed training system failed to comply with various mandatory specification requirements, including the visual projection and recoil requirements. We find these arguments without merit.

Visual Projection Requirements

With respect to the visual projection requirements, the purchase description generally provided for two types of scenarios: (1) a marksmanship qualification mode; and (2) a combat marksmanship mode, including scenarios simulating shoot/no-shoot decision-making by military police, close quarters battle encounters and other simulated combat scenarios. In this regard, paragraph 3.2.1.6.1 of the purchase description provided that:

> "[t]he projected images shall be a combination of real images and graphic images. Real images are defined as images generated from filmed images of live personnel and actual terrain. . . . The

> targets presented during shoot/no-shoot and combat scenarios shall be real images, unless it can be otherwise demonstrated that graphically generated images provide increased or equal realism and also provide some benefit from the training course."

In addition, the purchase description generally provided for two modes of display: (1) computer generated imagery (which the agency defines as images generated by computer software from the digitizing of graphics or video), and (2) video disc technology, which uses filmed sequences stored on a video disc. (According to the agency, while computer generated imagery provides greater flexibility than video discs because the scenario can be changed every time it is used and targets react to hits, video disc technology provides a more realistic display at ranges of less than 100 meters.) The purchase description provided that: "Computer generated imagery is required for training scenarios that exceed 1,000 meters. Video disc technology may be used for training at projected distances of less than 1,000 meters."

While FATS generally proposed to use a combination of real and graphic images, it specifically stated in its proposal that "for shoot/no-shoot and combat tactical scenario targets, live images are used for total realism." In addition, FATS proposed "using CGI [computer generated imagery] at ranges greater than 1,000 meters and video discs for ranges less than 1,000 meters." In this regard, FATS noted in its proposal that photographs of targets and of background scenes can be digitized and processed by the scanning hardware and software of its image processor subsystem.

ECI essentially argues that for combat scenarios at ranges in excess of 1,000 meters, where the purchase description required the use of computer generated imagery and "real images" for targets, FATS's proposed use of digitized photographs fails to comply with the solicitation's definition of real images as "images generated from filmed images of live personnel and actual terrain." (Emphasis added.) According to the protester, the only acceptable approach to furnishing "real images" for use as targets in combat scenarios at ranges in excess of 1,000 meters is the use of digitized video, as proposed by ECI, that is, video filming targets and then digitizing the filmed targets for manipulation by the computer.

We find ECI's interpretation of the purchase description unreasonably restrictive. As noted by the agency, the purchase description does not expressly require the use of digitized video but, rather, requires the use of computer

generated imagery, a broader concept, for scenarios at ranges greater than 1,000 meters. Indeed, the Marine Corps specifically amended the solicitation to remove a reference to digitized video in the solicitation's statement of evaluation criteria (section M). As issued, section M provided that, to be evaluated as satisfactory, offerors were required to demonstrate answers to a number of questions, including: "Does the system utilize digitized video?" However, in response to an offeror's inquiry as to whether this question should read "does this digitized video provide photographic realism utilizing pre-filmed targets and target paths," the agency amended the solicitation to eliminate altogether the section M reference to digitized video and substituted the following questions:

> "Does the system utilize computer generated imagery? Does the video provide realistic, high resolution targets and background (whether it comes from pre-photographed or graphic targets)?"

Under these circumstances, ECI's position unreasonably attributes to the solicitation a digitized video requirement; ECI ignores the fact that section M of the RFP was amended to eliminate the reference to digitized video, and that no such requirement is set forth in the RFP.

Recoil Requirements

ECI's argument concerning the compliance of FATS' proposed approach to simulating weapons recoil is without merit. As noted above, the purchase description required the proposed M-16A2 rifles to provide 70 percent of the actual weapon's recoil force when fired. In its initial proposal, FATS generally claimed that Air Force testing demonstrated that the recoil of its simulated weapons was more than sufficient to train shooters; with respect to the M-16A2, FATS specifically stated that the recoil would be 55-60 percent of that of the actual weapon. When asked by the agency during discussions to show how "recoil will be improved so that it meets or exceeds the requirement" of the purchase description, FATS responded that:

> "The [recoil of the] M-16 has also been increased but remains below the specification requirement of 70%. FATS can increase the M-16 recoil further, however there will be a very significant impact on the reliability of the original weapon parts. . . . If additional recoil is required the failure rate will increase thus impacting on reliability and repair costs. A discussion of failure rates and recoil percentages will be provided [at the second capability demonstration]."

ECI argues that FATS's response must be interpreted as taking exception to the 70-percent recoil requirement of the purchase description with respect to the M-16A2. We find it clear from the language of the above quote that FATS offered to comply with the recoil requirement; it then cautioned that providing the specified recoil force would adversely affect reliability. In this regard, the agency reports that FATS in fact demonstrated a 70-percent recoil force for the M-16A2 at the second capability demonstration simply by adjusting upward the pneumatic pressure supplying the simulated recoil.

NONRESPONSIBILITY DETERMINATION

ECI alleges that in negatively evaluating ECI's capability to complete development, manufacture, and deliver the trainers within the required delivery schedule, the agency in effect made a nonresponsibility determination which, because ECI is a small business concern, it was required to refer to the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), the SBA has conclusive authority to determine the responsibility of small business concerns; an agency may not deprive a small business offeror of its right to pursue a COC by in effect determining it nonresponsible under the guise of a technical evaluation. As noted by the protester, ability to comply with the specifications is a traditional responsibility matter. See PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210.

Our Office has long recognized, however, that traditional responsibility factors may be used for the comparative evaluation of proposals in relevant areas, Design Concepts, Inc., B-184754, Dec. 24, 1975, 75-2 CPD ¶ 410, and that where a proposal is determined to be deficient pursuant to such an analysis, the matter is one of technical unacceptability not requiring referral to the SBA. See Advanced Resources Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348. Furthermore, where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, referral to the SBA is not required. See Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248. Here, the Marine Corps took ECI's ability to comply with the specifications into consideration as part of a comparative evaluation. Furthermore, the finding of technical unacceptability was also based upon an

evaluation factor that was not responsibility-related--the performance of the trainers in the capability demonstrations. In these circumstances, no referral to SBA was required.

The protest is denied.

for Paul Lieberman
Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

103382

Decision

Matter of: Foley Company

File: B-258659

Date: February 8, 1995

William J. DeBauche, Esq., Niewald, Waldeck & Brown, for the protester.
Delia Downer, Department of Agriculture, for the agency.
Katherine I. Riback, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer's rejection of protester's low bid on the basis that the bid contained a mistake was improper where there is no evidence in the record that the bid contained a mistake or was based on a misunderstanding of the work to be performed.

DECISION

Foley Company protests the rejection of its bid and the award of a contract to Barge Company under invitation for bids (IFB) No. KCMO-0026-I-94, issued by the Department of Agriculture for construction services. The agency rejected Foley's bid because it determined that the bid price was so low that it must reflect a mistake.

We sustain the protest.

The solicitation, issued on July 26, 1994, required bidders to submit a lump-sum price for a single bid item, to furnish all labor, materials, and equipment to relocate a water service entry, backflow preventor valve, and water maintenance by-pass valves. The agency issued one amendment on August 12, which made some changes to the technical specifications. The effect of the amendment was to reduce the government's estimate of the cost of the work, which was not disclosed in the IFB, from $126,000 to $111,300.

By the August 30 bid opening, the agency had received five bids, ranging from $41,207 to $152,550. Foley submitted the low bid at $41,207. In a letter dated August 31, the contracting officer notified Foley that it was the apparent

low bidder and requested that Foley verify its bid. The contracting officer noted in her letter that Foley's bid was approximately 66 percent less than the government estimate of $126,000 (citing the estimate that was superseded by the IFB amendment). The letter advised that the bid risked being rejected pursuant to Federal Acquisition Regulation (FAR) § 14.404-2(f) (bid may be rejected where price is unreasonable).

By letter of September 6, Foley confirmed its bid price. Nonetheless, the contracting officer then sent Foley an undated letter stating that its bid was being rejected as nonresponsive and unreasonable as to price, pursuant to FAR § 14.404-2(f), due to the variance between Foley's bid and the other bid prices and the revised government estimate of $111,300. The agency made award to Barge Company, the third low bidder, in the amount of $78,000.[1] This protest followed.[2]

The contracting officer acknowledges that, while the letter to Foley stated that its bid was rejected because it was unreasonable as to price, the bid was in fact rejected due to a mistake, in accordance with FAR § 14.406-3(g)(5). The agency contends that Foley's bid was properly rejected under the authority of FAR § 14.406-3(g)(5), which provides that where a bidder:

> "fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted, unless (i) the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders."

Essentially, the contracting officer based her finding of a mistake on Foley's failure to provide a satisfactory explanation of what the contracting officer viewed as an "unconscionably low" bid. In the agency report prepared in response to this protest, the contracting officer states

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[1]The record provides no explanation concerning why the second low bid of $48,500 was not considered for award.

[2]Performance has been withheld pending the outcome of this protest.

that "the cost of materials alone would have exceeded Foley's bid before adding the prevailing Davis-Bacon wage rates." The agency report included the equipment and materials portion of the government estimate, which listed prices for 21 items, such as gravel and backhoe rental. The sum total of these items, according to the agency, was $46,519.60.

Foley challenges the contracting officer's assumption that its bid contained an error. Foley asserts that it made no mistake and affirms its promise to perform the contract work at the price it bid. Foley points out that it complied with the agency's verification request, and notes that it was never specifically advised that the agency suspected a mistake or asked to provide an explanation or documentation to support its bid price. As evidence of the reasonableness of its price and its willingness to provide the agency with documents to support its bid price, Foley provided its worksheets with its comments on the agency report.

Foley also disagrees with the agency's contention, relied on as the rationale for rejecting Foley's bid, that the cost of equipment and materials alone exceeds Foley's total bid price. Foley points out that the agency more than doubled its estimated equipment and material costs through an arithmetical error. Specifically, Foley points out, and our review confirms, that the correct total for the equipment and materials costs listed in the government estimate was $21,769.60--rather than $46,519.60--a figure which is well below Foley's bid price of $41,207. Foley states that the reduced total for equipment and materials would reduce the overall government estimate to $86,550.[3]

FAR § 14.406-3(g)(1) requires the contracting officer to advise the bidder if a mistake is suspected. Generally, if the bidder verifies its bid, the contracting officer is to consider the bid as it was originally submitted. FAR § 14.406-3(g)(2). An exception to this general rule arises only where there is clear evidence, notwithstanding the bidder's verification, that a mistake has been made. See Contract Servs. Co., Inc., 66 Comp. Gen. 468 (1987), 87-1 CPD ¶ 521. The concern in that exceptional situation is that the bidder based its bid, and its verification, on

[3]The agency, in a subsequent submission, states that the equipment and materials portion of the government estimate included with its reports was not "inclusive of all costs," as previously stated. However, the agency failed to provide further information regarding the government estimate and has not specifically denied Foley's allegation of an arithmetical error.

an erroneous understanding of the solicitation requirements and that acceptance of the bid could be unfair. See Pamfilis Painting, Inc., B-237968, April 3, 1990, 90-1 CPD ¶ 355. At issue is fairness to the bidder, whose offer was based on a mistaken understanding of the solicitation requirements, since award will result in the government getting "something for nothing" through the bidder's having to perform work different from what it intended, see Handy Tool & Mfg. Co., Inc., 60 Comp. Gen. 189 (1981), 81-1 CPD ¶ 27; and to the other bidders whose offers were premised on a correct understanding of the solicitation requirements, see FAR § 14.406-3(g)(5).

Here, as there was no clear evidence of mistake, the contracting officer's rejection of Foley's low bid was premature. Her August 31 letter requested that Foley verify its bid, which it immediately did by confirming that there was no mistake in the bid, a position that it has consistently reaffirmed since then. Once she received that verification, the contracting officer should not have rejected the bid without first requesting that Foley provide an explanation or supporting documentation to demonstrate to the contracting officer that the bid as verified was correct. Contract Servs. Co., Inc., supra.

Moreover, the documentation submitted to our Office by the agency and the protester during the course of the protest demonstrates that, if the contracting officer had afforded Foley the opportunity to explain its bid, the contracting officer could not have reasonably found a mistake in the bid. Specifically, as explained above, the contracting officer's conclusion was initially premised on a comparison of Foley's bid with a government estimate of $126,000, which was only later reduced to $111,300 to reflect the changes implemented in the IFB amendment. Correction of the agency's mathematical error reduces this estimate to approximately $86,500. The agency does not contend that the contracting officer would have found that Foley's $41,207 contained a mistake if she had compared it with this corrected government estimate. Indeed, as noted above, another firm also bid less than $50,000, which tends to support the reasonableness of Foley's bid.

Further, the agency has limited its allegation of mistake to Foley's costs for equipment and materials, which amount to less than one third of the total cost under both Foley's bid and the government estimate. A considerably larger share of the expected cost of performance is attributable to labor, but the agency, despite having had the opportunity through the protest process to review Foley's detailed worksheets, has not challenged any of Foley's labor costs (either the

number of hours of labor estimated for each task or the labor rates to be paid) or alleged any mistake as to those costs. The agency has also not argued that any of Foley's indirect costs reflect a mistake.

As to the equipment and materials costs, the two challenges that the agency raises do not demonstrate a mistake in the bid. First, the agency notes that Foley's worksheets did not include the cost of approximately six items and argues that it would be unconscionable for the government to accept those items at no cost. Foley states that it intends to provide those items from stock it has on hand without charge to the government. While the agency correctly points out that Foley's bid is below cost as to those items, the submission of a below-cost bid is not improper and the government cannot withhold award simply because an otherwise responsive bid is below cost. See BFPE Int'l, B-248783, Sept. 25, 1992, 92-2 CPD ¶ 206.

Second, the agency contends that Foley's bid failed to include certain materials and equipment that were required by the solicitation, and the agency infers from this that the bid was premised on an erroneous understanding about the materials and equipment required by the solicitation. To the extent that Foley may have failed to include any items in its bid that were specifically called for in the IFB, these items were of insignificant dollar value, even under the government estimate. For example, in calculating its bid price, Foley apparently failed to include the cost of two sections of 8-inch cast iron pipe. This item appears to be required by the IFB, and its cost in the government estimate was $350. While the parties disagree about whether this and several other items are required by the IFB, the value of those items, even under the government estimate, forms so small a proportion of the overall value of the contract that their absence from Foley's bid could not reasonably support a finding that Foley's bid was unconscionably low or otherwise mistaken, as argued by the agency. None of these items suggests a significant mistake or omission in Foley's bid that would indicate that Foley did not understand the scope of the work required by this solicitation.

In sum, we find that the agency rejected Foley's bid prematurely and without a reasonable basis. Accordingly, by separate letter of today to the Acting Secretary of Agriculture, we are recommending that the contract with Barge be terminated for the convenience of the government and award made to Foley, if otherwise eligible. In addition, Foley is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with

4 C.F.R. § 21.6(f), Foley's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Howard C. Spraggins - Transfer of Duty Station - Real Estate Sale Expenses

File: B-258766

Date: February 10, 1995

DIGEST

Incident to a permanent change of station, an employee claims reimbursement for the real estate sales expenses incurred in the sale of his former family residence, although he had moved out of the residence 3 years previously when his marriage deteriorated, and he was living in an apartment, from which he commuted to work, at the time he first learned of his transfer. Under the Federal Travel Regulation, real estate sales expenses normally are reimbursable only for the residence from which the employee commutes to work at his official station. Although an exception is recognized where an employee, pending a divorce, involuntarily vacated the family residence pursuant to a court order, in the instant case, the employee did not vacate the residence pursuant to a court order, and at the time of the transfer, he had not lived in and commuted from the residence in 3 years, and he had been divorced for 2 years from his wife who had exclusive use of the residence. Therefore, the exception to the rule does not apply, and his claim is denied.

DECISION

This is in response to a request for a decision as to whether Special Agent Howard C. Spraggins of the U.S. Secret Service may be reimbursed for real estate expenses he claims incident to a change-of-station transfer in 1994 from Dallas, Texas, to Washington, D.C.[1] For the reasons explained below, the claim may not be paid.

Mr. Spraggins claims reimbursement for the real estate expenses incurred in the sale of the residence in Richardson, Texas, which he and his former wife jointly owned, but which he had not occupied since March 1990. He states that he moved out of that residence in 1990 due to the deterioration of his marriage, and he

[1]The request for decision was submitted by the Chief, Relocation and Travel Services Branch, U.S. Secret Service, Washington, D.C. We also received and considered a letter submitted directly to us by Mr. Spraggins.

acknowledges that at the time he was first notified of his transfer in 1994 he was residing in and commuting to and from work from an apartment in Irving, Texas.

According to the record, the Spragginses' divorce became final in January 1992. Under the terms of the divorce decree, Mr. Spraggins's former spouse was entitled to exclusive use of the home in Richardson. The decree required Mr. Spraggins to continue the mortgage payments and his former spouse to make a monthly contribution to him toward those payments until the home was sold. The home was sold April 28, 1994, about 1 month after the agency notified Mr. Spraggins of his transfer.

The agency initially denied Mr. Spraggins's claim on the basis that real estate sales expenses normally are reimbursable only for the employee's residence, which is defined as "the residence or other quarters from which the employee commutes to and from work." Federal Travel Regulation, 41 C.F.R. §§ 302-6.1(d), and 402-1.4(k) (1994). However, Mr. Spraggins asserts his case falls within a limited exception to this rule we have recognized, as stated in our decision, Charles R. Holland, B-205891, July 19, 1982. In Holland, we allowed reimbursement for the real estate sales expenses of a residence involuntarily vacated by an employee pursuant to a court order pending a final divorce decree. We noted that the employee considered his absence from the residence to have been temporary. In that case, the court ordered the employee to vacate the residence by April 18, 1981; the employee learned of his transfer on July 23, 1981; the court issued the final divorce decree on August 26, 1981; and the home was sold on September 1, 1981.

Unlike the circumstances in Holland, Mr. Spraggins's absence from the residence was not the result of a court order barring him from the home pending divorce. As noted above, he states that he moved out of the residence in 1990 due to the deterioration of his marriage, and at the time he first learned of his transfer, he had not lived there for 3 years and had been divorced for over 2 years during which the residence was subject to the exclusive use of his former wife. Therefore, his absence could not be considered temporary.

Accordingly, the Richardson house does not qualify as Mr. Spraggins's residence for real estate expense reimbursement, and we affirm the agency's denial of the claim.

Robert P. Murphy
General Counsel

Comptroller General
of the United States
Washington, D.C. 20548

519142

Decision

Matter of: Modasco, Inc.

File: B-258708

Date: February 13, 1995

Rafiah Kashmiri for the protester.
Brad H. Smith, Esq., Department of Energy, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was properly eliminated from the competitive range under the solicitation which called for industry-wide partnership teams to develop a new paradigm for the design and construction of residential housing, where the protester essentially limited its proposal to implementing only one new component of a house, failed to form a partnership team with broad industry representation, and failed to provide a detailed proposal with regard to two of the three required tasks.

DECISION

Modasco, Inc. protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. RAR-4-14061, issued for the Department of Energy (DOE), National Renewable Energy Laboratory (NREL), by Midwest Research, National Renewable Energy Laboratory Division, the prime management and operations contractor for NREL.

We deny the protest.

The RFP, issued February 14, 1994, contemplated award of several cost participation, task order agreements for a project entitled "Systems Engineering Approaches to Development of Advanced Residential Buildings." The RFP implemented phase II of the DOE-sponsored "Building America Initiative," the objective of which is to develop innovative system engineering approaches to advanced housing that will enable the domestic housing industry to deliver affordable and environmentally sensitive housing while maintaining profitability and competitiveness of homebuilders and

product suppliers in the marketplace both in the United States (U.S.) and abroad.[1] The RFP statement of work (SOW) stated:

> "The objective of this project is to promote system engineering approaches to the development of advanced residential buildings, including production techniques, products, and technologies that result in more efficient, better quality, and more affordable housing.
>
> "A systems approach for development of advanced residential buildings is defined to be any approach that utilizes comprehensive examination and analysis of overall design, delivery, business practices, and construction processes, including financing, and performs cost and performance tradeoffs between individual building components and construction steps that produce a net improvement in overall building performance. A systems approach includes the use of systems engineering and operations research techniques. A systems approach requires integrated participation and team building among all stakeholders in the building process including architects, engineers, builders, equipment manufacturers, material suppliers, community planners, mortgage lenders, and others.
>
> . . . . .
>
> "The project is expected to contribute to the development of a new paradigm for delivery of energy efficient, affordable, quality housing that results in a significant reduction in the time required to bring new products and systems to market, a significant increase in the energy performance of new housing, a significant increase in construction productivity, a significant increase in the use of recycled materials, a significant reduction in waste produced during housing construction, and a significant increase in the global competitive position of the U.S. in advanced housing materials and components.
>
> . . . . .

[1]Phase I of the initiative consisted of a pilot subcontract to demonstrate the viability of housing industry consortia.

> "Each proposing team shall have sufficient breadth to include all the major types of companies involved in design, construction, and delivery of the typical residential building in the U.S. including equipment component and material manufacturers . . . ."

The RFP provided a mailing list of more than 250 organizations and stated that:

> "[b]ecause teaming arrangements are required under this solicitation document . . . the mailing list for this solicitation document is included to assist [o]fferors in identifying other organizations that may be interested in proposing for this project."

The RFP divided the project into three task areas:

> "Task I - Requirements for Development of Advanced Residential Building Systems;
>
> "Task II - Test Houses; and
>
> "Task III - Advanced Production and delivery." [emphasis in original].

The RFP provided for a best value basis for evaluating proposals, listing the following evaluation factors in descending order of importance:

1. Technical (35 percent)
2. Cost Realism and Cost Participation (30 percent)
3. Management & Team Composition (25 percent)
4. Small Business and Small Disadvantaged Business Involvement (10 percent).

NREL received 22 proposals by the June 10 due date. The source evaluation panel (SEP) evaluated and scored each proposal according to the evaluation plan stated in the RFP. Modasco's proposal was ranked twentieth of the 22 proposals received. Based on the SEP evaluation, the source selection board (SSB) established a competitive range that did not include Modasco.[2]

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[2]We do not disclose how many proposals are included in the competitive range since award has not been made, pending our disposition of this protest.

By letter of September 6, NREL notified Modasco that its proposal had been eliminated from the competitive range for the following three reasons:

> 1. The proposal did not take a comprehensive systems engineering approach, but rather focused on a single component--a solar roof concept;
>
> 2. The proposed team lacked strong building industry involvement; and
>
> 3. The proposal did not fully develop Tasks II and III.

Modasco protests the elimination of its proposal from the competitive range.

The competitive range consists of all proposals that have a reasonable chance of being selected for award. Where a proposal would require major revisions or essentially the submission of a new proposal before it could be considered eligible for award, the proposal need not be included in the competitive range. See TSM Corp., B-252362.2, July 12, 1993, 93-2 CPD ¶ 13. The evaluation of proposals and the resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency because it is responsible for defining its needs and determining the best method of accommodating them. Id. Our Office will not substitute its judgment for the agency's regarding the relative merits of proposals, but rather will examine the proposals and the agency's evaluation to ensure that the evaluation was reasonable and consistent with applicable statutes and regulations, and the stated evaluation criteria. Id. Based on our review as discussed further below, the agency reasonably eliminated Modasco's proposal from the competitive range.

First, NREL reasonably found that Modasco's proposal failed to demonstrate a comprehensive systems engineering approach to the development of advanced residential buildings. The most important evaluation criteria, "Technical," referenced the SOW and clearly provided for evaluation of a comprehensive systems engineering approach:

> "that utilizes comprehensive examination and analysis of overall design, delivery, business practices, and construction processes, including financing, and performs cost and performance tradeoffs between individual building components and construction steps that produce a net improvement in overall building performance."

Modasco's proposal was limited to implementing a component technology for innovating the roof system, called "SOLAROOF," as a means of reducing home energy consumption. Modasco's proposal stated that its "primary goal is to convert [a portion of the solar energy falling on roofs] for residential use [using SOLAROOF technology]," and that:

> "its project objective was to evaluate the technical and economic merits of the SOLAROOF concept and develop the communication techniques between building components and systems within an interactive environment and then demonstrate this on a test house. From the data generated[,] a commercialization business plan will be developed."

In defining the scope of its technical approach, Modasco stated that:

> "[t]he innovative approach proposed is to utilize off the shelf equipment with minimum modifications on both the roof tile/shingles and the conventional home construction practices."

The proposal included "SOLAROOF Task Work Assignments," a "SOLAROOF Project Bar Chart" and a "SOLAROOF Organization Chart." In sum, Modasco's proposed systems engineering effort essentially falls within the context of implementing the SOLAROOF technology and fails to address the objective of this RFP for project teams to develop "a new paradigm" for housing design and construction. Thus, NREL reasonably found Modasco's proposal to be so deficient under the technical factor as to require major revisions in order to be considered eligible for award.

Second, NREL reasonably found that Modasco's proposal failed to propose a team having sufficient breadth of industry stakeholders to include participation from all the major types of companies involved in design, construction, and delivery of the typical residential building in the U.S., including equipment, component and material manufacturers, as required by the "Management & Team Composition" evaluation factor and the SOW. Modasco's proposed team included only one member, other than itself, which could arguably be considered a stakeholder in the U.S homebuilding process, and this member's involvement was focused only on the incorporation of a potential building system control device. All of the remaining members of Modasco's proposed team were either in-house subsidiaries or individual consultants with academic or state government backgrounds. Although these team members were found to offer relevant technical expertise, the Modasco team fails to meet the RFP requirement for an industry-oriented stakeholder

partnership. Thus, the agency's determination that Modasco's proposed team composition was deficient and would require major revision to be considered for award was also reasonable.

Finally, Modasco's proposal failed to provide a detailed description of its task plan for Tasks II and III. The RFP cautioned offerors that:

> "the initial evaluation of any proposal will be made upon a review of the written proposal only . . . . Therefore, [o]fferors are cautioned to ensure that their written proposal properly reflects their ability to satisfy the requirements of the [RFP]; and, that the proposal is as complete, detailed, and thorough as is possible."

The RFP further stated that:

> "[t]he technical proposal shall clearly describe the multi-year development strategy that is being proposed, and the changes in research emphasis that will occur during different phases of the project. In addition, the proposal shall clearly define the interim milestones that define transitions between different phases of the project."

Although Modasco's proposal provided a detailed description of the proposed performance under Task I, it failed to provide such detail for the proposed performance under Tasks II and III. Of the 15 work activities which Modasco listed for Task II, the proposal simply stated "self explanatory" next to all but five. Likewise, for 14 activities listed under Task III, Modasco failed to provide any description for all but four activities. Modasco concedes that it did not provide details for Task II and states that its proposal to implement SOLAROOF in a multi-unit development satisfies Task III--which, as indicated above, does not satisfy the agency's requirements. Thus, here too, the agency's determination that Modasco's proposal would require major revisions to be considered for award was reasonable.

Since the record shows that Modasco's proposal would require major revision before it could be considered eligible for award, NREL reasonably eliminated Modasco's proposal from the competitive range. Id.

The protest is denied.

Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Michael Newman–Transfer Overseas–Designation of Residence

File: B-257861

Date: February 15, 1995

DIGEST

An employee who had previously resided in California traveled to Hawaii at his own expense where he was hired locally by an agency to a position for which a transportation agreement was not offered by the agency. About 1½ years later he accepted a transfer to Saipan incident to which he signed an employment agreement designating Hawaii as his actual place of residence at the time of the transfer. Fourteen years later he sought to have the agency redesignate California as his residence at the time of his transfer. The agency denied his request. The designation of an employee's actual place of residence is a matter primarily for the agency to determine, and GAO will not question any reasonable determination by the agency. In this case the agency's determination, well-supported by the facts, is affirmed.

DECISION

Mr. Michael G. Newman, an employee of the Social Security Administration (SSA) in Saipan, the Northern Mariana Islands (NMI), appeals our Claims Group settlement, Z-2869067, May 20, 1994, denying his request for a change in the designation of his actual place of residence at the time of his assignment to the position in the NMI. The settlement is affirmed.

BACKGROUND

Employees stationed at posts outside the continental United States, Alaska, or Hawaii may be eligible to receive allowances for travel and transportation expenses for themselves and their families to return home to take leave between their tours of duty outside the United States. 5 U.S.C. § 5728 (1988). Also, upon completion of their overseas assignment such employees may be entitled to travel allowances for themselves and their dependents, and transportation of their household goods, from their post outside the United States to the place of their actual residence at the time of their assignment outside the United States. 5 U.S.C. §§ 5724(d) and 5722.

The eligibility requirements and limitations for these types of travel are set out in the Federal Travel Regulation (FTR) at 41 C.F.R. §§ 302-1.13(b) and 302-1.12 (1994). The limitation at issue here, which is stated in the statutes and the regulations, is

that the travel and transportation shall be from the employee's post of duty "to the place of his actual residence" at the time of appointment or transfer to the post of duty outside the continental United States. 5 U.S.C. §§ 5728(a) and 5722(a); and FTR § 302-1.12.

Although at the time of his transfer to the NMI, Mr. Newman designated his actual place of residence as Maui, Hawaii, the place where he was then residing and employed by SSA, he has requested that this designation be changed to Los Angeles, California, where he had previously resided.

According to the record, Mr. Newman previously had been employed with the SSA in Ukiah, California. He resigned from this position in early 1977. In January 1978, he accepted a temporary position with SSA in Maui, Hawaii, for which he signed no transportation agreement, and he paid his own travel expenses to Hawaii. This appointment was converted later to a "reinstatement-career" position. In June 1979, he transferred to the NMI from his post of duty in Maui, Hawaii. Incident to this transfer, he signed a service agreement designating his actual place of residence as Kihei (Maui) Hawaii, and in subsequent tour renewal agreements signed in 1981, 1985 and 1990, he continued to designate Hawaii as his actual place of residence.

In January 1993, Mr. Newman submitted a request for a change in the designation of his actual place of residence from Hawaii to Los Angeles, California, where he asserted he lived for the year before receiving the temporary appointment in Hawaii in 1978. Mr. Newman also stated that he had lived his entire life in California. He added that, at the time of his transfer to NMI, the agency designated Hawaii as his residence, and that he accepted this definition because he was not aware of the meaning of that term or that he could claim another location. Mr. Newman stated that no determination of his residence was made at the time he accepted the appointment in Hawaii because the assignment was temporary and he paid his own travel expenses from Los Angeles to Maui. However, he subsequently asserted that SSA erred by not having him designate an actual place of residence when he accepted the temporary post in Hawaii. He bases this claim on the FTR provision that states, "An employee hired locally at a location outside the continental United States who claims residence at another location in the United States . . . at the time of appointment, shall designate in writing the claimed place of actual place of residence for the consideration of the agency officials." FTR § 301-1.12(c)(1). Nonetheless, based on the record as summarized above, the agency denied his request to change the designation, and our Claims Group sustained the agency's denial.

In his appeal, Mr. Newman asserts that, after leaving his position in California in 1977, he moved his household goods into his parents home in Northridge, California, and traveled around the world for 10 months. Further, he asserts that he took the job in Maui only as a "stepping stone" to a position in the NMI. Mr. Newman states that he never intended to establish a permanent residence in

Hawaii, and he notes that he rented an apartment and he used furniture and a car provided by a friend, leaving his household goods in California.

OPINION

Concerning Mr. Newman's allegation that the agency erred in not designating California as his actual place or residence at the time he was given the temporary appointment in Maui, since he was considered a local hire to whom a transportation agreement was not being offered, there would appear to have been no purpose for such a designation. While, as Mr. Newman states, FTR § 302-1.12(c) allows an employee hired locally outside the continental United States who claims a residence at another location to designate it in writing, "for the consideration of agency officials," that would appear to have application in a case where the agency would otherwise offer the employee a transportation agreement, which apparently was not the case with Mr. Newman's temporary appointment in Maui. Whether to offer a transportation agreement in connection with a local hire in such a case is a matter within the discretion of the agency, and the agency is not required to do so. See FTR § 302-1.13(c)(2)(iii). See also, Marilyn M. Millikin, B-191144, Mar. 15, 1979; and 46 Comp. Gen. 691 (1960).[1]

As to Mr. Newman's contention that he should be allowed to change the designation of his place of actual residence made later when he was appointed to the position in NMI, the designation of an employee's actual place of residence is a matter primarily for the agency to determine, and we will not question any reasonable determination by the agency. Miquel Caban, 63 Comp. Gen. 563, 567 (1984), and decisions cited therein. There are no rigid standards for making this determination, but the FTR provides, as a matter of guidance, that a residence is "the place of general abode, meaning principal, actual dwelling place in fact, without regard to intent." FTR § 301-1.12(c)(3).

When an employee designates an actual place of residence in an official document, this designation may be changed only upon a showing by the employee "that the earlier designation was in error or that later circumstances entitle a different location to be made." FTR § 301-1.12(c)(3)(iii). After an employee is stationed outside the continental United States, the designation "shall be changed only to correct an error in the designation of residence." Id.

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[1]When an agency hires an employee locally in a position for which it is not offering a transportation agreement, it is to so advise the employee prior to the expiration of the period of service generally applicable to employees at that post of duty to whom transportation agreements are provided. In this case, it seems clear that Mr. Newman knew at the time he was hired for the temporary position in Maui, that it entailed no transportation entitlements.

We find no basis to set aside the agency's determination in this case which appears well-supported by the facts. Regardless of whether Mr. Newman had intended to reside only temporarily in Hawaii, he was hired there locally, not transferred there from California, and at the time of his appointment to the NMI position, he had in fact, resided and worked in Hawaii for nearly 1½ years before his transfer to the NMI. He designated Hawaii as his actual place of residence at the time of his transfer in 1979, and he redesignated Hawaii three additional times, apparently without question until 1993.

Accordingly, the Claims Group's settlement sustaining the agency's denial is affirmed.

for Seymour Efros

Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John P. Rieder--Waiver Request

File: B-259199

Date: February 22, 1995

DIGEST

An Air Force member's paydate was incorrectly established as April 15, 1976, instead of April 15, 1987. The incorrect paydate and years of service were reflected on his leave and earnings statements. The resulting overpayments may not be waived under 10 U.S.C. § 2774 because the member had a duty to verify the information on his leave and earnings statements and to bring any errors to the attention of the proper officials.

DECISION

This is in response to an appeal of a Claims Group settlement which denied the waiver request under 10 U.S.C. § 2774 of former Air Force member John P. Rieder for waiver of a debt which arose when his pay was calculated using an incorrect paydate. We affirm the Claims Group's settlement.

Mr. Rieder enlisted in the Air Force on April 15, 1987. His paydate, the beginning date used in calculating his years of service, was incorrectly entered as April 15, 1976. While the error occurred early in Mr. Rieder's military career, it did not begin to cause overpayments until April 28, 1989, when he became eligible for a longevity raise. The paydate was corrected in February 1992, but the overpayments were not discovered until July 1992. Mr. Rieder's pay was corrected at that time, and the overpayments ended on June 30, 1992. Due to the overpayments, Mr. Rieder is indebted to the government in the amount of $1,989.81. The amount was reduced to $1,610.33 when $379.48 which was due Mr. Rieder at separation was applied to the debt.

Under 10 U.S.C. § 2774, the Comptroller General may waive a claim against a member of the uniformed services arising out of an erroneous payment of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. The claim may not be waived, however, if there is any indication of fraud, misrepresentation, fault, or lack of good faith on the member's part.

In our decision Henry A. Pharr, B-197507, June 4, 1980, we dealt with a member who received an overpayment of a reenlistment bonus. Before he reenlisted, he

received information on his leave and earnings statements as to the amount of reenlistment bonus to which he would be entitled if he reenlisted. When he reenlisted, his bonus was larger than it should have been. We said that the information that had been on his leave and earnings statements put him on notice as to the correct amount of his bonus, and we therefore denied waiver.

Moreover, in our decisions we have emphasized the duty of a payee to verify the information on his leave and earnings statements. In our decision Roosevelt W. Royals, B-188822, June 1, 1977, we discussed the duty of a payee to verify the information on his leave and earnings statements. If he is provided information which if reviewed would indicate an error, waiver of a resulting overpayment is precluded because he is at least partially at fault for not taking action to have the error corrected.

In the present situation, Mr. Rieder regularly received leave and earnings statements which clearly indicated an error. At least by November 1988 he was receiving statements which indicated that he was an E-2 with 12 years of service with a pay date of April 15, 1976. Mr. Rieder should have detected this error and brought it to the attention of the proper Air Force officials, especially since, as Mr. Rieder himself notes, he was 8 years old in 1976. If he had taken action promptly, the error could have been corrected before any overpayments were made. Mr. Rieder continued to receive leave and earnings statements for most of the period of the overpayments, and by January 1992 he was designated on the statements as an E-4 with 15 years of service. Since Mr. Rieder should have noticed the error and taken corrective action, we cannot conclude that he is entirely without fault regarding the overpayments. Waiver is therefore precluded.

Accordingly, we affirm the Claims Group's denial of Mr. Rieder's waiver request.

for Seymour Efros
Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

232282

Decision

Matter of: KPMG Peat Marwick

File: B-258990

Date: February 27, 1995

Michael A. Nemeroff, Esq., Gary P. Quigley, Esq., and Richard L. Larach, Esq., Sidley & Austin, for the protester.
Robert G. Fryling, Esq., and John W. Fowler, Jr., Esq., Blank, Rome, Comisky & McCauley, for Digital Systems Group, Inc., an interested party.
Eva Kleederman, Esq., Federal Emergency Management Agency, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging exclusion from competitive range is denied where the protester fails to raise any specific challenge to the evaluation of proposals, and where the agency accurately determined that the protester's lower-rated, significantly higher-priced proposal had no reasonable chance for award.

2. Protest that agency acted improperly by failing to hold face-to-face discussions is denied where the record shows that the agency held extensive written discussions with the offeror prior to excluding it from the competitive range and because there is no requirement that agencies conduct oral discussions rather than written discussions.

DECISION

KPMG Peat Marwick protests the exclusion of its proposal from the competitive range under letter of interest (LOI) No. EMW-94-LOI-1, issued by the Federal Emergency Management Agency (FEMA) to purchase financial management systems software.

We deny the protest.

On July 8, 1994, FEMA issued the LOI to all firms holding contracts under the General Services Administration's multiple award schedule contracts program for financial management systems software. See Federal Information

Resources Management Regulation (FIRMR) § 201-39.804-4. The LOI contemplated issuance of a delivery order under the contract of the firm whose proposal was selected for award. See id.

By the August 15 closing date, FEMA received proposals from three contractors. After a preliminary evaluation, members of the source evaluation board (SEB) prepared written discussion questions for each of the firms submitting proposals. These questions were issued on September 6, with written responses due by September 13. During this period, the SEB members also attended an operational demonstration at each offeror's facility. After receipt of written responses, and after the operational demonstration, the SEB reconvened on September 15 to reevaluate and score the proposals. Upon completion of this reevaluation, the SEB prepared a report setting forth the proposed price and scores of each offeror, as shown below:

Offeror	Score	Price
Digital Systems Group	79	$3,099,785
Company A	54	$3,217,312
KPMG Peat Marwick	53	$4,881,986

On September 26, the contracting officer concluded that neither Company A nor Peat Marwick had a reasonable chance of award because of their proposals' lower technical scores and higher prices. Thus, both proposals were excluded from the competitive range.[1] After further discussions, the agency issued a delivery order to Digital on September 30. This protest followed.

[1]Both the agency and the protester treat this acquisition as if it were a conventional negotiated procurement subject to the Federal Acquisition Regulation (FAR) provisions related to such matters as a competitive range determination. Generally, the procedure applicable to these procurements, set forth at FIRMR § 210-39.804-4, simply calls for the agency to solicit and analyze the schedule contractors' offerings and to issue a delivery order to the contractor providing the most advantageous alternative. However, in view of the agency's apparent intent to blend features of the multiple award schedule program with features of a standard negotiated procurement, our decision addresses this protest using the concepts applicable to a standard competitive range determination. See Digital Systems Group, Inc., B-257721; B-257721.2, Nov. 2, 1994, 94-2 CPD ¶ 171 (denying protest against agency decision to supplement procedures in FIRMR § 201-39.804 with additional evaluation requirements).

The protester argues that FEMA improperly excluded its proposal from the competitive range; failed to hold oral discussions; and awarded numerical point scores that were inconsistent with the adjectival ratings assigned to the proposals.

In reviewing an agency decision to exclude an offeror from the competitive range, we look first to the agency's evaluation of proposals to determine whether the evaluation had a reasonable basis. MGM Land Co.; Tony Western, B-241169; B-241169.2, Jan. 17, 1991, 91-1 CPD ¶ 50. To make this assessment, we examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. Thus, we look first to Peat Marwick's claim that FEMA's scoring of proposals was irrational.

Under the evaluation scheme set forth in the LOI, there were seven evaluation factors worth a total of 100 points. Of these factors, the functional capabilities factor, worth 35 points, was the most important. Digital's proposal received 29 points under this evaluation factor, while Peat Marwick's received 16 points; both companies received an adjectival rating of superior. Peat Marwick claims that the scoring was irrational because its proposal's score of 16 (out of 35 available points) is inconsistent with its adjectival rating of superior. Peat Marwick raises the same argument with respect to a second evaluation factor, systems capabilities. Under this factor, worth 20 total points, Peat Marwick's received 12 points and an adjectival rating of acceptable, while Digital's proposal received 16 points and a rating of superior.[2]

While it argues that its proposal should have received higher point scores under these two factors, Peat Marwick's simple comparison of the number of evaluated strengths and weaknesses of its proposal compared to the proposal of the

[2]The numerical and adjectival ratings awarded for these two categories were consistent with the Acquisition Plan, which established the numerical point spread and corresponding adjectival rating to be used by the evaluators. The plan set forth the following ranges for the functional capabilities factor, worth a total of 35 points: 1-15 points, acceptable; 16-35 points, superior. The ranges for the systems capabilities factor, worth a total of 20 points, were as follows: 1-7 points, unacceptable; 8-11 points, unacceptable but susceptible to being made acceptable; 12-15 points, acceptable; 16-20 points, superior.

awardee does not constitute the kind of specific challenge needed to overturn an agency evaluation. See MGM Land Co.; Tony Western, supra (general arguments that do not rebut specific findings of an evaluation panel do not provide the necessary evidence to conclude that the evaluation was unreasonable). Moreover, even if Peat Marwick were awarded all the points that Peat Marwick argues its proposal should have received under these two factors (27 points instead of 16 points under the functional capabilities factor, and 16 points instead of 12 points under the systems capabilities factor), its score would have increased to 68 points--still significantly lower than the 79 points given to the awardee's proposal--while its price would remain nearly 60 percent higher than the awardee's price. Peat Marwick's relative position in the competition thus would not have materially changed. Under these circumstances, we fail to see how Peat Marwick was prejudiced as a result of the alleged evaluation impropriety.

With respect to Peat Marwick's contention that the agency held inadequate discussions, our review of the record reveals that the agency, in fact, conducted extensive discussions with Peat Marwick. The record shows that FEMA directed some 36 written questions to Peat Marwick involving numerous facets of the company's proposed approach. Peat Marwick, in turn, provided 54 pages of written responses and tabular information to address the issues raised by the agency. In the absence of any specific challenge by Peat Marwick that the discussion questions failed to address areas where the company was later downgraded, or that the agency misled the company in some way, we find nothing unreasonable about the conduct of discussions in this case. See generally Cecil Pruitt, Jr., Trustee, B-251705.2, June 10, 1993, 93-1 CPD ¶ 449 (protest argument that agency should have discussed matters that were not even considered a weakness by the agency, does not raise an adequate challenge to an agency's conduct of discussions). There is also no requirement that an agency conduct face-to-face discussions in addition to, or in lieu of, written discussions. FAR § 15.610(b).

Since we conclude that the evaluation of Peat Marwick's proposal was reasonable, we next review the decision to exclude Peat Marwick from the competitive range. In a negotiated procurement, an agency may determine a competitive range "on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award." FAR § 15.609(a). Our review of such determinations is to ensure that the evaluation as a whole has a reasonable basis and follows applicable statutes and regulations. See Advanced Sys. Technology, Inc.; Eng'g and

Professional Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153.

In this case, other than its complaint that there were no oral discussions and that the scores were irrational, Peat Marwick offers no support for its argument that the competitive range determination was improper. As a starting point, there is no per se requirement that prevents an agency from making a second competitive range determination after discussions, and excluding an offeror from further consideration when it becomes clear that the offeror has no reasonable chance for award. InterAmerica Legal Systems, Inc., B-224443, Sept. 15, 1986, 86-2 CPD ¶ 304; Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451.

Peat Marwick correctly notes that our Office will closely scrutinize a competitive range of one offeror, see Herley Indus., Inc., B-237960, Apr. 5, 1990, 90-1 CPD ¶ 364, aff'd, B-237960.2, Aug. 29, 1990, 90-2 CPD ¶ 173. However, unlike here, both of the decisions cited by the protester involved specific evaluation challenges that called into question the agency's competitive range determination. For example, in Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100, we sustained a protest against a FEMA competitive range determination where half of the difference in the scores of the two offerors derived from the agency's evaluation of their ability to obtain cooperation of high level leadership to address complex problems--which was one of the evaluation criteria in that procurement. Our decision explained that the scoring difference in this area was not great, that the problem involved omissions from the proposal rather than aspects of the proposed approach, and that it was unreasonable not to permit the protester an opportunity to remedy the issue after discussions. Likewise, in Eureka Software Solutions, Inc., B-250629, Feb. 8, 1993, 93-1 CPD ¶ 112, we sustained a protest against a competitive range determination where the protester showed that discussions could have resolved staffing uncertainties in the protester's proposal.

Our decision in Eureka also provided examples of situations where an agency should include a proposal in the competitive range and hold discussions. These situations include: if there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposals; or if the informational deficiency reasonably could be corrected by relatively limited discussions. See also Besserman Corp., 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191. Here, the protester's proposal, while acceptable, was rated significantly lower than the proposal remaining in the competitive range; was priced significantly above that

proposal; and the protester has made no specific challenge to the evaluation--which on its face appears reasonable. On these facts, we have no basis to question the agency's decision to exclude the proposal from further consideration.

The protest is denied.

for Paul Lieberman
Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Analytic Sciences Corporation

File: B-259013

Date: February 28, 1995

Leon J. Glazerman, Esq., Palmer & Dodge, for the protester.
Gregory H. Petkoff, Esq., and Mark J. Otto, Esq., Department of the Air Force, for the agency.
Paula A. Williams, Esq., Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's consideration of an offeror's subcontractor's capabilities as well as the offeror's in determining offeror capability was proper where the amended solicitation allowed for the potential prime contractor in agreement with its identified subcontractors to perform the contract services as a team and for the offeror's capability to be determined on that basis.

2. Allegation that contracting agency failed to conduct meaningful discussions is denied where the weaknesses at issue were not considered significant during evaluation of the protester's otherwise technically acceptable proposal and did not preclude the protester from having a reasonable chance of receiving the award.

DECISION

The Analytic Sciences Corporation (TASC) protests the award of a cost-plus-fixed-fee, indefinite quantity contract to Lawrence Associates, Inc. (LAI), under request for proposals (RFP) No. F33615-94-R-1406, issued by the Department of the Air Force for research and development services in support of the Preliminary Exploration of Targeting Subsystems (PETS) program at Wright-Patterson Air Force Base, Ohio. TASC contends that the Air Force's award is inconsistent with the subcontracting restriction contained in the RFP and

that the agency failed to conduct meaningful discussions with the protester.[1]

We deny the protest.

The RFP's PETS effort involves a research and development program to include the investigation and evaluation of technologies essential to the development of future reconnaissance and weapon delivery, radar, electro-optical, fire control, and automatic target recognition systems. The PETS contractor is to study and evaluate new technologies for various airborne targeting subsystems and attack avionics related to the emerging technologies under the PETS. The required contract tasks are specifically listed and described in the RFP's statement of work[2] and provides for an estimated level of effort of 8 man-months over a 5-year period.

The RFP at section L-35 provides that:

> "[f]or proposal purposes, the offerors are to assume that they must demonstrate a capability to address a major portion (greater than 50%) of the work through their own facilities and capabilities."

Amendment No. 0001, issued on February 14, 1994, contained 41 pre-proposal questions and agency answers concerning the terms and requirements of the RFP. Section L-35 of the RFP was amended as follows:

> "Q. Request clarification of [section L-35] . . . Do we interpret 'offerors' to mean 'team'?
>
> "A. You may consider 'offerors' to be a 'team' as identified in the proposal."

The RFP states that evaluation of proposals would be conducted under the streamlined source selection procedures of Air Force Regulation (AFR) 70-30 and that award would be made to the offeror whose proposal was determined to be most advantageous to the government, considering technical

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[1]In its December 9 comments on the agency report, TASC abandoned two of its original protest grounds--that its proposal was technically equal to LAI and that the agency used unstated criteria in evaluating proposals.

[2]For example, one task is to design, develop, test, and evaluate electro-optical technologies that are capable of detecting targets which use advanced reduced signature technology.

excellence, cost, and other factors. Technical excellence would be considered more important than cost, which while not specifically rated, would be evaluated as to realism, reasonableness and completeness. The five technical evaluation factors, listed in descending order of importance, are: (1) understanding the problem; (2) soundness of approach; (3) special technical factors; (4) compliance with requirements; and (5) initial delivery order.

Five firms, including TASC and LAI, submitted proposals and all were included in the competitive range.[3] Written and oral discussions were conducted with all five offerors. Each offeror submitted revised proposals which were evaluated with the following technical rating and risk assessment for the relevant offerors:

	LAI	Offeror A	TASC
1. Understanding the problem	A+/L	E/L	A+/L
2. Soundness of approach	E/L	A/L	A/L
3. Special technical factors	E/L	E/L	A/L
4. Compliance with requirements	A/L	A/L	A/L
5. Initial delivery order	A+/L	M+/H	M+/H
Overall Rating	E-/L	E-/L	A/L

All offerors' submitted best and final offers (BAFOs) and in their BAFOs, each offeror acknowledged that its revised technical proposal was unchanged. As a result, the BAFO's technical ratings and risk assessments remained the same. All five firms' BAFOs were reviewed for cost realism and all were found acceptable.[4] LAI had the second highest

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[3]Technical proposals were qualitatively evaluated in accordance with the adjectival rating and risk assessment scheme stated in AFR 70-3, as either exceptional, acceptable, marginal, or unacceptable. Within the rating categories, proposals were ranked with pluses and minuses used to identify variations within each rating category. In addition, proposal risk was assessed as either high, moderate, or low.

[4]TASC argues for the first time in its comments on the agency report that the Air Force did not perform a proper cost realism analysis. This allegation is apparently based on the absence from the agency report of any cost realism documentation, which was not provided because cost realism was not an issue raised by the initial protest. The agency subsequently provided documentation of its cost realism analysis.

evaluated cost at $12,246,673; TASC had the second low evaluated cost at $10,982,529. Award was made to LAI on September 29, 1994, based on its "exceptional(-)" technical rating which was found to offset the cost advantage of TASC, the "acceptable" third offeror. The unsuccessful offerors were notified of the award to LAI on September 30.

TASC first protests that paragraph L-35 of the solicitation limited the use of subcontractors to less than 50 percent of the total contract services and that LAI's proposal demonstrates that LAI intends to perform only 30 percent of the contract services itself and the remainder through subcontractors. The Air Force disagrees with TASC's interpretation of paragraph L-35, maintaining that amendment No. 0001 broadened the meaning of the term "offerors" to include the potential prime contractor and its subcontractors working as a team, as identified in an offeror's proposal. The agency states that its interpretation of the term "team" is consistent with Federal Acquisition Regulation (FAR) § 9.601 which defines a contractor team arrangement as either "two or more companies [which] form a partnership or joint venture to act as a potential prime contractor" or, "a potential prime contractor agree[ing] with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program."

Where a solicitation imposes requirements that an "offeror" or "contractor" must meet, but it is the agency's intention to allow those requirements to be met through subcontractors or other contractor team arrangements, the solicitation should so indicate. See 50 Comp. Gen. 163 (1970). Here, the RFP amendment made it clear that the evaluation of performance capability would take into account not only the abilities and facilities of the actual offeror but also of any members of the offeror's "team." As the contracting officer points out, "team" includes both the potential prime contractor and other companies when the potential prime contractor and those other companies have agreed that those companies will act as subcontractors. See Energy Compression Research Corp., B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466 n.3. Accordingly, we see nothing improper with the agency's considering the capabilities of both LAI and its identified subcontractors under paragraph L-35.[5]

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[5]To the extent the protester is arguing that the solicitation was misleading or defective because, instead of deleting paragraph L-35 in response to the pre-proposal question concerning this paragraph, the agency merely clarified the term "offeror" to include "team," the protester's argument, raised after the closing date for

(continued...)

TASC also argues that the agency failed to conduct meaningful discussions by not specifically identifying three weaknesses in its proposal which were included in the source selection briefing document on which the source selection authority relied in selecting the awardee. Generally, agencies are required to conduct discussions with all competitive range offerors and this mandate is satisfied only when discussions are meaningful. FAR § 15.610; The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. However, agencies are not obligated to afford offerors all-encompassing discussions. Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. The content and extent of meaningful discussions in a given case is a matter of judgment primarily for the determination of the agency involved and not subject to question by our Office unless clearly arbitrary or without a reasonable basis. Where a proposal is considered to be acceptable and in the competitive range, an agency is not required to discuss every aspect of the proposal receiving less than the maximum rating. Fairchild Space and Defense Corp., B-243716; B-243716.2, Aug. 23, 1991, 91-2 CPD ¶ 190; Caldwell Consulting Assocs., B-242767; B-242767.2, June 5, 1991, 91-1 CPD ¶ 530.

In this case, the record shows that TASC's proposal was considered acceptable overall; it contained no deficiencies that would preclude the firm from performing the required services satisfactorily. The record further shows that while the evaluators identified several weaknesses in TASC's proposal, almost all were identified as insignificant.[6] The contracting officer conducted one round of written discussions and two rounds of oral discussions with the protester to discuss specific weaknesses identified in its

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[5](...continued)
receipt of initial proposals, is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1); see American Int'l Global, B-247896, July 2, 1992, 92-2 CPD ¶ 3. Moreover, we fail to see how the protester might have been prejudiced here since it does not contend that it would have changed the structure or price of its proposal in any way had it interpreted the terms of paragraph L-35 to allow consideration of identified subcontractors' capabilities and facilities.

[6]In response to TASC's protest, the source selection official clarified his initial source selection documentation, affirming the selection of LAI for award. For purposes of our review of this protest issue, we have reviewed and refer to both the original and the subsequent written source selection decisions, each of which we believe independently supports denying the protest contention.

initial delivery order which adversely impacted its rating under that evaluation factor. The record shows that the weaknesses in TASC's proposal which were not discussed did not cause the evaluators to assess the firm's proposal with any additional risk or reduce the firm's technical ratings. For example, one weakness which was not discussed with the protester concerns the incomplete discussion of its personnel experience or qualification in fire control under the special technical factor. Although TASC's discussion of its fire control personnel experience was incomplete, this involved only a minor consideration under the applicable technical evaluation criterion, the evaluators did not view this as significant, and the proposal was rated fully acceptable with low risk in this area. Since there is no evidence to suggest that this or any of the other weaknesses would have prevented the agency from making award to TASC, because none of these weaknesses were viewed as significant, we do not believe that the agency was required to discuss these matters with TASC. See Booz, Allen & Hamilton, Inc., B-249236.4; B-249236.5, Mar. 5, 1993, 93-1 CPD ¶ 209. Given the technical superiority of the awardee's proposal, there is no showing in the record that the noted insignificant weaknesses adversely affected the proposal's rating to preclude a reasonable chance of receiving the award. Department of the Navy--Recon., supra.

The protest is denied.

Ronald Berger for
Robert P. Murphy
General Counsel

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