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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Scot, Inc.

File: B-295569; B-295569.2

Date: March 10, 2005

Brian W. Craver, Esq., Person & Craver, for the protester.
Frederick W. Claybrook, Jr., Esq., and Amy E. Laderberg, Esq., Crowell & Moring, for Gentex Corporation, an intervenor.
Lenore K. Strakowsky, Esq., Department of the Navy, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency did not give sufficient weight to protester's superior warranty in selecting low-priced proposal for award based on a cost/technical tradeoff is denied, where agency reasonably determined in accordance with the solicitation that the warranty was not worth a price premium.

2. Agency reasonably considered awardee's past performance to be relevant, even though it was on lower-priced contracts than protester's relevant contracts, where solicitation did not state that contract value was a consideration in determining relevance.

3. Protest that awardee's price is unbalanced is denied, where the agency reasonably considered the risk to the government associated with the offerors' different pricing strategies, and properly determined that the government would pay less under the awardee's pricing approach than with the protester's and that the cost risk entailed in the awardee's approach was acceptable.

4. Agency did not err in accepting expired offer for award without reopening negotiations where, despite the protester's assertion that it can now offer a lower price, the acceptance of the expired offer did not prejudice the competitive system or provide the awardee with an unfair competitive advantage.

DECISION

Scot, Inc. protests the award of a contract to Gentex Corporation under request for proposals (RFP) No. N68335-03-R-0141, issued by the Department of the Navy for oxygen mask, regulator, helmet, and communications test sets. Scot challenges the evaluation of proposals and the acceptance of Gentex's expired offer.

We deny the protest.

The RFP provided for award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract for a minimum quantity of 1 test set and a maximum quantity of 251 test sets to be purchased over a 5-year period, with a maximum quantity of 50 test sets to be purchased in any calendar year. Each test set consisted of a portable oxygen regulator, mask, helmet, and communications test set that was to be capable of testing all personnel-mounted aviator's breathing oxygen regulators, masks, helmets, and communications in the Navy inventory. The contractor selected for award was to provide 1 first article test unit to the Navy for testing within 120 days of award, with 10 production units to follow within 90 days of first article approval, and the remaining production units to be delivered within 6 months of first article approval as specified in delivery orders; training was also to be provided within 90 days of first article approval.

The RFP contained a number of provisions relating to the acquisition of commercial items. For example, offerors were required to "provide a narrative, discussing in detail the warranty service [to be provided] . . . includ[ing] length of warranty service and any other relevant information as specified in the solicitation," RFP attach. 3, Instructions to Offerors, at 4, and submit any standard warranty normally offered in a similar commercial sale. RFP at 39. Each offeror was also required to "hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation." RFP at 17. The firms were further instructed to provide the history of the proposed test unit (i.e., how long the item had been designed, modified, or produced in the current configuration, and the quantity produced) as part of its "commercial item description." RFP attach. 3, Instructions to Offerors, at 3.

The RFP provided for award on a "best value" basis considering (in descending order of importance) technical, past performance, and price. The technical factor consisted of the technical approach, logistics, and management subfactors. The technical approach and logistics subfactors were equally weighted, and combined were more important than the management subfactor. Each of these technical subfactors had sub-subfactors listed in descending order of importance. The logistics subfactor had five sub-subfactors; of relevance to this protest, the fourth listed one was the warranty plan. The past performance subfactors--quality of product and processes, customer satisfaction, and timeliness--were stated to be of equal importance. RFP attach. 3, Evaluation Factors for Award, at 7-8.

Under the past performance factor, the RFP stated that the government would evaluate the offerors' past performance under existing or prior government (federal, state, and local) and private contracts that were "relevant (similar in nature)" to the effort here. Customer satisfaction (the second of the past performance subfactors) required consideration of the "[s]atisfaction of end users with the Contractor's service/product." Id. at 10.

With regard to price, the RFP specified that the offerors' total proposed price for the first article test unit, training and data, and production units would be considered. In this regard, the agency advised as follows:

> The average price per unit for all five years will be calculated from the proposed step-ladder pricing[1] and multiplied by a quantity of fifty (50). The calculated amount will then be added to the proposed prices for all the other line items listed in Schedule B.

Agency Report (AR), Tabs 17 and 18, Letters from Navy to Offerors (Aug. 5, 2004). The RFP advised that the agency might reject unbalanced offers, stating that an "offer is materially unbalanced when it is based on prices significantly understated for some items and overstated in relation to the price for other items." RFP attach. 3, Evaluation Factors for Award, at 10-11.

Two offerors, Scot and Gentex, submitted proposals based on modified designs of commercial items available in their current product lines. The technical evaluation team (TET) evaluated proposals and initially rated Scot's proposal as marginal with medium risk and Gentex's proposal as satisfactory with low risk under the technical factor. Scot's lower ratings were primarily due to a [redacted] weakness under the technical approach subfactor and a [redacted] weakness in the logistics subfactor. Both weaknesses, the TET found, would cause inefficiencies within the Navy context of operations. Gentex's proposal, on the other hand, was determined to be satisfactory and low risk because it met the requirements of the solicitation and any weaknesses found were minor in nature. AR, Tab 23, TET Final Evaluation Summary, at 3, 8; Tab 24, Source Selection Evaluation Board (SSEB) Memorandum, at 2.

After holding discussions and evaluating final proposal revisions, the TET upgraded Scot's proposal's technical ratings to satisfactory and low risk, finding that the firm

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[1] The "step-ladder" pricing pertained to production units. Each offeror was to provide unit pricing for quantity ranges of 1-10, 11-20, 21-30, 31-40, and 41-50. RFP, Schedule B.

adequately addressed the agency's concerns and made improvements to its proposal in the technical approach and logistics areas. In fact, Scot improved its proposal such that it received highly satisfactory ratings under the two most heavily weighted sub-subfactors under the technical approach subfactor--system performance and test/evaluation--as well as under the fourth listed warranty plan sub-subfactor under the logistics subfactor. Gentex also improved its proposal rating and was considered highly satisfactory under the third most important sub-subfactor of the technical approach subfactor--reliability/maintainability--but otherwise its proposal ratings under the technical subfactors and its overall technical rating remained the same. The TET reported these findings to the SSEB, indicating that Scot's proposal was technically superior to Gentex's, and the SSEB concurred with the TET's evaluation ratings. AR, Tab 23, TET Final Evaluation Summary, at 4-5, 9; Tab 24, SSEB Memorandum, at 2-3. The detailed ratings of the firms' proposals under each of the evaluation factors and subfactors as follows:

	SCOT	GENTEX
Overall Technical	**Satisfactory/Low**	**Satisfactory/Low**
Technical Approach	**Highly Satisfactory/Low**	**Satisfactory/Low**
System Performance	Highly Satisfactory/Low	Satisfactory/Low
Test/Evaluation	Highly Satisfactory/Low	Satisfactory/Low
Reliability/Maintainability	Satisfactory/Low	Highly Satisfactory/Low
Commercial Item Description	Satisfactory/Low	Satisfactory/Low
Logistics	**Satisfactory/Low**	**Satisfactory/Low**
Technical Manual	Satisfactory/Low	Satisfactory/Low
Supply Support Plan	Satisfactory/Low	Satisfactory/Low
Training Plan	Satisfactory/Low	Satisfactory/Low
Warranty Plan	Highly Satisfactory/Low	Satisfactory/Low
Calibration Requirements	Satisfactory/Low	Satisfactory/Low
Management	**Satisfactory/Low**	**Satisfactory/Low**
Mfg. Capacity/Facilities	Satisfactory/Low	Satisfactory/Low
Quality Assurance Program	Satisfactory/Low	Satisfactory/Low
Small Disadvantaged Business Participation	Good	Good
Past Performance	**Low**	**Low**
Quality of Product & Processes	Low	Low
Customer Satisfaction	Low	Low
Timeliness	Low	Low
Price	**$1,023,404.52**	**$936,749.00**

AR, Tab 24, SSEB Memorandum, at 1, 3.

For past performance, Scot provided two references from the Air Force, both of which were from the same individual, relating to Scot's "CAST tester," which is a product that the agency determined to be similar to the test set proposed here. The value of these contracts was approximately $2.4 and $2.5 million. In its report to the

SSEB, the TET noted that Scot's Air Force reference was "pleased" with the quality of the equipment delivered, and that customer satisfaction was "excellent." AR, Tab 12, TET Initial Evaluation Summary, at 10. The Air Force customer rated Scot's performance as outstanding or highly satisfactory in each evaluated area.

Gentex identified five references, three of which provided past performance evaluations for contracts valued at less than $300,000. Two of the responding references were retailers/distributors, and one was an aerospace company that used the product. These references provided feedback concerning existing product lines that the agency found formed the bases for Gentex's test set proposed here, such that the agency considered this contract performance to be relevant and similar in nature to the required effort. The references rated Gentex's performance as outstanding or highly satisfactory in almost all evaluated areas (the only exception was that one reference rated Gentex's performance as only satisfactory under the timeliness subfactor), and all were "highly complimentary" about Gentex's performance. AR, Tab 12, TET Initial Evaluation Summary, at 16.

Based on these references, both the TET and SSEB determined that both offerors were deserving of a low risk rating for past performance.

With regard to price, the SSEB noted that Scot's proposal was 8 percent higher than Gentex's. As the SSEB found, Scot [redacted]; whereas Gentex [redacted]. The total evaluated price for both offerors was as follows:

	SCOT	GENTEX
First Article Test	$[redacted]	$[redacted]
Training/Data	$[redacted]	$[redacted]
Production Units	$[redacted]	$[redacted]
Total	$1,023,404.52	$936,749.00

AR, Tab 24, SSEB Memorandum, at 3. The SSEB recognized that the government would experience [redacted]. Based on the agency's estimate that a total of 50 production units would be ordered, it was determined that Gentex's proposal was lower overall in price by $86,655.52. Id.

The SSEB then placed a value on the benefit to the agency from certain items in Scot's proposal that led to its higher ratings to determine whether Scot's proposal was worth the higher price. For example, the agency quantified the benefit associated with [redacted] and a [redacted] warranty plan instead of Scot's standard commercial [redacted]-month warranty. Specifically with regard to the warranty, the agency determined that this feature provided no added value because "although extended warranties typically carry a monetary value in the commercial market, the [program here] does not benefit from warranties because equipment is normally stored in a staging facility beyond the warranty period." Id. at 5. However, the remaining items were found to be worth a total of $17,833, which reduced the evaluated price differential from $86,655.52 to $68,822.52. Id. at 4-5.

The SSEB thus determined that the benefits of Scot's proposed additional technical features were "not of a significant enough value to the Government to be worth the higher price and therefore, would not justify award to Scot, the higher priced offeror." Id. at 5. The SSEB recommended to the source selection authority (SSA) that Gentex be selected for award, and the SSA concurred. After receiving notice of the award to Gentex, Scot filed an agency level protest that was denied, and then Scot timely protested the denial of its protest to our Office.

Scot challenges the agency's evaluation of proposals and selection of Gentex for award, contending that the agency misevaluated Scot's warranty plan, Gentex's past performance, and Gentex's price.[2] In reviewing an agency's evaluation, our Office will not reevaluate proposals, but will examine the record to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 6.

Scot first contends that the agency unreasonably placed a "zero" value on Scot's proposed warranty during the best-value analysis, since this negated the importance of the warranty plan technical sub-subfactor. The record shows that the agency favorably recognized Scot's extended warranty and in fact rated the firm's proposal highly satisfactory under the warranty plan sub-subfactor as a result. The record also shows, however, that while this feature was considered to be a technical strength, the agency found that it provided a "negligible" monetary benefit to the government because the equipment would be stored beyond the warranty period so that the government would not be able to take advantage of the extended warranty.[3] Thus, in performing its best-value comparison, the agency concluded that Scot's

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[2] In addition, Scot generally contends that the agency failed to follow the stated evaluation criteria in performing its best-value determination and in evaluating the technical subfactors of technical manual and supply support plan, but provides no arguments on these issues in its comments after the agency addressed the protest allegations in its agency report. Instead, Scot asserts in its comments that it "cannot demonstrate an abuse of discretion solely from the written agency record." Protester's Comments at 12. Given this concession, we need not address these issues further, but note from our review of the record that the agency's evaluation in these areas appears reasonable.

[3] To the extent that Scot argues that the agency should have disclosed that the units would be stored, we do not find that Scot was misled in this regard.

extended warranty did not provide sufficient value to the government to justify paying a higher cost. Although Scott apparently believes that its warranty is worth a higher value to the government, it has not shown that the agency's evaluation was unreasonable or inconsistent with the RFP's evaluation scheme, given the agency's explanation and the relatively little weight in the overall evaluation of this fourth most important sub-subfactor of the logistics subfactor of the technical factor.

Scot also challenges the agency's evaluation of past performance. It contends that Gentex's proposal should have received a higher risk past performance rating than Scot's because Gentex's prior contracts were smaller in dollar value and two of its references were from retailers/distributors who were not "end users" of the Gentex product.

The evaluation of past performance, including the agency's determination of the relevance and scope of the offeror's performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation criteria. Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3.

While it is true that the value of Gentex's referenced contracts was less than $300,000 each and that Scot's were over $2 million each, the agency found that the experience of both offerors was relevant because it related to supplying commercial items that formed the bases of their product designs here. AR, Tab 12, TET Initial Evaluation Summary, at 10, 16. Based on our review of the record, we find the agency's evaluation was reasonable and consistent with the evaluation criteria, which announced that the agency would consider contracts that were "similar in nature" to the effort here without indicating that the value of the contracts was a consideration.

We also find that the agency properly considered the positive references from the retailers/distributors that sold Gentex products. Although the customer satisfaction subfactor required consideration of the "satisfaction of end users with the contractor's service/product," neither this subfactor nor any other past performance criteria stated that only end users could report on the experience. Since the retailer/distributor references had knowledge of "end user" satisfaction, the agency could properly consider it here.

Thus, we find no basis to conclude that the agency's evaluation of Gentex's past performance was unreasonable or inconsistent with the RFP.

Scot next challenges the price evaluation. It contends that Gentex's price is unbalanced because it [redacted]. It contends that the Navy failed to consider the risks to the government associated with this unbalanced pricing.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated, while others are understated. Federal Acquisition Regulation (FAR) § 15.404-1(g)(1); Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7. While unbalanced pricing may increase risk to the government, contrary to the protester's argument, agencies are not required to reject an offer solely because it is unbalanced. Rather, where an unbalanced offer is received, the contracting agency is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, including the risk that the unbalancing will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2); Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3; Citywide Managing Servs. of Port Washington, Inc., supra.

As noted above, the offerors employed significantly different pricing approaches. In this regard, [redacted]. Although there is a wide variance between the offerors' line-item pricing, the record does not establish that either offeror's approach results in unreasonably high or low line-item pricing, and the agency denies that either pricing approach is unbalanced.

Even if we were to find that Gentex's prices were unbalanced, however, the record here confirms that the agency considered the risks to the government from the offerors' different pricing strategies. The agency found that under the Gentex approach, the costs would be [redacted], but that the government would likely pay less overall for contract performance because [redacted]. Based on the agency's estimate that 50 production units would be procured,[4] the agency calculated that Gentex's overall price was lower than Scot's and closer to the government estimate.[5] AR, Tab 26, Post-Negotiation Business Clearance Memorandum, at 8-12. As more [redacted] are purchased, the cost savings to the government from selecting Gentex

[4] Scot contends for the first time in its comments that the agency's estimate that 50 production units would be ordered is inaccurate. However, this protest ground is untimely. Scot was informed during discussions that the agency's price calculations under the price evaluation would be based on its estimate that 50 production units would be procured, and thus should have protested this, if viewed as a solicitation defect, by the time set for receipt of final proposals. See 4 C.F.R. § 21.2(a)(1) (2004). In any event, the record establishes the reasonableness of the agency's estimate. For example, internal Navy e-mails estimate that a "total of [redacted]" units would be ordered by the Navy, and this number could be even higher since, as acknowledged by the protester, other agencies may order from this ID/IQ contract as well. Supp. AR, Tab 1, Internal Navy E-mails, at 1; Protest at 5.

[5] Scot's price was found to be, on average, 42 percent above the government estimate, while Gentex's price was, on average, 28 percent below the government estimate. AR, Tab 26, Post-Negotiation Business Clearance Memorandum, at 12.

over Scot becomes even greater. Under these circumstances, we find that the agency considered the risks to the government and reasonably concluded that Gentex's proposal reflected the lowest cost to the government, that its acceptance would not result in payment of unreasonably high prices for contract performance, and that the cost risk of this award was acceptable. FAR § 15.404-1(g)(2).

Scot also argues that the award to Gentex was improper because Gentex's offer, which according to the RFP was to remain open for 30 days, had expired 10 days prior to award. Scot contends that since its offer had also expired, the agency must resolicit proposals. It asserts that due to ongoing "manufacturing process redesign efforts," it would have been able to submit a lower price had it known that the award, and thus the performance period, would be delayed. Declaration of Scot's Director of Life Support Programs, Feb. 2, 2005, ¶¶ 3-4.

It is not improper for an agency to accept an expired offer without reopening negotiations where acceptance is not prejudicial to the competitive system. Krug Life Scis., Inc., B-258669.2, Feb. 22, 1995, 95-1 CPD ¶ 111 at 4; The Fletcher Constr. Co., Ltd., B-248977, Oct. 15, 1992, 92-2 CPD ¶ 246 at 6. Even where, as here, the acceptance period has expired on all offers, an agency may allow the successful offeror to waive the expiration of its proposal acceptance period without reopening negotiations and make award on the basis of the offer as submitted. The Fletcher Constr. Co., Ltd., supra. Here, although the acceptance of Gentex's expired offer permitted Gentex to waive the expiration of the offer, because no changes were made to Gentex's proposal, this waiver did not prejudice the competitive system or provide Gentex with an unfair competitive advantage. Although Scot asserts that it can now provide a lower price to the agency, the agency was not required to reopen the competition when proposals expired to allow the offerors to revise their proposals. See BioGenesis Pac., Inc., B-283738, Dec. 14, 1999, 99-2 CPD ¶ 109 at 6 (agency not required to consider protester's revised proposal submitted after proposals expired but could make award based on unchanged expired proposals).

The protest is denied.

Anthony H. Gamboa
General Counsel