



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Creative Management Technology, Inc.

File: B-266299

Date: February 9, 1996

Jacob Dixon, Jr. for the protester.

Col. Thomas F. Brown, Capt. Christopher M. Petras, and Martin F. McAlwee, Esq.,
Department of the Air Force, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency failed to conduct meaningful discussions with protester is denied where discussion questions reasonably led protester into area of its technical proposal that was deficient.

2. Agency's determination that the protester's lower-priced proposal did not represent the best value to the government in a procurement for technical engineering and spacelift services is unobjectionable where the agency reasonably evaluated the protester's proposal as posing a moderate performance risk due to the protester's reliance on subcontractor personnel and corporate resources, and reasonably concluded that compared to the awardee's proposal, which was reasonably evaluated as posing a low performance risk due to the awardee's capability to rely on in-house personnel and internal corporate resources, was worth the price premium.

3. Protest that awardee gained an unfair competitive advantage because it proposed the services of government employee as a project leader is denied where:
(1) government employee advised the agency of his employment discussions and subsequent offer from the awardee; (2) the government employee did not participate in the procurement; (3) there is no evidence that the government employee influenced the technical evaluators or that the employee had access to source selection information, or otherwise conferred an unfair competitive advantage on the awardee; and (4) there is no evidence that the government employee participated in the preparation of the awardee's proposal.

DECISION

Creative Management Technology, Inc. (CMT) protests the award of a contract to AJT and Associates under request for proposals (RFP) No. F08650-95-R-A078, issued by the Department of the Air Force for technical engineering and spacelift services

(TESS) to support the agency's 45th Space Wing Eastern Launch Range Space Program. CMT contends that the Air Force failed to apprise the firm of informational deficiencies in its proposal, thereby depriving the protester of the opportunity to improve its moderate risk proposal rating. CMT contends that it should have received the award since the agency's risk concerns were unreasonable, and it offered a lower price than the awardee. CMT also argues that the technical evaluation and subsequent award to AJT were tainted by a conflict of interest.

We deny the protest.

The TESS services are critical engineering support necessary to ensure scheduled space program launches and missions including Titan IV, Atlas II, Delta II and III, Trident D-5, and various commercial satellite programs. The procured services include phase-in tasks; project management; engineering design; emergency on-call engineering support; inspection services; and data compilation/recordkeeping. The RFP was issued on May 15, 1995 and contemplated the award of a 1-year contract with 4 option years based on an integrated assessment of technical and price factors, with price less important than technical merit. The RFP required each offeror to submit a technical/management proposal, which was to be evaluated under seven criteria of equal importance. The RFP further provided that risk analysis of each proposal would be performed and considered as part of the overall evaluation.

By the June 21 closing date, four offers were received, including offers from CMT and AJT. During the next 2 months, numerous "Clarification Requests/Deficiency Reports" (CR/DR) were issued to each of the four offerors. Of significance to this protest, 4 of the 36 CRs/DRs provided by the Air Force to CMT stated,

"[CMT's proposal] states CMT will use their fixed-price engineering personnel for on-call engineering services. Mixing work requirements may create project scheduling problems during actual execution of the contract. Example, fixed-price design might have longer completion date or completion date might be delayed. Please revalidate your approach."

"Various references in multiple sections refer to corporate resources as a means of accomplishing work. What are these resources? Past performance does not indicate any other technically oriented personnel (design-types) employed."

"Proposal states that CMT has the ability to 'bring in subcontracted consulting or temporary personnel.' Please provide how these personnel will be drawn and how this will be done 'quickly'?"

"[Reference the proposed list of on-call engineering associate contractors.] Does CMT have existing agreements with Associate Contractor[s]?"

On August 11, the Air Force requested best and final offers (BAFO), which were submitted by each offeror on August 15. At the conclusion of the BAFO evaluation, in a Proposal Analysis Report dated August 11, the source selection evaluation team (SSET) recommended AJT for award. Although AJT and CMT were closely ranked, the SSET determined that AJT's proposal was technically superior to CMT's since AJT proposed to satisfy all required on-call engineering services exclusively through the use of in-house personnel and in-house corporate resources, which posed significantly less risk than CMT's proposed on-call engineering approach--which relied heavily on subcontractor personnel and resources--and was therefore rated a moderate performance risk by the SSET.

On September 7, after reviewing and concurring in the SSET's finding, the source selection authority (SSA) awarded the contract to AJT. Although CMT's price was lower than AJT's, the SSA determined that AJT's lower performance risk warranted paying an approximately 12-percent price premium. Specifically, the SSA noted that any interruption in the required TESS services--including delays in providing emergency on-call engineering services--could potentially cause launch delays that would cost the agency approximately \$1 million per day. On September 26, after attending the agency's debriefing, CMT filed this protest.

DISCUSSION

Adequacy of Discussions

At the debriefing, the Air Force advised CMT that one of the chief reasons for the protester's moderate performance risk rating was the protester's failure to provide letters of commitment or similar agreements from its proposed on-call engineering subcontractors. As a result, the agency concluded that in the event CMT's proposed subcontractors were unavailable, the protester would be forced to relocate full-time personnel to perform any emergency on-call engineering tasks--incurring delays in ongoing critical TESS services that could potentially disrupt intended launch schedules and related space program projects. In addition, because of CMT's lack of subcontractor agreements, the agency questioned whether CMT could rely on its subcontractor's corporate resources in the event they were required.

In its protest, CMT contends that the Air Force never requested subcontractor letters of commitments or similar agreements during its discussions with the protester, and had the agency done so, CMT could have provided these documents.

In response, the Air Force maintains that it was unable to specifically request such evidence as part of its discussions with CMT because of technical transfusion and technical leveling concerns. The Air Force states that because AJT had already furnished letters of commitment in its initial proposal and evidence of an approved corporate credit line, and because the solicitation did not require this type of evidence, the agency believed that if it requested these specific documents from the protester it would be engaging in technical transfusion or technical leveling by revealing one of the strengths in AJT's approach. The Air Force further asserts that based on the questions the agency issued to CMT regarding its proposed subcontractors, on-call engineering approach and corporate resources, CMT reasonably should have been able to ascertain that stronger evidence of the protester's ability to rely on its subcontractors and their resources, as well as evidence of providing prompt on-call engineering services without interruption to the other required TESS tasks, was needed to support its proposal.

In negotiated procurements, agencies are required to conduct meaningful discussions with all competitive range offerors. Acumen Eng'g/Analysis, Inc., B-260102, May 11, 1995, 95-1 CPD ¶ 240. While this generally requires agencies to advise offerors of proposal deficiencies and to afford them an opportunity to submit a revised proposal, it does not mean that agencies must conduct all-encompassing discussions; rather, agencies are only required to lead offerors into those areas of their proposals needing amplification, given the context of the procurement. Id. In this regard, the content and extent of discussions are within the discretion of the contracting officer, since the number and type of proposal deficiencies, if any, will vary among the proposals. Federal Acquisition Regulation (FAR) § 15.610(d); Pan Am. World Servs., Inc. et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

In any discussions with competing offerors, agencies must avoid unfairness and unequal treatment. CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308. Disclosure of one offeror's approach to another is unfair and is prohibited as "technical transfusion." See FAR § 15.610(d)(2); CBIS Fed. Inc., supra. Similarly, technical leveling is also to be avoided; this situation occurs when an agency, through successive rounds of discussions, helps to bring a proposal up to the level of another proposal by pointing out weaknesses that remain in the proposal due to an offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them. FAR § 15.610(d); SAIC Computer Sys., B-258431.2, Mar. 13, 1995, 95-1 CPD ¶ 156.

Because the protester had already provided the agency with a list of its proposed subcontractors in its initial proposal, we think the Air Force could have requested copies of subcontractor agreements and letters of subcontractor commitment without concerns about improperly disclosing aspects of AJT's technical approach (technical transfusion) or improperly coaching CMT (technical leveling). See CBIS Fed. Inc., supra. However, as noted above, agencies enjoy a great deal of discretion

in how they discuss proposal deficiencies with various offerors, and in this case we think the questions posed to CMT reasonably placed the protester on notice that providing firm evidence of the reliability of its subcontractors, such as letters of commitment or subcontractor agreements, would be a desirable response.

As noted above, the Air Force explicitly asked CMT during discussions to examine its approach towards staffing on-call engineering requests given the agency's concerns about disruptions in the non-emergency schedule work that would arise if designated full-time staff were taken off their routine tasks. Additionally, the record shows that the Air Force asked CMT to amplify how it would bring in subcontracted personnel "quickly," and whether the protester had "existing agreements" with its proposed on-call engineer "associate contractors." In the context of this procurement, these three discussion questions plainly indicated that the agency was concerned about CMT's ability to rely on and promptly retain its proposed subcontractors for any required on-call engineering tasks, and that CMT's proposed approach might entail scheduling disadvantages and performance risks not addressed in the protester's proposal. The Air Force was under no legal obligation to spell out exactly what technical response would completely allay the agency's concerns about CMT's ability to provide low-risk performance. Medland Controls, Inc., B-255204; B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260. Under the circumstances, the Air Force's discussions were adequate to lead the protester into the area of the agency's concern, and were therefore legally unobjectionable.

Risk Evaluation and Selection Decision

CMT maintains that its proposed approach should not have been determined to pose a moderate risk because despite its failure to provide letters of commitment regarding proposed subcontractor personnel and their corporate resources, the protester's proposal nonetheless conveyed that the firm had immediate access to these proposed firms and their assets. In this regard, CMT admits that it "does not have a highly qualified technical staff sitting around waiting to solve problems such as those associated with on-call engineering" and further concedes that "[u]nless you use resources already on the contract, there will be a lag period before any outside sources can be placed on the project." Nevertheless, CMT contends that the reputation of its subcontractors--which are generally recognized as having strong personnel and resources, and which have performed several similar requirements at CCAS and other space program locations--as well as CMT's established history of working with these firms, renders the SSET's risk concerns unreasonable. We disagree.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In reviewing an agency's evaluation of competing proposals, we

only examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. See Orion Research, Inc., B-253786, Oct. 21, 1993, 93-2 CPD ¶ 242. A protester's mere disagreement with the agency's evaluation determination does not demonstrate that the evaluation was unreasonable. Global Assocs., Ltd., B-256277, June 6, 1994, 94-1 CPD ¶ 347.

Contrary to the protester's arguments, we find that the agency reasonably evaluated the protester's proposal as posing a higher risk than the awardee's. Because CMT provided no concrete evidence of its ability to swiftly dispatch its proposed subcontractors to perform any required on-call engineering tasks, we think the agency reasonably concluded that CMT's proposal presented a higher risk of interruption to the TESS services--and therefore disruption to the related space programs and missions--than did AJT's proposal. In contrast to CMT, AJT proposed only in-house personnel for all TESS requirements--including the on-call engineering; further, AJT provided a letter of commitment from its bank demonstrating that in addition to its substantial internal corporate resources, the bank had established for it a significant line of credit so that the firm had access to additional, immediately available funding for any unforeseen contract contingency, including any emergency on-call engineering support. Finally, unlike CMT, for the few consultants and subcontractors that AJT proposed on a contingency, emergency basis, AJT provided letters of commitment demonstrating an unquestionable ability to immediately deploy any and all proposed subcontractors, in the event they were required, to support any task under this contract.

Technical/price tradeoffs may be made in deciding between competing proposals; the propriety of such a tradeoff turns not on the difference in technical scores or ratings, per se, but on whether the agency's judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. Global Assocs., Ltd., *supra*. Here, given AJT's lower-risk approach--which provided a better guarantee that the Air Force would not suffer any costly interruptions in the performance of critical TESS services--we think the SSA could reasonably conclude that AJT's lower-risk proposal was worth the 12-percent price premium, particularly since under the evaluation scheme in the RFP, price was less important than technical merit. See Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225.

Alleged Conflict of Interest

The record shows that AJT's proposed project manager was a contracting officer's technical representative (COTR) who served on the predecessor contract until he retired, 1 day after the current contract was awarded to AJT. CMT contends that AJT's proposed employment of the project manager constituted a personal conflict of interest prohibited by the procurement integrity provisions of FAR subpart 3.104. Alternatively, CMT contends that AJT's proposed project manager must have used

inside source selection information to assist the awardee in drafting the winning proposal; CMT also maintains that the project manager similarly must have assisted the agency in drafting the current RFP to favor AJT's capabilities, resulting in an improper organizational conflict prohibited by FAR subpart 9.5.

The Air Force acknowledges that AJT's proposed project manager served as the COTR for the predecessor contract; however, the agency asserts that contrary to the protester's contentions, no procurement integrity or organizational conflict of interest regulations were violated by AJT's proposed use of the COTR.

The Air Force reports that AJT approached the COTR on April 18, 1995 and offered him an employment position as project manager for the upcoming procurement. The COTR accepted the employment offer with an effective start date of October 1, but conditioned his acceptance of AJT's employment offer on the Air Force's determination that such employment would not constitute an improper conflict of interest. The COTR then reported the employment contact to the agency and, by memorandum dated May 8, formally requested an ethics advisory opinion regarding his potential post-government employment by AJT. The Air Force determined that employment with AJT was permissible since the COTR was not involved in any aspect of the current TESS procurement.

The interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee during the award selection process. Cleveland Telecommunications Corp., B-257294, Sep. 19, 1994, 94-2 CPD ¶ 105; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132.

Here, we find nothing improper in either the COTR's conditional acceptance of employment while still an Air Force employee, or in AJT's proposed use of the COTR in its proposal. Although procurement officials are prohibited from engaging in employment negotiations during the conduct of a procurement, FAR § 3.104-3(b), the COTR was not a procurement official as defined within these regulations: the COTR had no involvement with drafting, reviewing or approving the RFP specifications; evaluating proposals; selecting sources; conducting negotiations; or approving the award to AJT. FAR § 3.104-4(h). Further, while any government employee is prohibited from "participating personally and substantially" in any matter that would "affect the financial interests of any person with whom the employee is negotiating employment," FAR § 3.104-1(b)(2), there is no evidence that the COTR participated in any way in the procurement on behalf of the Air Force or AJT. See Cleveland Telecommunications Corp., *supra*. Nor did the COTR participate in the drafting or negotiation process for the predecessor solicitation, known as the Ground Systems Associate Contract (GSAC). In this regard, the Air

Force reports that the GSAC requirements underwent substantial changes, rewriting, and restructuring before being issued as the instant TESS procurement.

Since the COTR was not involved in any aspect of the TESS procurement, and since the COTR was not employed by AJT, and did not otherwise assist AJT in the drafting of its proposal for this procurement, the organizational conflict of interest restrictions set forth at FAR 9.5 are inapplicable. See Abt Assocs., Inc., B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269.

Although the protester contends that AJT's proposed employment of a current Air Force employee must have influenced the SSET to favor the AJT proposal, the record simply does not support this contention. CMT has not furnished any evidence to support this allegation, and we will not attribute bias in the evaluation of proposals on the basis of inference or supposition. See TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37. The protester's speculation notwithstanding, the record contains no evidence of bias in the evaluation of either CMT's or AJT's proposal; instead, the record contains a well-documented, detailed evaluation and source selection analysis, showing that the Air Force conducted its evaluation reasonably and in accordance with the evaluation criteria. Under these circumstances, CMT's allegations of possible impropriety, unaccompanied by supporting evidence, amount to nothing more than speculation, and as such, do not provide a basis for protest. ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30.

The protest is denied.

Comptroller General
of the United States