



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Magnum Products, Inc.; Amida Industries, Inc.

File: B-277917; B-277917.2; B-277917.4

Date: December 8, 1997

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Alexander J. Brittin, Esq., and Suzanne L. Karbarz, Esq., McKenna & Cuneo, L.L.P., for T & J Manufacturing, Inc., an intervenor.
Joseph Summerill, Esq., U.S. Department of Justice, Federal Prison Industries, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's determination that protester's revised proposal remained technically unacceptable after discussions, and that the proposal should be eliminated from further consideration for award, was proper where the agency reasonably concluded that the proposal would require major revision in order to become acceptable and the record shows that, in light of overall technical inferiority and higher price of its proposal, protester did not have a reasonable chance of receiving award.
2. Protest that awardee fails to comply with solicitation's experience requirements is denied where solicitation did not expressly prohibit offerors from relying on proposed subcontractors to meet the requirements and awardee's proposal shows that proposed major subcontractor has required experience.

DECISION

Magnum Products, Inc. and Amida Industries, Inc. protest the award of a contract to T & J Manufacturing, Inc. under request for proposals (RFP) No. 1PI-R-0613-97, issued by the Department of Justice, Federal Prison Industries (FPI) for portable floodlight systems and related support services. Magnum protests that the agency's exclusion of its proposal from the competitive range was unreasonable; both Magnum and Amida challenge the award to T & J.

We deny the protests.

The RFP contemplated the award of a 5-year fixed-price requirements-type contract for the manufacturing and some assembling of portable floodlight systems, and related support services--the systems are to be delivered to FPI as kits to be assembled by inmates and supplied by FPI to other federal agencies.

Section M of the RFP advised offerors of the following evaluation factors for award, listed in descending order of importance: technical quality (including subfactors for reliability and market acceptance, technical conformance and performance, certifications, maintenance and availability of replacement parts, safety features, and quality assurance, reliability, and maintainability programs); management (including previous performance experience and key personnel); and price. Alternate proposals, as separate submissions accompanying a fully compliant basic offer, were permitted. Award was to be made to the responsible offeror submitting the offer determined to be most advantageous to the government.

Magnum, Amida, and T & J were among those offerors whose initial proposals were included in the competitive range for discussions. Each offeror was told of the agency's concerns regarding weaknesses/deficiencies in its proposal. After reviewing the revised proposals, the agency concluded that Magnum's proposal was technically unacceptable and excluded it from the competitive range. Amida's and T & J's proposals remained in the competitive range; further discussions were held with these firms on August 11, and best and final offers (BAFO) were submitted and evaluated. T & J's BAFO (at a unit price of \$9,259) received a slightly higher technical/management evaluation score and offered a considerably lower price than Amida's BAFOs. Award was made to T & J on August 28. These protests followed.

Magnum's protest

Magnum protests the agency's decision to exclude its proposal from the competitive range, which was based primarily on a perceived deficiency regarding the proposed engine. As explained below, the record here shows that the agency reasonably excluded Magnum's proposal from the competitive range.

The evaluation of proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency since it is responsible for defining its needs and determining the best method of accommodating them. Network Sys. Solutions, Inc., B-249733, Dec. 14, 1992, 92-2 CPD ¶ 410 at 4. Generally, offers that are technically unacceptable as submitted and that would require major revision to become acceptable may be excluded from the competitive range. Id. Further, a proposal may be excluded from the competitive range if, based upon the array of technical ratings actually obtained by the offerors and consideration of proposed prices, the proposal does not stand a real chance of being selected for award. Intown Properties, Inc., B-272524, Oct. 21, 1996, 96-2 CPD ¶ 149 at 4. In reviewing an agency's evaluation and competitive range determination, we will not independently reevaluate

proposals but instead will examine the evaluation to ensure that it was reasonable and in accordance with the stated evaluation criteria. Id. at 2. Mere disagreement with the agency's technical judgment does not show that the evaluation was unreasonable. Seair Transp. Servs., Inc., B-252266, June 14, 1993, 93-1 CPD ¶ 458 at 4.

As part of the technical evaluation here, offerors were to show compliance with the solicitation's statement of work requirements, including a performance purchase description (PPD) for the item, which set out minimum requirements for acceptability. See RFP § L.B.1. The PPD required that the engine-generator set have a proven reliability record (PPD § 3.1.6.1) and be designed for "long life" (PPD §§ 3.1.4 and A.3.2.4.1) in harsh environments with "minimum maintenance and little or no downtime." PPD § A.3.2.4.1. The PPD, at § 3.1, also specifically required, as one of the "minimum essential criteria," that the engine be "capable of using [m]ulti [f]uels and . . . comply with the requirements in Appendix B" (PPD § 3.1.4.2); in relevant part, Appendix B (at PPD § B.3.5.1) specified "JP-5" and "JP-8" jet fuel as "standard operating fuel" for the engine.

Magnum's initial proposal advised that when using JP-5 and JP-8 jet fuels, its proposed Isuzu engine is "[n]ot meant for continuous, high accumulation of operating hours." The agency viewed this as an unacceptable restriction on fuel use and engine duration. Since the protester's proposed engine/jet fuel restriction was viewed as inconsistent with the solicitation's long life and multi-fuel use requirements, the agency pointed out the following deficiency to Magnum during discussions: "The proposed engine has a restriction of long hours using [JP-8] or other jet fuels."

The protester's revised proposal did not remove the Isuzu engine restriction; rather, in its revised proposal, Magnum stated that it was "convinced [Isuzu is] not concerned about the use of jet fuels in this application." To support this contention, Magnum submitted with its revised proposal a copy of a letter from Isuzu which stated that, although Isuzu has not experienced problems with its engine due to the use of low lubricity jet fuels such as JP-5 and JP-8, it continues "to issue [its] standard jet fuel statement [including the challenged JP-5 and JP-8 fuel restriction] to engine users, indicating that there is at least the theoretical potential for decreased injection system component life." The agency evaluators found that Magnum's revised proposal remained technically unacceptable for failure to correct, among other things, this engine-related deficiency. Magnum was notified that its proposal was excluded from the competitive range because it failed to meet RFP minimum requirements; the major deficiency cited was Magnum's proposed engine's failure to satisfy the RFP's multi-fuel use requirement because of the stated restriction associated with the use of certain required jet fuels. The agency determined that the deficiency could not be cured without major revision to the proposal.

Magnum states that the agency unreasonably concluded that its proposal was unacceptable and required major revision to become acceptable. Magnum first contends that the engine manufacturer which issued the challenged restriction, Isuzu, states that the jet fuel problem is theoretical only. Magnum contends that since Isuzu has not experienced actual problems with the engine's use of jet fuel, the restriction should not render the proposal unacceptable. Our review of the record, however, confirms that the agency had a reasonable basis to conclude that the Isuzu restriction clearly is at odds with the RFP's requirements for a heavy-duty (in terms of both durability and duration of use), reliable, multi-fuel unit. Although Isuzu says the restriction results from theoretical concerns, the fact remains that the restriction against the use of required fuels for any long period of time, contrary to the agency's needs, has not been removed from the protester's proposal. Additionally, despite the fact that Magnum states generally that all engines are subject to certain performance problems when using jet fuels, there is no persuasive support in the record for this contention, and, moreover, no other offeror expressly restricted the use of its engine with required fuels as Magnum did. Further, in our view, the materiality of the restriction is supported by the fact that acceptance of that restriction would not only constitute a waiver of requirements for Magnum, but would also affect the legal relationship between the parties. For instance, the agency's position on future claims for performance-related problems from the proposed engine's use of the required jet fuels could be compromised by the agency's acceptance of the restriction, since such acceptance could reasonably be viewed as a waiver of contractor liability in this regard. See generally Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555 at 3.

Magnum next contends that substitution of its proposed engine would constitute only a minor revision to its proposal because different engines are essentially interchangeable in the engine/generator set. We see no basis to question the reasonableness of the agency's determination to the contrary. The agency first points out that substitution of the engine could require numerous modifications to the engine-generator set; specifically, an Air Force engineer states that "[e]ngine mounting, vibration isolators, air management for the engine and for the generator, engine cooling system, exhaust system, control system, fuel supply hoses, electrical wiring, etc. would all require some engineering evaluation and modifications." The Air Force engineer further explains that the engine is the most significant sub-component from a technical standpoint and that changing the engine would be relevant to the agency's evaluation of the proposal under all of the technical evaluation criteria and would involve major revision to the proposal. The protester does not refute this position or provide detailed technical support for its general conclusion that alternate engines are "easily interchangeable." Affidavit of Thomas Joseph, submitted with Magnum Comments, Oct. 17, 1997.

In our view, the record supports the Air Force's position that a substantial amount of technical information about any substituted engine would have had to be provided by Magnum, since the engine would have to be evaluated under all the

subfactors--e.g., technical conformance and performance--of the technical quality evaluation factor. The protester's unsupported, general contention that other engines are interchangeable in its system is simply insufficient to show that the agency's determination that engine substitution would entail major proposal revision was unreasonable, since even if certain engines were physically interchangeable in the proposed system, a major proposal revision--to include technical data on the substituted engine for evaluation by the agency--would still be required.¹

Finally, in addition to the deficiency related to its proposed engine's restricted use, the record provides substantial support for the significant downgrades in evaluation score assigned to Magnum's technical proposal for a number of other deficiencies which the protester does not challenge. For instance, Magnum was advised during discussions of other material deficiencies in its proposal, which the firm failed to cure in its revised proposal, regarding its failure to provide sufficient reliability, performance, and delivery information to meet the essential minimum criteria of the solicitation.² Consequently, the Magnum proposal was assigned a substantially

¹Magnum also contends that it offered an alternate engine in its revised proposal that the agency failed to evaluate. The Magnum proposal provided that:

Isuzu is the engine manufacturing and service organization we recommend for your application. Kubota is another manufacturer of diesel engines which could be used in this application. . . . However, we believe Isuzu is the better engine . . . We submit Kubota's documentation in order to support the general assertions we present and to let you see the like nature between engine manufacturers.

The agency states that, although the Magnum revised proposal mentions Kubota, no Kubota engine was proposed by the firm. Our review of the Magnum proposal confirms the reasonableness of the agency's position--the reference to Kubota is clearly for comparison to Magnum's proposed Isuzu engine; the Kubota engine was not priced by Magnum in the proposal, requisite technical data for the Kubota engine were not provided, and there was no separate proposal submission made for that engine, as required by the RFP for agency consideration of any alternate proposal.

²Specifically, Magnum was told during discussions that the firm's proposal, among other things, failed to "supply documentation of the combined engine generator set performance history as a set" and that the proposal failed to provide required past performance and contract delivery schedule information. In its revised proposal, Magnum explained that it did not provide the required documentation regarding its proposed engine-generator set's reliability and performance history since Magnum had no experience with or reliability data regarding these two sub-components

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lower overall evaluation score (including a substantially lower management proposal score) than T & J's and Amida's proposals. Magnum's proposed price was also substantially higher than these two offerors' prices. Magnum concedes that a downgrade for the engine restriction might have been reasonable (rather than a finding of technical unacceptability) in terms of maintenance and life-cycle costs, and Magnum does not challenge the agency's critical evaluation of (and substantial downgrade for) other portions of its proposal. Magnum likewise does not contend that substitution of the proposed engine (the subject of its protest) would have either raised its proposal's technical score to such an extent as to outweigh its comparatively low management score, or that such substitution would have lowered its proposal's substantially higher price. Accordingly, in light of the protester's overall technically inferior proposal and substantially higher price, the record clearly supports the agency's conclusion that the firm had no reasonable chance for award; the proposal, therefore, properly was excluded from the competitive range for further consideration for award. See Intown Properties, Inc., supra, at 4-5.³

Amida's protest

Amida contends that the agency improperly considered the experience and qualifications of T & J's major subcontractor, Allmand Brothers, a floodlight manufacturer, in determining that T & J met the solicitation's experience requirements. The RFP called for award to an "experienced portable floodlight manufacturing firm" (RFP § C.4.1) that has "5 years experience in . . . floodlight systems" (RFP § C.4.2). Amida contends that consideration of a subcontractor's experience to satisfy these requirements is not permitted by the RFP. In support of this argument, Amida relies on section C.4.1. of the RFP, which states that the agency "seeks to enter into a development contract with an experienced portable floodlight system manufacturing firm." Amida also points to the agency's response to a question received during the pre-proposal question and answer period. One offeror contended that the "commercial floodlight manufacturer" requirement was

²(...continued)

working as a set. The revised proposal also did not include detailed past performance and delivery schedule information, but rather, provided the protester's assurances that it believed it could meet all of the contract requirements.

³With respect to Magnum's challenge to the award to T & J, under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. See 4 C.F.R. § 21.0(a) (1997). Since the agency reasonably excluded Magnum's proposal from the competitive range for further consideration for award, and since another offeror's acceptable proposal was placed in the competitive range, Magnum is not an interested party to challenge the award to T & J. See The Hines-Ike Co., B-270693, Mar. 15, 1996, 96-1 CPD ¶ 158 at 4-5.

unduly restrictive--the offeror suggested that the "specification requirements can be met utilizing non-development item major [subassemblies] without this provision." The agency responded as follows:

The requirement for "commercial floodlight manufacturer" is not unduly restrictive and serves a material purpose. The solicitation is for a joint agreement with a commercial floodlight manufacturer that has previous experience and expertise to provide manufacturing data, unassembled parts, subassemblies, technical direction, and prior knowledge for [the agency] to assemble/manufacture reliable and durable floodlight units. A company that has not manufactured floodlights previously has less experience to provide services and materials required.

As a general rule, the experience of a technically qualified subcontractor may be used to satisfy experience requirements for a prospective prime contractor. See Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 4-5. If a solicitation by its express language prohibits satisfying a particular experience requirement through the experience of a prospective subcontractor, however, such a provision limits a prime contractor from relying on a subcontractor to comply with the experience criterion. Id. at 5.

Amida does not challenge the agency's determination that Allmand has the requisite experience and qualifications, but rather states that the terms of the RFP do not permit consideration of a subcontractor's experience to meet the requirements. Although the RFP (including the pre-proposal question and answer) emphasizes the importance of floodlight manufacturing experience to better ensure reliability and successful performance of the contract, and indicates that the agency anticipated a joint agreement with a commercial floodlight manufacturer, the RFP contains no express prohibition against a prime contractor relying on a subcontractor or other third party to comply with the solicitation requirements.⁴ Given the lack of any prohibition in the RFP on reliance on a subcontractor's experience, it was proper for subcontractor experience to be attributed to the offeror for purposes of assessing floodlight manufacturer/supplier involvement and experience.

⁴Subcontracting was plainly contemplated under the solicitation--subcontractor past performance and financial information was specifically requested by the solicitation (RFP § L.C.1.a), and, without differentiating between prime contractor and subcontractor performance information, the RFP instructions (at § L.C.1.b) provided in general terms that "[p]erformance information provided by the offer and any additional data obtained by the Government will be used for both responsibility determinations [and for evaluation purposes.]"

Consequently, we see no basis to object to the agency's consideration of Allmand's experience in determining whether T & J satisfied the RFP's requirements.⁵

With regard to the agency's determination that T & J in fact did satisfy the experience requirements, T & J's proposal contemplates a significant role for Allmand in performance of the contract's floodlight manufacturing requirements, and it is undisputed that Allmand has the requisite floodlight manufacturing experience to comply with the RFP requirements. Accordingly, we think the agency reasonably found that T & J, through its major subcontractor, satisfied the RFP's experience requirements.⁶

The protests are denied.

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⁵Similarly, the RFP's stated evaluation factors did not limit consideration by the agency of a proposed subcontractor's experience and technical expertise. Thus, we also do not find persuasive Amida's general protest allegation that the evaluators should have assigned greater risk to the awardee's proposal due to T & J's lack of its own floodlight manufacturing experience. Our review of the record confirms that the agency's risk assessment reasonably reflects the overall merits of the proposal, including the strong technical and management proposal submitted by T & J based upon its own substantial government contract experience and the specialized floodlight experience of its subcontractor.

⁶In its supplemental report comments, Amida contends that even though Allmand is a proposed subcontractor rather than the actual offeror, since the agency considered Allmand's experience in determining T & J's compliance with the RFP's qualification requirements, the agency should have evaluated Allmand's business information before awarding the contract. We have reviewed the awardee's technical proposal and the agency's record of its evaluation of that proposal in response to the protester's supplemental allegations. Our review confirms that a substantial amount of Allmand information--regarding Allmand's business (including current financial data and evidence of the firm's 40 years of floodlight manufacturing experience), products (including reliability and sales data), and numerous outstanding past performance references--was provided in the T & J proposal and was considered by the agency in its evaluation of that proposal. Consequently, Amida's contention that the agency failed to evaluate Allmand's business information and qualifications is simply not supported by the record.