Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MCA Research Corporation

File: B-278268.2

Date: April 10, 1998

Jan L. Atkinson, Esq., for the protester.
Philip F. Eckert, Jr., Esq., and Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.
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DIGEST

1. Proposal which did not clearly take exception to the solicitation's subcontracting limitation was properly considered to be technically acceptable by the contracting agency.

2. Contracting agency did not improperly apply unannounced criteria in evaluating as a strength of the awardee's proposal the awardee's possession of security clearances and its employee retention rates, but properly considered those features of the awardee's proposal as reasonably related to the stated management and personnel criteria in making qualitative distinctions between proposals.

DECISION

MCA Research Corporation protests the award of a contract to Automated Precision Technology, Inc. (APT) under request for proposals (RFP) No. SPO410-97-R-0281 issued by the Defense Logistics Agency (DLA), Defense General Supply Center, Richmond, Virginia, for management support services for various Naval Ordnance Center facilities. The procurement was conducted competitively pursuant to section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1994).[1] MCA contends that APT's proposal did not comply with the solicitation's mandatory subcontracting limitation, which rendered its proposal technically unacceptable, and

[1]Section 8(a) of the Small Business Act authorizes the U.S. Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1997) provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns.

that the contracting agency's technical evaluation and award selection were otherwise improper.

We deny the protest.

BACKGROUND

The RFP, issued November 19, 1996, contemplated the award of an indefinite-quantity, time-and-materials contract for a base period of 1 year with four 1-year options. RFP at 56, 72. The RFP's best value evaluation scheme provided for an integrated assessment of proposals considering price and certain capability criteria. RFP at 72, 75. The capability criteria consisted of three equally weighted evaluation criteria--management, personnel, and past performance--that were together significantly more important than cost/price. RFP at 75.

The RFP incorporated the Limitation on Subcontracting clause, FAR § 52.219-14, which is required for section 8(a) contracts. RFP at 56. This clause states, in relevant part, as follows:

> By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--
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> (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

The RFP's schedule of supplies/services identified 23 categories of labor required for performance of 9 task areas identified in the RFP's statement of work, and provided estimated annual quantities (in hours) for each labor category line item. The estimated annual quantities represent the maximum number of hours that can be ordered for each labor category. RFP at 2, 56. The RFP states that the quantities of services specified in the schedule are estimates only and that performance shall be made only as authorized by issued delivery orders. RFP at 56.

DLA received four proposals, including APT's and MCA's. The source selection evaluation board (SSEB) rated APT's proposal the highest, with highly acceptable/low risk ratings for the management, past performance, and personnel criteria. The SSEB rated MCA's proposal the [deleted], with [deleted] ratings for the [deleted] criteria and an [deleted] rating for the [deleted] criterion. APT stated in its proposal that its "subcontracts will be prepared in full compliance with FAR 52.219-14."

After initial proposals were received, the RFP's schedule of supplies/services was amended to include separate line items for subcontracted effort for each year; these line items had not-to-exceed ceiling amounts starting at $1.6 million for the base

year and escalating $50,000 for each option year. RFP Amendment 0002. Offerors were instructed to use only prime contractor rates for their prices for the labor category line items in the schedule because all subcontracting costs were to be encompassed in the separate not-to-exceed subcontracting line items.[2] Id. In other words, offered labor rates were to be prime contractor rates only and offerors were not to price any labor categories which were not to be performed by the prime contractor's employees. Given the approximate $5 million estimated annual value of the contract, the not-to-exceed subcontracting line items potentially limit the subcontracting effort more than the FAR § 52.219-14 subcontracting limitation incorporated in the solicitation.

In requesting best and final offers (BAFO), the contracting officer reiterated that prices should be for prime contractor labor only and that any labor categories the prime contractor would not provide during the life of the contract were to be "zeroed out" in the BAFO. The contracting officer also stated in her letter that in evaluating prices the agency would evaluate those labor categories for which all the contractors provided rates to ensure the comparison was on an equal basis.

APT offered prime contractor rates in its BAFO for 10 of the 23 labor categories for each year and "zeroed out" the prices for the remaining 13 categories of labor for which it proposed utilizing only subcontractor labor. APT's total BAFO price under the RFP schedule was $20,443,543. MCA's BAFO offered prime contractor rates for all 23 labor categories; this allows MCA to allocate either prime or subcontractor labor to each labor category, as necessary. MCA's BAFO price under the RFP schedule was [deleted].

In evaluating BAFOs, the agency noted that the fact that MCA offered prices for all 23 labor categories, even though it intended on subcontracting for many of the hours in these categories, caused its BAFO price to be artificially inflated because this pricing strategy essentially "double-counted" many of the hours to be provided. That is, MCA's BAFO included extended prices for all 23 labor category line items (the unit prices times the estimated maximum hours in the RFP schedule) plus the not-to-exceed subcontracting line items, which also cover labor hours included in the 23 labor category line items MCA priced. On the other hand, as noted by the agency, APT's BAFO, which provided prices for only 10 labor category line items and proposed subcontracting the entire labor effort of the 13 remaining categories, resulted in APT having the lowest price as calculated from the RFP schedule. However, the agency calculated that for the 10 categories of labor, for which both APT and MCA submitted prices, MCA had the lower common labor cost with a price of [deleted] compared to APT's price of $8,553,131.

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[2]This pricing structure was utilized by DLA following the advice of the Defense Contract Audit Agency that a time-and-materials contract should not include "blended" prime contractor and subcontractor rates in the labor categories.

DLA also estimated that 53 percent of APT's total labor costs would be for subcontractor costs, which the agency noted would exceed the 50-percent subcontracting limitation as well as the not-to-exceed subcontracting line items. The agency's estimate was based on the application of the subcontractor labor rates provided by APT in its initial proposal to the total estimated labor hours for the labor category line items that APT did not price in its BAFO, i.e., that APT proposed to subcontract.

Following the BAFO evaluation, the agency contract specialist telephoned APT's president on September 8, 1997 to confirm that the offeror understood that the prime contractor was required to provide at least 50 percent of the cost of labor because of the subcontracting limitation. According to the contract specialist's record of that call, APT's president advised that he was "fully aware of the requirement and prepared his bid accordingly" and "that he is confident that APT can achieve this with the categories [of labor] quoted."

On September 9, 1997, the agency's source selection authority (SSA) was briefed on the evaluation by the SSEB and, following the SSEB's recommendation, selected APT for award, as documented in a source selection decision document (SSDD). The SSDD listed 13 specific strengths associated with APT's proposal that led the SSA to consider APT's proposal technically superior to MCA's proposal.[3] The SSDD expressly recognized that the total prices, as calculated from the RFP schedule, which showed that APT's proposal was significantly lower priced, could not reasonably be used to compare the proposals because APT priced only 10 labor categories whereas MCA priced all 23 labor categories. The SSDD noted MCA's price advantage for the 10 common labor categories and found that the offerors' prices were reasonable and realistic. The SSDD noted, however, that "[i]t is difficult to conclude which firm would be the lowest offer[or] had all labor categories been quoted by both firms." The SSDD concluded that, although both MCA and APT submitted "extremely good proposals" and [deleted], the advantages offered by APT's technical strengths outweighed any potential cost advantage offered by MCA as well as the increased flexibility offered by MCA's approach of providing personnel from either itself or its subcontractors for all 23 labor categories.

The SSDD expressly discussed the potential that APT may prematurely reach the limits of the not-to-exceed subcontracting line items or exceed the 50-percent subcontracting limitation, given APT's technical approach of only providing personnel for 10 labor categories, but concluded that "it is worth this risk to obtain APT's strengths on this acquisition." In this regard, the SSDD noted that the actual work to be ordered is "completely unpredictable" and that APT's proposal offers to perform the work in categories that constitute a substantial amount of the contract work.

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[3]These strengths were found and documented by the SSEB.

Award was made to APT, following the SBA's determination that APT was eligible for award as an 8(a) concern.[4] After a debriefing, MCA filed an agency-level protest, and following the denial of its agency-level protest, MCA filed this protest with our Office.

ANALYSIS

Subcontracting Limitation

MCA contends that because APT proposed to perform only 10 categories of labor with its own employees (amounting to 44 percent of the total estimated labor hours), with the remainder of the 23 categories to be provided by subcontractors (amounting to 56 percent of the total estimated labor hours), that APT's proposal on its face does not offer to comply with the mandatory subcontracting limitation, and is therefore technically unacceptable. MCA points to the agency's assessment, based on APT's subcontractor labor rates submitted with its initial proposal, which found that APT may be unable to comply with the 50-percent subcontracting limitation and to perform within the limits of the not-to-exceed subcontracting line items, should the agency actually order the maximum number of labor hours specified in the solicitation's schedule of supplies/services for the labor categories subcontracted by APT.

As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Orincon Corp., B-276704, July 18, 1997, 97-2 CPD ¶ 26 at 4. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, we have considered this to be a matter of the proposal's technical acceptability; a proposal that fails to conform to a material term and condition of the solicitation such as the subcontracting limitation is unacceptable and may not form the basis for an award. Id.

We disagree with MCA that APT's proposal on its face should have led the agency to the conclusion that APT could not or would not comply with the 50-percent subcontracting limitation. As described above, APT, in its proposal, specifically offered to comply with the subcontracting limitation in entering into subcontracts with its team members. After the solicitation was amended to establish not-to-exceed line items for all subcontracted work, APT submitted an amended proposal and BAFO to account for this amended pricing structure, and did not take

[4]There is no indication that the SBA specifically considered any aspect of APT's proposed compliance with the subcontracting limitation in determining APT eligible for award as an 8(a) concern.

exception to the not-to-exceed subcontracting line items, even though these amounts potentially limit the subcontracting effort more than the 50-percent subcontracting limitation. The fact that APT will provide its own personnel for only 10 of the 23 labor category line items, which constitute the minority of the total estimated hours to be provided under the contract, does not necessarily mean that APT could not or would not comply with the subcontracting limitation, given that it is uncertain what labor categories will actually be ordered under the contract, the limitation is based on the "cost of contract performance" by prime contractor employees (not merely the number of hours worked by prime contractor employees), and APT is, in fact, offering to perform a significant portion of the contract labor with its own employees.[5]

Thus, contrary to the protester's assertion, the September 8 post-BAFO communication, during which APT's president confirmed his understanding of, and intention to comply with, the subcontracting limitation, was not the basis on which the agency determined APT's proposal acceptable in this regard because APT was not offered the opportunity to, nor did it, change its proposal. Cf. Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 (during post-BAFO discussions, awardee changed its technical approach to comply with subcontracting limitation).

MCA nonetheless maintains that in evaluating APT's compliance with the subcontracting limitation and determining compliance, the agency must have improperly "rescoped" the contract's level of effort by reducing its requirements for the categories of labor APT proposed to subcontract. MCA states that, had it known that the majority of work would be assigned to the 10 labor categories which APT priced, MCA would have utilized a different pricing strategy to make its price for these potentially highly-used labor categories more competitive.

The record simply does not show that the agency has modified its estimates as to the relative amount of work it expects to be assigned of the various labor

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[5]We note that a contractor's compliance with the subcontracting limitation in an indefinite-quantity contract, such as is involved here, ultimately depends on the type of work required by the delivery orders, which, as stated by the SSA in the SSDD, "is completely unpredictable at this point." In this regard, there is no requirement that each delivery order performed by the contractor comply with the subcontracting limitation. See Lockheed Martin Fairchild Sys., B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 at 5 (subcontracting limitation clause applies to the contract as a whole and does not require that each delivery order placed under the contract satisfy the requirements of the clause); 13 C.F.R. § 124.314(d) (1997) (an 8(a) program contractor for an indefinite quantity of services or supplies is not required to perform at least 50 percent of each task order with its own force, but is required to perform at least 50 percent of the combined total of all task orders).

categories. Instead, the agency recognized the risk APT's approach presented of exceeding the 50-percent subcontracting limitation or of prematurely reaching the limits of the not-to-exceed subcontracting line items, but, since APT was offering to perform a substantial amount of the work itself and committed to comply with the limitations, the agency was unable to conclude that APT could not or would not comply with them. Based on our review, we cannot say the agency's judgment was unreasonable.

MCA contends that the SSEB did not properly consider the risk to the agency presented by APT prematurely reaching the limits of the not-to-exceed subcontracting line items, because under agency procedures technical evaluators are not privy to cost information, and thus did not know whether APT's proposed staffing in its cost proposal was consistent with its proposed technical approach. MCA further alleges that no subsequent integrated assessment was made as required.

However, APT's proposal, which was evaluated by the technical evaluators, clearly indicated a functional allocation of tasks to specific subcontractors, with APT retaining certain functional areas. Although the technical evaluators may not have known precisely the categories of labor APT intended to subcontract, or the extent of that subcontracting, the SSA nonetheless conducted an integrated assessment of APT's technical and cost proposals, including the impact of APT's subcontracting, following the initial technical evaluation. Indeed, the SSDD details the SSA's integrated assessment of APT's technical strengths in light of the risk to the government posed by the extent of APT's subcontracting and the SSA's acceptance that if APT reached the subcontracting limit during performance, "it is worth this risk to obtain APT's strengths on this acquisition."

Other Issues

MCA contends that some of the 13 evaluated strengths for APT's proposal listed in the SSDD and considered by the SSA in making the source selection decision were not based on the RFP's stated evaluation criteria. Specifically, MCA objects to the listed strength in the SSDD that APT and its personnel already possess security clearances, since the RFP contained no requirement for the contractor or its personnel to possess security clearances and the RFP's instructions to offerors did not indicate that the holding of security clearances would be considered in any manner. MCA also objects to the SSA viewing as a strength APT's retention rates for its personnel and those of its subcontractors, which APT volunteered in its proposal. MCA views the SSA's consideration of APT's security clearances and retention rates in making the source selection decision as tantamount to the use of unannounced evaluation criteria as discriminators in the award selection. MCA contends that, had these evaluation criteria been disclosed, it could have also addressed them in its proposal to its advantage.

A solicitation must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors and significant subfactors set forth in the solicitation. FAR §§ 15.605(d), 15.608 (June 1997); Akal Sec., Inc., B-271385, B-271385.3, July 10, 1996, 96-2 CPD ¶ 77 at 3. However, while agencies are required to identify the evaluation factors and significant subfactors, they are not required to identify all areas of each factor or subfactor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. ORI Servs. Corp., B-261225, July 28, 1995, 95-2 CPD ¶ 55 at 2-3; Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 at 4.

Here, the record shows that the SSEB and the SSA reasonably evaluated APT's possession of security clearances and employee retention rates in the context of the stated evaluation criteria for management and personnel, and that these and other listed strengths were a reflection of the comparative judgments made by the SSEB and the SSA about the relative merits of the competing proposals.

Specifically, while the SSEB and the SSA recognized that possession of security clearances is not required by the RFP, they viewed APT's possession of security clearances as a strong point of that offeror's proposal under the management criterion because it reflects thoroughness of management and administrative organization and supports the contingency requirements of the government.[6] The SSEB also viewed the possession of security clearances by APT contractor personnel as a strong point under the personnel criterion because it reflects positively on the knowledge and expertise of the proposed personnel. MCA has not shown that the SSA's consideration of APT's possession of security clearances as "tend[ing] to support a sound, respectable business base" and as supporting the government's contingency requirements is not reasonably related to the above evaluation criteria or otherwise improperly taken into account.

Regarding APT's retention rates, the SSEB logically related these to the management criterion because, as indicated in the evaluation documentation, the retention rates reflect positively on the labor force in terms of the capability of the contractor's personnel management policies and resources to deliver the required

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[6]The contract security classification specification in the RFP's statement of work requires the contractor under certain circumstances to obtain facility and personnel clearances in order to have access to, or to be able to handle, classified information or material, as may be required during contract performance. RFP at 38. The statement of work also lists a number of applicable Department of Defense (DOD) and agency directives related to handling of classified information and other security procedures, such as DOD Directive 5200.2-R, DOD Personnel Security Program. RFP at 25-27. Accordingly, contrary to MCA's assertion, the possession by APT and its personnel of security clearances is a feature of APT's proposal reasonably related to the requirements of the statement of work.

expertise at the required level of effort. MCA has not persuaded us that the SSA's consideration of APT's retention rates as demonstrating the ability of that offeror to acquire the "right people for the right job" and to "create a professional environment that allows them to retain talented resources" was not reasonably related to the management evaluation criterion or was otherwise improperly considered.

MCA also contends that the remaining 11 APT strengths listed in the SSDD are also present in MCA's proposal in one form or another so that they could not properly be considered qualitative discriminators between the proposals. However, as explained in the agency administrative report, the agency does not argue that MCA failed to address these areas or that they were unique APT capabilities, but that it was the subjective assessment of the evaluators, based on the relative differences in the information APT and MCA had in their proposals, that APT's proposal was better in these areas. In its comments, MCA has not rebutted this reasonable explanation of the agency's comparative evaluations.

MCA next points out that the SSA's statement in the SSDD that APT's and its subcontractors' overlapping prior experience allows for greater flexibility is contradicted by the SSA's statement, also in the SSDD, that APT's providing only 10 labor categories as a prime contractor will limit its flexibility in allocating work to either itself or to its subcontractors. MCA has taken the SSA's statements out of context. The "flexibility" referred to by the SSA in evaluating APT's past performance with its team members refers to APT having "demonstrated that coordination, communication and the ability to resolve conflicts/issues is already resident within the contractor's team." This is clearly different from the potential lack of "flexibility" noted by the SSA with regard to APT's subcontracting arrangements with its team members for performance of the delivery orders under the contract, which was a potential problem considered by the SSA in assessing APT's proposal.

Finally, MCA alleges that the agency failed to conduct meaningful discussions because no substantive weaknesses (such as the lack of information in its proposal on security clearances) were brought to its attention during discussions, and despite its asserted strengths for personnel, it received only an "acceptable" rating for the personnel criterion. However, the agency was not required to specifically mention to MCA during discussions enhancements that would improve MCA's "acceptable" rating for the personnel criterion, such as information on security clearances, because there was no deficiency, weakness, or excess in MCA's proposal in this regard that required amplification or correction. See Holmes & Narver, Inc., B-266246, Jan. 18, 1996, 96-1 CPD ¶ 55 at 6.

The protest is denied.

Comptroller General
of the United States