



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Mnemonics, Inc.

File: B-290961

Date: October 28, 2002

John R. Kancilia, Esq., Gray, Harris & Robinson, for the protester.
Maj. Robert B. Neill and Wayne J. Van Kauwenbergh, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation provided that technical evaluation factors would be evaluated against specified requirements on a “pass/fail” basis, and agency concluded that protester’s proposal met all the stated “pass/fail” requirements, agency improperly excluded protester’s proposal from the competitive range [deleted] because protester’s proposal was “not among the most highly rated,” where the agency’s determination was based on an assessment of proposals’ “strengths” “weaknesses” and “deficiencies” under the factors that the solicitation indicated would be evaluated on a “pass/fail” basis, as well as under other undisclosed evaluation factors.

DECISION

Mnemonics, Inc. protests the Department of the Army’s exclusion of Mnemonics’ proposal from the competitive range under request for proposals (RFP) No. USZA95-02-R-0017 for the development and production of Intel Broadcast Receivers (IBR) to be used in MH-47 and MH-60 helicopters. Mnemonics’ protests, among other things, that the agency’s exclusion of Mnemonics’ proposal, and the retention of [deleted] proposal in the competitive range, were based on the agency’s application of unstated evaluation factors.

We sustain the protest.

BACKGROUND

The RFP was issued on February 15, 2002, seeking proposals to develop, test, and produce IBRs for use with MH-47 medium lift and H-60 utility helicopters.¹ Agency Report, Tab 3, RFP at 6. The value of the resulting contract is expected to be [deleted]. Agency Report, Tab 2, Contracting Officer's Statement, at 1-2.

As amended, the solicitation provided that proposals would be evaluated on the basis of technical, business, and past performance factors, and that technical factors were "of paramount importance." Agency Report, Tab 3, RFP at 54. Section M of the solicitation listed 17 technical evaluation factors, provided that evaluation under 14 of these 17 factors would be performed on a "pass/fail" basis,² and stated that proposals would be subjectively "graded" under the 3 remaining technical factors.³ Id. at 55-58. The solicitation also provided that an evaluation of "proposal risk" would be integrated into the rating of each technical evaluation factor.⁴ Id. at 54.

For each of the 14 "pass/fail" factors, section M of the solicitation listed the factor and, beside that listing, described the specific requirements proposals must meet. For example, the solicitation stated, in part:

- a. Receive Capability The IBR shall have a cPCI [compact Peripheral Component Interface] ENTR [Embedded National Tactical Receiver] card to receive four (4) receive channels with spare capability to insert another cPCI ENTR card to increase to eight (8) receive channels. Channels shall be processed simultaneously. IBR must receive and process Tactical Related Applications Program (TRAP) Data Dissemination Systems (TDDS), Tactical Information Broadcast Service (TIBS), and On-Board Processing/Direct Down Link (OBP/DDL),

¹ The function of the IBRs is to allow receipt of real time intelligence information up to and during missions. Agency Report, Tab 2, Contracting Officer's Statement, at 2.

² The fourteen "pass/fail" factors were: receive capability, weight, form/fit, system start up, classification level, COMSEC (Communications Security Function), data processing functions, bus control, zeroize functions, self test, software, electrical interfaces, cooling, and operating environment. Id. at 55-57.

³ The three "graded" factors were: date for first article delivery, processor and memory, and maintenance and support. Id. at 57.

⁴ "Proposal risk" was defined as "those risks associated with an offeror's proposed approach in meeting the Government requirements." Id. at 54.

previously called Tactical Data Information Exchange Subsystem B (TADIXS-B). The user must be able to select and/or change preloaded frequencies for all channels, threats, filter settings, and other pertinent IBR settings via the 1553 or Ethernet interface. The IBR shall provide status on the operation of each channel via the 1553 and Ethernet interface. Data rates shall be adjustable up to 19.2 Kilobits Per Second (kbps).

.

f. COMSEC (Communications Security Function) Provide embedded COMSEC for all data channels. (COMSEC will be determined by IBS requirements as reflected in IBS Broadcast JORD.) The IBR must have an internal power backup of crypto keys that can provide a minimum of 24 hour backup. The IBR must provide crypto loading at the LRU and an external connector for remote crypto loading capability via a remotely located fill panel. The IBR shall receive “black” or unclassified traffic keys for training and/or maintenance functions.

.

g. Data Processing Functions Data filtering and output message formatting must be independently selectable. Provides discrete serial, 1553 bus, and Ethernet bus communications.

h. Bus Control IBR shall be controllable by CAAS using Ethernet and MIL-STD-1553B messages in flight.

Agency Report, Tab 3, RFP at 54-56.

On or before the May 6, 2002 closing date, proposals were submitted by [deleted] offerors--Mnemonics, [deleted].⁵ Following requests for clarification, the agency evaluated the offerors’ technical proposals, finding that [deleted] Mnemonics’ and [deleted] proposals met all of the stated requirements for each of the 14 “pass/fail” factors; accordingly, [deleted] proposals received ratings of “pass” for each of these factors. Agency Report, Tab 49, Briefing for Source Selection Authority (SSA) at 28,

⁵ Because the agency’s evaluation of [deleted] is not relevant to resolution of Mnemonics’ protest, our decision does not further discuss [deleted].

42. Nonetheless, the agency also performed a qualitative assessment of proposal “strengths,” “weaknesses” and “deficiencies” related to each of the 14 “pass/fail” factors.

Specifically, the agency evaluated [deleted] proposal as containing various “strengths” because it proposed to exceed the stated requirements for the “pass/fail” factors.⁶ For example, the agency credited [deleted] proposal with a “strength” under one “pass/fail” factor, [deleted], stating: “[deleted]. This was not a requirement.” Agency Report, Tab 49, Briefing to SSA, at 30. Similarly, the agency credited [deleted] proposal with a “strength” under another “pass/fail” factor, [deleted], because [deleted] proposed “[deleted] over and above what was required.” Agency Report, Tab 46, Technical Evaluation Summary [deleted], at 4. Again, with regard to [deleted], also a “pass/fail” factor, the agency credited [deleted] proposal with a strength, stating: “[deleted] proposed [deleted] that exceed the requirements. [deleted] were proposed.” Agency Report, Tab 49, Briefing to SSA, at 31. Overall, the evaluation record shows that the agency credited [deleted] proposal with a total of [deleted] strengths under [deleted] of the “pass/fail” evaluation factors.⁷ Agency Report, Tab 46, Briefing to SSA, at 30-33.

In contrast, while acknowledging that Mnemonics’ proposal met every stated requirement under each of the “pass/fail” factors, the agency evaluated Mnemonics’ proposal as reflecting certain “weaknesses” and “deficiencies” under these factors. Most significantly, in evaluating Mnemonics’ proposal under the “pass/fail” factor for [deleted], the agency assessed a “major deficiency” to Mnemonics’ proposal on the basis that Mnemonics had proposed to [deleted].⁸ Agency Report, Tab 49, Briefing to SSA, at 48. The agency does not dispute that use of the [deleted] will, in fact, comply with the requirements stated by the solicitation regarding [deleted]. Rather the agency states that [deleted] rendered Mnemonics’ proposal “deficient” because [deleted].” Agency Report, Tab 49, Briefing to SSA, at 48. One of the individual evaluators’ worksheets candidly states: “The contractor[’]s proposal [deleted] makes a significant departure from the intent of the government to [deleted]. The [deleted] is planned as the new [deleted] standard.” Agency Report Tab 34, Individual Evaluator Worksheet, at 2.

⁶ The agency’s source selection plan, which was not disclosed to offerors, defined a “strength” as “a feature, item, technique or methodology, which stands out as a significant benefit to enhance the effective execution of the program.” Agency Report, Tab 16, Source Selection Plan, at 5.

⁷ The agency credited [deleted] proposal with [deleted] strengths under the “pass/fail” factor, [deleted], and [deleted] each under each of the following “pass/fail” factors: [deleted]. Id.

⁸ The [deleted] are [deleted] which [deleted].

Following the agency's completion of its technical evaluation, and evaluation of the offerors' cost and past performance,⁹ the agency determined to eliminate Mnemonics' proposal from the competitive range [deleted] "on the basis of its [Mnemonics'] technical proposal not being among the most highly rated."¹⁰ Agency Report, Tab 55, Letter from Contracting Officer to Mnemonics (July 1, 2002). Upon being advised that it had been eliminated from the competition, Mnemonics filed this protest.

DISCUSSION

Mnemonics protests that its proposal was improperly eliminated from the competition on the basis of unstated evaluation factors. More specifically, Mnemonics maintains that the agency's evaluation of [deleted] Mnemonics' and [deleted] proposals under the 14 "pass/fail" technical evaluation factors reflected the agency's consideration and application of material, undisclosed criteria. We agree.

Although procuring agencies have broad discretion regarding selection of the evaluation criteria to be applied, *see, e.g., TRW, Inc.*, B-234558, June 21, 1989, 89-1 CPD ¶ 584 at 4, they are required to disclose all evaluation factors and significant subfactors, along with their relative importance, in order for offerors to meaningfully compete on an equal basis. 41 U.S.C. § 253a(b)(1) (1994); Federal Acquisition Regulation (FAR) § 15.203(a)(4). An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another. *Hattal & Assocs.*, B-243357; B-243357.2, July 25, 1991, 91-2 CPD ¶ 90. Accordingly, once offerors are informed of the evaluation criteria against which proposals will be evaluated, the agency must adhere to the stated criteria, or inform all offerors of all significant changes. *DynCorp*, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 5.

Here, the agency clearly advised offerors that proposals would be evaluated under 14 of the 17 technical evaluation factors based on an objective assessment as to whether or not the proposed IBR would meet the stated performance requirements. The agency's stated basis of evaluation for these factors was specifically described in contrast to the subjective grading by which the remaining three technical factors

⁹ Our decision does not further address the agency's evaluation of cost and past performance because the contracting officer expressly states: "Mnemonics was not excluded from the competitive range based upon cost or past performance." Agency Report, Tab 2, Contracting Officer's Statement, at 10.

¹⁰ More specifically, the contracting officer stipulates that Mnemonics' proposal of [deleted] "was a primary reason for elimination from the competitive range." Agency Report, Tab 2, Contracting Officer's Statement, at 15. [Deleted].

would be evaluated. Notwithstanding these publicly stated ground rules for the competition, the agency proceeded to make qualitative distinctions between the two proposals based on factors which were neither disclosed, nor reasonably subsumed within the stated requirements. Ultimately, the agency concluded that [deleted] “among the most highly rated” based on these distinctions.

As noted above, despite the undisputed fact that Mnemonics’ proposed [deleted] met the solicitation’s stated requirements, the agency concluded that this aspect of Mnemonics’ proposal rendered its proposal “deficient” because this approach was “a significant departure from the intent of the government [deleted].” Agency Report, Tab 34, Individual Evaluator Worksheet, at 2. On this basis alone we find the agency to have clearly applied an unstated evaluation factor.¹¹ The agency asserts that, by advising offerors of the agency’s intent to perform a “proposal risk” assessment, the agency fulfilled its obligation to disclose all of the evaluation criteria that it subsequently applied. We disagree.

While agencies are not required to identify each and every individual element encompassed within a stated evaluation factor/subfactor, unstated individual elements must be reasonably subsumed within the stated factors/subfactors. Israel Aircraft Indus., Ltd. MATA Helicopters Div., B-274389, et al., Dec. 6, 1996, 97-1 CPD ¶ 41. This was not the case here. Specifically, nothing in the solicitation’s stated requirements reasonably put offerors on notice that a proposal incorporating anything other than [deleted] would be evaluated as contrary to the “intent of the government” and that such a proposal would be evaluated as containing a “major deficiency.”

Additionally, the agency’s assessment of “strengths” in [deleted] proposal under the “pass/fail” evaluation factors was inconsistent with the solicitation statement that proposals would be evaluated against the stated performance requirements on a “pass/fail” basis. Nothing in the solicitation reasonably notified offerors that, in

¹¹ We also note that the existing record contains virtually no documented support for the agency’s stated concerns regarding Mnemonics’ ability to obtain [deleted]. Specifically, Mnemonics responded to the agency’s clarification requests concerning the availability of the [deleted] by stating that Mnemonics currently possesses [deleted] to meet initial delivery requirements, and provided the agency with correspondence between itself and the [deleted] would be available. Agency Report, Tab 29, Mnemonics’ Response to IBR Clarification Questions. Nothing in the record refutes Mnemonics’ representations in this regard. The agency’s estimation of a total contract value [deleted] is based on purchasing production quantities of 800 IBR units. Agency Report, Tab 3, RFP at 2, contract line item numbers 3, 4. Further, the agency upwardly adjusted Mnemonics’ proposed price by [deleted] to reflect the [deleted] acquisition of [deleted]. Agency Report, Tab 48, Business Report Memorandum, at 2.

addition to evaluating whether or not a proposal met the stated “pass/fail” requirements, proposals would be credited with “strengths” for exceeding those requirements in various undisclosed ways. Offerors whose proposals were excluded from the competitive range might have proposed enhancements had they been advised of the agency’s intent in this regard. In our view, the agency’s failure to disclose its intent created an unfair competition.

The protest is sustained.

RECOMMENDATION

Based on the record, as discussed above, the existing solicitation appears to be defective in two respects. First, the RFP does not disclose the Army’s apparent conclusion that a proposal based on [deleted] does not meet its needs. Second, the solicitation describes a “pass/fail” evaluation methodology for the majority of the technical evaluation factors, while the Army apparently desires to evaluate relative strengths, giving credit for proposed enhancements that exceed minimally acceptable performance levels. Accordingly, we recommend that the agency review its requirements and amend the solicitation in a manner which clearly discloses the applicable requirements and evaluation methodology. Upon amending the solicitation, the agency should seek new proposals and evaluate those proposals in a manner consistent with the solicitation provisions. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2002). In accordance with section 21.8 of our Regulations, Mnemonics’ certified claim for those costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel