



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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: Dixon Group, Inc.; Command Decisions Systems and Solutions, Inc.

File: B-402118; B-402118.2; B-402118.3; B-402118.4; B-402118.5

Date: January 15, 2010

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for Dixon Group, Inc.; Kenneth D. Brody, Esq., and Thomas K. David, Esq., David, Brody & Dondershine, LLP, for Command Decisions Systems & Solutions, Inc., the protesters. James H. Roberts, III, Esq., Van Scoyoc Kelly, PLLC, for Lux Consulting Group, an intervenor.

Jonathan A. Baker, Esq., Department of Health and Human Services, for the agency. Paula A. Williams, Esq., Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation provided that the past performance of proposed subcontractors would be evaluated, agency properly downgraded protester's proposal under the past performance evaluation factor based on the decision of protester's proposed subcontractor to suspend performance under a prior contract.
2. Agency conducted meaningful discussions with protester where it notified the protester that it was considering negative past performance information regarding its proposed subcontractor and protester responded by acknowledging that the subcontractor was communicating directly with the agency regarding that matter.
3. Contracting officer reasonably determined that, except for past performance, protester's and awardee's proposals were equal with regard to non-cost evaluation factors, and that protester's negative past performance rating outweighed its slight price advantage.
4. Where solicitation required performance of cost realism analysis, agency's discussion of areas in protester's cost proposal that appeared unrealistically low were not misleading or improper.

DECISION

Dixon Group, Inc. (Dixon), of Washington, D.C., and Command Decisions Systems and Solutions, Inc. (CDSS) of Chantilly, Virginia, protest the Department of Health and Human Services' (HHS) award of a contract to Lux Consulting Group, Inc. (Lux), pursuant to request for proposals (RFP) No. 09Y070993 to provide grants management support services for HHS's Administration on Children, Youth and Families (ACYF) and Office of Head Start (OHS). The protesters challenge various aspects of the agency's source selection process.

We deny the protests.

BACKGROUND

The solicitation was issued in December 2008 as an 8(a) set-aside, seeking proposals to provide logistical and administrative support for ACYF's and OHS's grant review process.¹ The solicitation contemplated award of a cost-plus-fixed-fee contract for a base period, with four 1-year option periods, and advised offerors that award would be made on a "best overall value" basis after considering the following evaluation factors: technical merit,² past performance³ and cost/price.⁴ RFP at 249. Of relevance here, the solicitation specifically advised offerors that their

¹ More specifically, the solicitation provided that performance "shall include provision of support for the preparation and distribution of announcements of funding opportunities, responding to requests for clarification and material from potential applicants, conducting Peer Reviews, compiling, analyzing and reporting the results to Federal staff and supporting the Decision process, providing preliminary technical assistance to potential and to unsuccessful applicants, training of Peer Review Panel Chairs and Reviewers and ACYF and OHS staff, and preliminary evaluation of review processes of ACYF and OHS." Agency Report (AR), Tab 2, RFP at 176.

² With regard to the technical merit evaluation factor, the solicitation established the following subfactors: technical approach, management plan, qualifications of proposed personnel, understanding the problem, and organizational capacity and experience. RFP at 249-51.

³ With regard to past performance, the solicitation required identification of at least 5 prior contracts performed by the offeror, and at least 3 prior contracts performed by proposed subcontractors.

⁴ With regard to cost/price, the solicitation advised offerors that proposed costs would be evaluated for cost realism. RFP at 253.

subcontractors' past performance would be evaluated under the past performance factor. RFP at 243.

The record establishes that Dixon is the incumbent contractor for the requirements at issue;⁵ that Xtria LLC was one of Dixon's primary subcontractors under the prior contract; and that, as discussed further below, Xtria was proposed as a subcontractor by CDSS under the protested procurement. The record further establishes that, during performance of the prior contract, a dispute arose between Dixon and Xtria, and that this dispute resulted in Xtria's decision to--in Xtria's words--"withhold services to catalyze long overdue payment action from [Dixon]." Agency Report, Tab 13, Letter from Xtria to HHS, May 13, 2009, at 1622. Xtria elaborates that: "access to the [HHS] website was consciously restricted from January 9, 2009 to February 25, 2009 (46 days) for deliberate reasons stemming both from [Dixon's] chronic inability to settle Xtria's invoices in a timely manner, and pending [Dixon's] acceptance of our [Xtria's] written offer to continue support of the website beyond our original agreement." *Id.* In short, Xtria states that it made a conscious decision to stop providing subcontractor services under the predecessor contract because of Xtria's dissatisfaction with its ongoing business relationship with Dixon.

With regard to the current procurement, eight offerors submitted proposals on or before the February 5, 2009 closing date, including Dixon, CDSS, and Lux. After the initial evaluations,⁶ the agency conducted discussions, and sought various proposal revisions; final proposal revisions were submitted on September 17.

As mentioned above, CDSS's proposal contemplated reliance on Xtria (Dixon's prior subcontractor) to perform various portions of the contract requirements. In the initial evaluation, CDSS's proposal was downgraded with regard to past performance based on Xtria's decision to "withhold services" during the prior contract. In written discussions with CDSS, the agency notified CDSS of the agency's concerns about Xtria's past performance, stating:

The Government received negative past performance information for the subcontractor. The subcontractor is addressing this issue and will submit their comments to the Government under separate cover.

AR, Tab 12, at 1623.

⁵ The contracting officer describes the current solicitation requirements as "substantially the same as [those under] the predecessor contract." Contracting Officer's Statement, Nov. 20, 2009, at 1.

⁶ The proposals of the offerors other than the protesters and the awardee are not relevant to resolution of the protests, and are not further discussed.

Consistent with this notification, the agency sought further information from Xtria, advising Xtria, among other things, that:

[F]or the period of three months, technical support of the ACYF Grant Web, a critical component of ACYF's Grant Management Process, was withheld without explanation. This resulted in significant embarrassment of ACYF and potential loss of productivity in one of the critical elements of the contract.

AR, Tab 12, at 1642.

In response, Xtria stated:

[A]ccess to the Administration on Children, Youth and Families (ACYF) Grant website was consciously restricted from January 09, 2009 to February 25, 2009 (46 days) for deliberate reasons stemming both from [Dixon's] chronic inability to settle Xtria's invoices in a timely manner, and pending [Dixon's] acceptance of our written offer to continue support of the website beyond our original agreement. After repeatedly raising legitimate business concerns through the appropriate project channels, and concurrently with [Dixon's] executive management, Xtria eventually had no choice but to withhold services to catalyze long overdue payment action from [Dixon]. While we were very hesitant to do so, and extremely sensitive to the adverse impact this action might have on ACYF, at a certain point we could no longer provide our support to [Dixon] free of charge. . . .

.

While we have been tolerant and flexible, we may have to restrict service once again due to non-payment: [Dixon] has been notified as such and has failed to offer any resolution . . . or response, which repeats an ongoing pattern.

While we find it unfortunate that we need to raise these prime-subcontractor problems here, we also find it very concerning that the above may have been misrepresented as a lack of technical capacity on Xtria's part.

AR, Tab 13, Letter from Xtria to HHS, May 13, 2009.

In short, Xtria's response to the agency specifically stated that its decision to withhold services under the predecessor contract was not due to Xtria's, "lack of technical capacity," but, rather, was a "conscious" and "deliberate" decision by Xtria to "catalyze" certain actions by Dixon, including resolution of outstanding payment

issues and acceptance of Xtria's "written offer to continue support of the website beyond our original agreement." Id. at 1622. Further, Xtria expressly acknowledged that it was aware of "the adverse impact this action might have on ACYF," but took the action nonetheless. Finally, Xtria warned that "[w]hile we have been tolerant and flexible, we may have to restrict service once again." Id. at 1623.

In CDSS's May 15, 2009 revised proposal, CDSS expressly acknowledged the agency's identification of its concerns regarding its proposed subcontractor, stating:

Q: The Government received negative past performance information for the subcontractor. The subcontractor is addressing this issue and will submit their comments to the Government under separate cover.

A: Upon request, Xtria provided past performance evaluation clarification directly to the Contracting Office under a separate cover on May 13, 2009.

AR, Tab 16, at 1908.

Final revised proposals were evaluated by the agency's evaluation personnel, with the following results:

	Lux	Dixon	CDSS
Technical Merit	91.00	89.33	93.00
Past Performance	9.40	8.32	8.44
Total Score for Non-Cost Factors	100.4	97.65	101.44
Evaluated Cost/Price	\$18,787,205	\$22,431,570	\$18,553,113

AR, Tab 40, at 3150-51.

Upon reviewing the evaluation record, the contracting officer noted that Dixon's proposal received the lowest ratings under the non-cost factors, and proposed costs more than \$3 million higher than those proposed by either Lux or CDSS. Accordingly, the contracting officer eliminated Dixon's proposal from further consideration.

With regard to the proposals submitted by Lux and CDSS, the contracting officer concluded that, except for past performance, the two proposals were technically equal. The contracting officer further concluded that, notwithstanding the numerical scores assigned by the agency's evaluation teams, the negative past performance of CDSS's proposed subcontractor outweighed the proposal's slight cost advantage. Accordingly, the contracting officer concluded that Lux's proposal represented the best value to the government; a contract was awarded to Lux on September 30. These protests followed.

DISCUSSION

CDSS's Protest

CDSS first protests that it was “unreasonable” for the agency to downgrade its proposal under the past performance factor based on Xtria’s performance under the predecessor contract. In this regard, CDSS asserts that the agency had an insufficient factual basis to determine whether Xtria “fulfilled its requirements under its subcontract with Dixon,” and maintains that CDSS “should have received a 10 [the highest possible score] for its past performance rating.” CDSS Protest, Oct. 13, 2009, at 9-10; CDSS Supplemental Protest, Nov. 9, 2009, at 7.

The evaluation of past performance is a matter within the discretion of the contracting agency, which our Office will review in order to ensure that it was reasonable and consistent with the stated evaluation criteria. NLX Corp., B-288785, B-288785.2, Dec. 7, 2001, 2001 CPD ¶ 198 at 7. An agency’s past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency’s interpretation of the underlying facts, Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5, and the protester’s mere disagreement with the agency’s judgment is not sufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, we think the agency’s determination to downgrade CDSS’s proposal due to the prior past performance of its proposed subcontractor, Xtria, was reasonable. As noted above, the solicitation required offerors to submit past performance information regarding proposed subcontractors and specifically provided that subcontractors’ past performance would be considered in the evaluation. Further, as discussed above, CDSS’s proposed subcontractor made a conscious and deliberate decision to withhold services under the prior contract to exert pressure on Dixon, the prime contractor responsible for delivering those services, to resolve an ongoing dispute between those two companies—while expressly acknowledging that its actions had an adverse impact on the agency. On this record, we find no basis to question the contracting officer’s decision to downgrade CDSS under the past performance evaluation factor. CDSS’s protest that the agency’s past performance evaluation was unreasonable is wholly without merit.

Next, CDSS asserts that the agency failed to conduct meaningful discussions regarding the evaluation of its proposal under the past performance factor. Again, we disagree.

In order to satisfy its obligation to conduct meaningful discussions, an agency must lead the offerors into the areas of their proposals that reflect deficiencies or significant weaknesses; nonetheless, the particular content of discussions is largely a matter within the contracting officer’s judgment. This Office reviews the adequacy

of discussions to ensure that agencies point out weaknesses that, unless further addressed, would prevent an offeror from having a reasonable chance for award. E.g., Northrop Grumman Info. Tech., Inc., B-290080 et al., June 10, 2002, 2002 CPD ¶ 136 at 6.

Here, as discussed above, the agency specifically advised CDSS that it was considering negative past performance information regarding CDSS's proposed subcontractor; CDSS responded to this notification by expressly acknowledging the agency's concern and referring to the direct communication between Xtria and the agency regarding Xtria's past performance. There can be no reasonable dispute that the agency led CDSS into the area of its proposal that constituted a significant weakness. To the extent CDSS is now asserting that it was unaware of the specific facts discussed above, CDSS clearly could have obtained additional information from Xtria, its own proposed subcontractor, following the agency's notification. On this record, we find no merit in CDSS's assertion that the agency failed to conduct meaningful discussions.

Finally, CDSS protests that award to Lux was improper because the agency evaluators assigned slightly higher numerical scores to CDSS' proposal under the non-cost factors than they assigned to Lux's proposal, and because CDSS proposed slightly lower overall costs. In short, CDSS asserts that the award was improper because CDSS's proposal was evaluated as technically superior to Lux's proposal and offered a lower evaluated price. The record is to the contrary.

It is well-settled that an agency's source selection official is not bound by the ratings, conclusions, or recommendations of a subordinate evaluation team. E.g., Ass'n for the Educ. of the Deaf, Inc., B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220 at 5. Indeed, it is the responsibility of the source selection official to make the final determination regarding the relative merits of the competing proposals and to determine whether payment of a higher cost/price for a particular proposed approach is warranted. E.g., Barron Builders and Mgmt. Co., B-225803, June 30, 1987, 87-1 CPD ¶ 645 at 4-5. In this regard, the source selection official's judgment will be afforded considerable weight by our Office. Scheduled Airlines Traffic Offices, Inc., B-229883, Mar. 29, 1988, 88-1 CPD ¶ 317 at 4.

Here, the record is clear that the contracting officer reviewed the evaluation results and concluded that, except for past performance, Lux's and CDSS's proposals were technically equal. Further, the contracting officer determined that, notwithstanding the numerical scores assigned by the agency's evaluation teams, the past performance of CDSS's proposed subcontractor constituted a more significant weakness than the numerical scores indicated, and that this weakness outweighed CDSS's slight cost advantage. Accordingly, the contracting officer concluded that Lux's proposal represented the best value to the government. Based on our review of the entire record, we see no basis to question the contracting officer's

determination in this regard. CDSS's protest that its proposal represented the best value to the government is denied.⁷

Dixon's Protest

Dixon first protests that award to Lux was improper in that the agency failed to make an appropriate best value determination between Lux's and Dixon's proposals. Specifically, Dixon asserts that its proposal "was technically superior to the Lux proposal," and that the agency improperly made award "solely on the basis of [Lux's lower] cost." Protest, Oct. 13, 2009, at 5.

Contrary to Dixon's assertion, the record shows that Dixon's proposal was rated slightly lower than Lux's proposal under both of the non-cost evaluation factors, and that Dixon's evaluated cost was more than \$3 million higher than Lux's evaluated cost. On this record, the agency's selection of Lux's proposal over Dixon's reflects selection of the higher technically-rated, lower-priced proposal. Dixon's assertions regarding the agency's best value determination are factually inconsistent with the record and without merit.

Dixon next protests that the agency engaged in misleading discussions regarding Dixon's proposed costs. Specifically, Dixon complains that because its final proposed cost was higher than that of Lux, it was improper for the agency to question certain aspects of Dixon's costs during discussions on the basis that they appeared to be too low. Dixon specifically challenges the agency's questions regarding its proposed costs for overhead (OH) rates and other direct costs (ODCs). We have reviewed the record and find nothing improper in the agency's discussions.

As discussed above, the solicitation contemplated award of a cost-type contract and, accordingly, the agency was required to perform a cost realism analysis, since regardless of the costs proposed, the government will be required to pay the contractor its actual and allowable costs. See Federal Acquisition Regulation (FAR) §§15.305(a)(1); 15.404-1(d); Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4. Thus, in evaluating the proposals here, the agency considered, and discussed with each offeror, whether the proposed costs were realistic for various aspects of the work to be performed.

⁷ CDSS joins Dixon in protesting other aspects of the agency's source selection decision, which we address in our response to Dixon's protest below.

In this regard, the agency's written discussions with Dixon included the following:

DIRECT LABOR

- a. Based on the employees payroll listing dated February 2, 2009, [a named Dixon employee's] actual hourly rate is \$43.27 instead of the \$37.50 rate proposed. Also, [another named Dixon employee's] actual hourly rate is \$31.73 but her proposed rate is \$28.39. Please explain your rationale for proposing less than these employees' actual rates.
- b. The Government accepts the [deleted] overhead rate and [deleted] G&A rate as billing rates until provisional rates have been negotiated. However, the Government will incorporate an overhead ceiling rate of [deleted] and a G&A ceiling rate of [deleted] if this requirement is awarded to The Dixon Group. Please acknowledge your acceptance of these ceiling rates.

OTHER DIRECT COSTS

The Offeror proposed [deleted] for ODCs. The offeror proposed approximately the same amount for the base and each option period. . . . Since the base period is for seven months and each option period is for twelve months, please explain your rationale for proposing the same amount.

- a. Lodging: The Offeror proposed a total of [deleted] for lodging costs for 12,570 nights in Washington, DC at [deleted]. This proposed [deleted] was compared to the Federal Travel Regulations (FTR) currently in effect, which is \$206.33/night plus taxes at 14.5% or \$236.35/night. Please explain your rationale for proposing less than the FTR rate and revise your proposal accordingly.

- b. Per Diem: The Offeror proposed a total of 2,240 trips at [deleted] in Washington, DC (2,240 x [deleted]). The offeror stated that the [deleted] charge is for 2 travel days of per diem at \$48/day plus 4 on-site travel days when breakfast and lunch is provided at \$34/day (2 x \$48 plus 4 x \$34 = \$232). However, the correct calculation is \$232/day and not the [deleted] proposed. Please revise your proposal accordingly.

- c. On-Site Meeting: The Offeror proposed [deleted] for panel room rental. They provided a Marriott Hotels and Resorts Group Sales Agreement which showed a rate of [deleted] room. The offeror stated that they were proposing [deleted] since this cost can vary depending on the number of rooms requested and availability. Due to the fact that

this requirement is competitive and CPFF, the Government cost will increase if the offeror's projection is overly optimistic. Please provide an explanation how variance in the number of rooms requested might result in the reduction in the panel room rate.

d. Meeting Packages: The Offeror proposed a total of [deleted] for a meeting package. Some of this cost is for food and we cannot segregate the food costs from the other costs proposed. Food is not an allowable cost under this contract. Please remove the food costs from the meeting package and revise your proposal accordingly.

e. Marketing, Communications, Telecommunications, Systems, Equipment and Safety: The Offeror proposed [deleted] or [deleted] for 4,400 sq. ft. at [deleted] for OHS/ACYF Grants Op Facility. To support the [deleted] proposed, the offeror provided an invoice from Tyson Leasing LLC which showed the February rent as [deleted]. However, 4,400 sq. ft. @ [deleted] is [deleted] instead of the [deleted] proposed. Please revise your proposal accordingly.

AR, Tab 12, at 1630-31.

We first note that the agency's discussions with Dixon regarding its proposed costs identified concerns with various aspects of the cost proposal—some of which appeared to be too high and some of which appeared to be too low. Further, Dixon has not suggested that any of the questions and concerns raised by the agency regarding its proposed costs were based on factual inaccuracies. Rather, Dixon essentially argues that, because Dixon's higher proposed costs were a significant factor in the agency's source selection decision, it was improper for the agency to question any aspect of those costs that appeared to be unrealistically low. We disagree.

As discussed above, the agency had an obligation to evaluate the realism of Dixon's proposed costs and, during discussions, to identify areas that appeared unrealistic. Our review of the record leads us to conclude that is exactly what the agency did. In this regard, the agency would have been remiss in its obligations had it failed to identify the aspects of Dixon's proposal that appeared to be unrealistically low and/or that were inconsistent with other cost information available to the agency. Dixon's assertions that the agency's discussions were misleading or less than meaningful are without merit.⁸

⁸ To the extent Dixon asserts that the agency had an obligation to advise Dixon that its overall proposed cost/price was "too high," Dixon is mistaken, since it is clear that Dixon's proposed cost/price was never considered to be unreasonably high. See, e.g., Mechanical Equip. Co., Inc.; Highland Eng'g, Inc.; Etnyre Int'l, Ltd.; Kara

(continued...)

Dixon next protests that the agency failed to perform a proper cost realism analysis with regard to Lux's proposal. The record is to the contrary.

In performing a cost realism evaluation, an agency is not required to verify each and every element of a cost proposal, nor must the analysis rise to a level of scientific certainty. Rather, the agency's evaluation must be reasonably adequate to provide some measure of confidence that the costs proposed are reasonable and realistic in view of other cost information available to the agency at the time of its evaluations. See, e.g., SGT, Inc., B-294722, July 28, 2005, 2005 CPD ¶ 151 at 7.

Here, the record establishes that the agency, in fact, conducted a comprehensive cost realism analysis with regard to Lux's cost proposal. Specifically, the record contains contemporaneous documentation showing that—as with its review of Dixon's proposal—the agency requested, obtained, verified and evaluated a wide range of data that supported Lux's proposed direct labor rates, indirect cost rates, subcontract costs and ODC costs. Further, the agency compared Lux's final revised costs with Lux's prior submissions. AR, Tab 36. In addition to summary cost/price tables, the agency's contemporaneous evaluation record contains detailed narrative assessments regarding various aspects of Lux's proposed costs. Dixon has not persuasively shown that any significant aspect of Lux's cost proposal is unrealistic. On this record, Dixon's challenge to the agency's cost realism evaluation of Lux's proposal is without merit.

Finally, Dixon argues that Lux's proposal should have been downgraded for failing to, initially, include letters of commitment for certain proposed personnel, and that Dixon's proposal should have received higher ratings under the non-cost evaluation factors.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgments in determining the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

(...continued)

Aerospace, Inc., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 18 (where offeror's proposed costs are not so high as to be unreasonable, agency's discussions were meaningful without having raised the issue of cost/price).

With regard to letters of commitment for Lux's proposed personnel, the record shows that, following submission of its initial proposal, Lux, in fact, provided commitment letters to agency personnel.⁹ With regard to the agency's evaluation of Dixon's proposal under the non-cost factors, we have reviewed the record and conclude that Dixon's arguments reflect mere disagreement with the agency's judgments. Dixon's various protest arguments in this regard are without merit.

The protests are denied.¹⁰

Lynn H. Gibson
Acting General Counsel

⁹ The record also indicates that the personnel at issue are, in fact, currently performing for Lux under the contract, consistent with the representations in their letters of commitment.

¹⁰ In filing and pursuing these protests, CDSS and Dixon have raised various additional arguments, or variations of the arguments discussed above. We have considered all of the protesters' assertions and find no basis for sustaining their protests.