



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Universal Technologies, Inc.
File: B-241157
Date: January 18, 1991

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for the protester.
John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, and Stan Hinton, Esq., Duke & Riley, for Hughes Aircraft Company and United Telecontrol Electronics, Inc., interested parties.
Gregory H. Petkoff, Esq., and Gary J. Rosnick, Esq., Department of the Air Force, for the agency.
Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly awarded contract for quantity greater than stated maximum quantity in solicitation is denied where protester, whose proposal was rated marginal with high risk, would not have been in line for award if agency had afforded it opportunity to submit revised offer for additional quantity.
2. Protest of technical evaluation and performance risk assessment is denied where record supports agency's determination that proposal was marginally acceptable and performance risk was high.
3. Decision not to award to protester was proper where agency reasonably concluded that protester's proposal represented a significant performance risk and that awardee's proposal's technical superiority and low risk outweighed its cost premium.
4. Awardee's employment of former agency contracting official does not disqualify firm from award by that agency where individual accepted employment with awardee firm prior to issuance of solicitation, and there is no evidence that the individual improperly influenced the award or used inside information to help firm obtain award.

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DECISION

Universal Technologies, Inc. protests the award of contracts to United Telecontrol Electronics, Inc. (UTE) and Hughes Aircraft Company under request for proposals (RFP) No. F08635-90-R-0196, issued by the Department of the Air Force for advanced medium range air-to-air missile (AMRAAM) missile rail launchers (MRL). Universal alleges that the Air Force improperly awarded contracts for a quantity of MRLs greater than the RFP maximum quantity, that the Air Force improperly evaluated its proposal, and that an apparent improper conflict of interest existed in that a former Air Force procurement official accepted employment with UTE prior to issuance of the solicitation.

We deny the protest.

The AMRAAM MRL Lot IV procurement was first announced in the Commerce Business Daily (CBD) in June 1989. At that time, a technical library at Eglin Air Force Base containing all drawings and applicable documents was made available to prospective offerors. On October 23, the Air Force solicited industry comments on the acquisition through a draft RFP. An industry briefing was held on November 2 and 3, followed by a technical discussion on November 30. On January 24, 1990, the Air Force issued the RFP to 54 prospective offerors.

The RFP contemplated award of a combination fixed-price incentive (FPI) and firm-fixed-price (FFP) contract for production, inspection, testing and delivery of AMRAAM MRL Lot IV over a 26-month period, with two 24-month options for lots V and VI. The RFP contemplated a single award, but reserved the government's right to make more than one award, or no award at all. The RFP provided that award would be made to the offeror "that the government determines can accomplish the requirements set forth in the [RFP] in a manner most advantageous to the government, cost or price and other factors, consistent with the source selection criteria, considered." In this regard, the RFP informed offerors that technical and cost factors were of equal importance, but that award could be made to other than the low-priced offeror after consideration of all factors. The RFP provided that cost proposals would not be scored, but would be evaluated for completeness, reasonableness and realism. Within the technical factor, proposals were to be evaluated in five areas: product assurance, manufacturing, engineering capability, integrated logistics support, and financial/configuration/data management. The product assurance and manufacturing areas were of equal importance, and the remaining areas were progressively less important. For each

of these technical areas, proposals were to be evaluated in terms of technical compliance and associated technical risk.

In addition to the technical evaluation of proposals, each offeror's past performance was to be assessed by the performance risk analysis group (PRAG). The PRAG utilized on-site reviews, contractor performance assessment reports, telephone interviews, and pre-award surveys to determine each firm's ability to plan, implement and manage MRL production. The RFP provided that the PRAG assessment would be equal in weight to the technical evaluation.

Proposals were evaluated by the source selection evaluation team (SSET), which consisted of 22 evaluators and 27 advisors. The SSET assigned color-coded ratings for each evaluation factor: blue (exceptional), green (acceptable), yellow (marginal), or red (unacceptable). In addition, each technical proposal was evaluated in terms of the risk it presented (high, moderate or low). Finally, each offeror's past performance was assessed by the 12-member PRAG. The SSET determined that all 12 firms submitting initial proposals were in the competitive range. Following discussions and submission of best and final offers (BAFO), the offerors were ranked as follows:

<u>Offeror</u>	<u>Technical Rating</u>	<u>Proposal Risk</u>	<u>Performance Risk</u>	<u>Cost (millions) 1/</u>
Offeror A	Blue	Low	Low	\$ 79.2
Hughes	Green	Low	Low	62.2
Offeror C	Green	Low	Low	106.7
Offeror D	Green	Low	Low	113.2
UTE	Green	Low	Moderate	48.7 (FFP)
Offeror F	Green	Low	Moderate	55.9 (FFP)
Offeror G	Green	Low	Moderate	87.2
Offeror H	Green	Low	Moderate	108.6
Offeror I	Green	Moderate	High	65.5 (FFP)
Universal	Yellow	High	High	53.6 (FFP)
Offeror K	Yellow	High	High	71.8 (FFP)
Offeror L	Yellow	High	High	84.9 (FFP)

Based upon the evaluation results, the source selection authority (SSA) determined that a multiple award combining UTE's low price and moderate performance risk with incumbent Hughes' low performance risk would be most advantageous to the government. The SSA also found that, given UTE's and Hughes' prices, which were well below the government estimate, and the

1/ All prices are based upon most probable quantities. Where indicated, offerors proposed an FFP instead of on an FPI basis. Prices for FPI offers are target prices.

Air Force's immediate need for MRLs, two awards for a total of 2,191 MRLs, rather than the 1,435 maximum quantity stated in the RFP for Lot IV, were warranted. Upon learning of the August 31 awards to UTE and Hughes, Universal filed this protest on September 14.

AWARD QUANTITY

Universal contends that it was not proper for the Air Force to award two contracts for a total quantity of MRLs greater than the RFP maximum quantity. Universal argues that the Air Force's failure to advertise the increased quantity violated the Competition in Contracting Act of 1984 (CICA) requirement for full and open competition, and that the Air Force should have either amended the RFP or issued a new solicitation to reflect the increased requirement.

The Air Force offers several arguments in response. First, the Air Force notes that, notwithstanding the Lot IV maximum quantity of 1,435 units, the CBD synopsis of the draft RFP contemplated the purchase of 4,000 MRLs over Lots IV, V and VI, and that offerors were therefore on notice that award could be made for as many as 4,000 units. Further, the Air Force maintains that its requirements did not change, and that it therefore had no need to amend the RFP. In this regard, the Air Force states that "a rare opportunity presented itself" in that the prices offered were generally well below the government estimate, making it possible for the Air Force to purchase additional MRLs with the programmed amount of funds. As this opportunity did not present itself until after BAFOs had been received, the Air Force argues, amendment of the RFP at that point in time would have been "blatantly unfair."

We find the Air Force's position untenable. Federal Acquisition Regulation (FAR) § 15.606(a) requires agencies to amend RFPs when there are changes in the government's requirements either before or after the receipt of proposals. One circumstance calling for issuance of an amendment is where there has been a significant change in the government's quantity requirements. Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276. Here, there clearly was a significant change in the quantity required. While the Air Force states it really had a need for a quantity of up to 4,000 units, the RFP stated a maximum requirement of 1,435 MRLs for Lot IV. It was on the basis of this stated requirement that offerors prepared their proposals. After BAFOs were received, the Air Force determined that purchase of additional MRLs was warranted. While the Air Force characterizes this circumstance as an "opportunity," it is no less a change in requirements. We do not agree that a post-BAFO amendment would have been "blatantly unfair"; there's nothing unfair in allowing all

offerors to compete for the agency's actual requirements. Moreover, since FAR § 15.606(a) provides for amendment of an RFP at any time before award when the agency's requirements change, offerors were on constructive notice that any post-BAFO change in requirements would necessitate amendment of the RFP. We note that it appears the Air Force would have received more favorable prices if offerors had been permitted to submit proposals for all 2,191 MRLs; Hughes' and UTE's cost proposals reflect decreasing per-unit prices as MRL production increases.

While we find that the Air Force's failure to amend the RFP to reflect the intended award quantity was improper, this is not a basis for sustaining the protest since the record shows that Universal was not prejudiced by the agency's failure to amend; because of its low technical ranking among offerors, discussed below, Universal would not have been in line for award even if it had been afforded the opportunity to submit an offer for the increased quantity. See Connaught Laboratories, Inc., B-235793, Oct. 11, 1989, 89-2 CPD ¶ 337.

EVALUATION

Universal asserts that the SSET's rating of its proposal as "yellow" with high risk is without a reasonable basis. Specifically, Universal argues that the SSET failed properly to consider favorable information in its proposal and in the PRAG assessment regarding its manufacturing and engineering capabilities, and ignored its experience in producing items similar to MRLs.

The determination of the relative merits of proposals is primarily a matter of agency discretion which we will not disturb unless it is shown to be unreasonable or inconsistent with the stated evaluation criteria. Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441. A protester's mere disagreement with the agency's judgment does not establish that the judgment was unreasonable. Id.

The Air Force rated Universal's proposal marginal under two of the three most important evaluation factors, manufacturing and engineering capability. In the manufacturing area--which, along with the product assurance factor, was ranked most important--the Air Force found that Universal lacked experience in producing launchers, did not provide an adequate manufacturing plan, and did not understand the requirement for special test equipment (STE). In the engineering capability area, ranked second in importance, the Air Force found Universal's plan to subcontract most engineering tasks risky. The record supports the Air Force's conclusions and the resulting marginal ratings under these two evaluation factors.

Manufacturing

With regard to its experience, Universal argues that the RFP did not require launcher experience and that, in any event, its performance of other high-tech, large quantity production contracts, particularly the Hawk wing and the Tomahawk missile, should have earned it high scores for this factor. We find the evaluation in this area unobjectionable. While the RFP did not require launcher experience, it did specifically provide for evaluation of production capabilities as a subfactor under the manufacturing evaluation factor. It clearly was reasonable for the Air Force to find experience in producing launchers a better indication of a firm's capability to produce MRLs than experience with other weapons systems, and to award higher technical scores and lower technical risk ratings to offerors such as Hughes and UTE which have launcher experience. The Air Force explains that the MRL is a complete integrated missile system, while the Hawk wing is a single subassembly of a missile system, and that experience in manufacturing the Hawk wing is therefore not equivalent to experience in manufacturing the MRL. The Air Force also notes, and Universal does not dispute, that Universal's prior production contracts were on a smaller scale than the MRL effort.

In its proposal, Universal offered a production management system in compliance with MIL-STD-1528A, but gave no indication of how it would accomplish this. The Air Force concluded that Universal had failed to provide the required manufacturing plan in accordance with MIL-STD-1528A. The Air Force specifically asked Universal how it intended to comply with the requirement, but Universal responded only that the RFP did not require compliance until after award. We think the Air Force reasonably concluded that Universal's response was insufficient. While Universal was correct that the contractor would not be required to have the system in place until after contract award, Universal's response to that effect did not address the Air Force's concern, that is, how the firm would meet the requirement after award. Without any information with which to evaluate Universal's manufacturing plan or its likelihood of success, the Air Force reasonably found Universal's proposal technically risky in this area.

As for the STE requirement, Universal asserts that the Air Force misunderstood its approach to the requirement because it defined STE differently than did Universal. The record supports the Air Force's determination that Universal's proposal did not demonstrate an understanding of this requirement. In its initial proposal, Universal stated that STE is test equipment that, because of its specialized function, is turned over to the government at the end of the contract and that, since Universal considered its test

equipment more generalized in function, it planned to keep the equipment for future use. As its test equipment thus did not fit the definition of STE, Universal reasoned, there would be no use of STE in this contract. The Air Force found that this section of the proposal failed to meet the RFP requirement to describe the test equipment that would be used in the production of the MRL, and so informed Universal during written discussions. Universal reiterated its stated position regarding the proper definition of STE, but added that it understood that the Air Force wanted to know what kinds of test equipment would be used, and provided a general list of the equipment. The Air Force found Universal's response insufficient because it failed to provide a description of the equipment in detail or explain how it would be used, as specifically required by the RFP. The Air Force gave Universal an opportunity to further clarify the issue during oral discussions. Again, Universal stated that it understood the requirement but failed to provide a detailed response. The Air Force concluded from Universal's responses to its pointed questions in this area that the firm did not understand the STE requirement, and downgraded its proposal for this reason. We agree that Universal's failure to provide a detailed explanation of the test equipment to be used warranted the downgrading.

Universal asserts that its marginal rating in the manufacturing area also was unreasonable in view of its favorable pre-award survey recommendation by the Defense Contract Administration Services Region (DCASR), Atlanta. This argument is without merit. The pre-award survey was conducted for the purpose of evaluating Universal's capability to perform the contract in the event it received the award, while the technical evaluation served the different purpose of determining the relative merits of Universal's proposal in light of the specific RFP requirements and evaluation criteria. See, e.g., F.A.S. Sys. Corp., B-236344, Dec. 4, 1989, 89-2 CPD ¶ 512. Thus, while the pre-award survey indicated Universal could perform, the evaluation indicated that UTE and Hughes could perform better.

Engineering Capability

Universal was also rated marginal under the engineering capability factor. The evaluators found that Universal's offer presented a high technical risk under this factor because it proposed to subcontract most of the engineering work, and because the subcontractor appeared to be "on call," being tasked for particular efforts rather than totally integrated with Universal's MRL staff. Universal claims it should have received a low risk rating in this area because its subcontractor engineers "have worked with [Universal] for years." We think the Air Force's evaluation was reasonable.

In response to a written discussion question asking Universal how it would coordinate and manage the "separate" engineering staff, Universal offered one double-spaced page which stated that the subcontractor is "an integral part" of Universal's MRL team, but also stated that the subcontractor staff had agreed to be present "as needed" and would be "on call" to attend meetings. The proposal went on to state that the subcontractor would be responsible for design changes and for making sure that Universal's own production engineering department implemented the changes, but did not explain how this would be accomplished. Given the summary manner in which Universal's proposal addressed the agency's concerns, and the proposal's reference to the subcontractor's staff as "on call," the Air Force properly reduced Universal's score in this area.

Universal argues generally that the Air Force improperly evaluated its proposal based on standards established by Hughes, the incumbent. However, the record shows that the evaluation standards used by the Air Force in the evaluation were developed based upon its experience with the Lot I, II and III acquisitions. These standards were clearly set forth in writing and given to each member of the SSET, and the SSET used those written standards as a guideline for performing the evaluation. That Hughes may have enjoyed a competitive advantage by virtue of its incumbency under the prior acquisitions does not itself render the evaluation improper; an agency is not required to equalize competition with respect to such advantages so long as the advantages do not result from unfair action by the government. Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93. The record indicates that all offerors were evaluated using the same objective standards. We therefore have no basis to conclude that any competitive advantage Hughes may have enjoyed was due to unfair action by the government.

Universal takes issue with additional areas of the evaluation. However, in view of our conclusion that the record supports Universal's marginal rating in two of the three most important evaluation factors, we conclude that Universal's overall yellow rating was reasonable without considering the additional evaluation factors.

We note that much of Universal's disagreement with the evaluation seems to be based on a misunderstanding of the respective roles of the technical proposal and the PRAG assessment in the evaluation. As noted previously, the evaluation consisted of two equally weighted parts: technical evaluation of proposals and performance risk analysis. The RFP explained that the purpose of the proposal evaluation was to assess the offeror's compliance with RFP requirements and soundness of approach, while the purpose of the performance

risk analysis was to determine the probability that the offeror could successfully perform the contract as required. Proposals were evaluated by the SSET, while the performance risk analysis was conducted by the PRAG through site visits to each offeror's manufacturing facilities and offeror-provided performance data. Universal lists a number of PRAG comments with which it disagrees, but in support of certain arguments that the PRAG's findings were unreasonable, it cites information in its technical proposal. For example, Universal cites the PRAG's findings that the firm had "no equipment to produce the rail" and a "total lack of MIL-Spec quality assurance systems," but points out that the SSET found Universal's proposal "very strong in manufacturing and production capability." Moreover, Universal itself concedes that it does not currently possess several items of machinery required to produce the MRL, and that several required management and quality control systems were not in place at the time of the PRAG review. Thus, the fact that Universal did not achieve the same standard in the PRAG review that it did in its technical proposal does not establish that the PRAG assessment was unreasonable.

TECHNICAL/COST TRADEOFF

Universal alleges that the award to Hughes was improper in view of Hughes' higher price. (UTE's price was lower than Universal's and the protester thus does not challenge the award to UTE on this basis.) In this regard, Universal asserts that Hughes' price was reported to the SSA as the \$62.2 million "target" price rather than its \$72.2 million "ceiling" price, and that the SSA erroneously based his decision on the lower price. Universal concludes that Hughes' technical advantage was not worth the \$18.6 million price difference between Universal's fixed price and Hughes' ceiling price.

Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost/technical tradeoffs may be made subject only to the test of rationality and consistency with the established evaluation factors. Institute of Modern Procedures, Inc., B-236964, supra.

We think the Air Force made a reasonable cost/technical tradeoff in awarding a contract to Hughes. The RFP provided that technical factors would be considered as important as price, and Hughes was found to be technically superior to Universal both in the proposal evaluation and performance risk assessment; as indicated above, Hughes received an overall green (acceptable) rating with low risk, while Universal received an overall rating of yellow (marginal), with high risk. We find nothing objectionable in the SSA's

determination that Hughes' technical advantages and low risk outweighed its somewhat higher price. Universal's assertion that the SSA made the cost/technical tradeoff solely with reference to Hughes' target price is unsupported in the record; the Proposal Analysis Report, which was provided to the SSA, included both Hughes' target and ceiling prices.

On the other hand, it does appear the agency gave great weight to the target price. Again, we find this reliance unobjectionable. In FPI contracts, the amount of the contractor's profit is determined by a formula set forth in the contract, which rewards the contractor with additional profit for efficient operation and penalizes the contractor with reduced profit for inefficient operation. See FAR § 16.403. However, the government is only responsible for the contractor's costs up to the stated ceiling. Thus, use of this contract type requires a realistic target cost estimate and a realistic ceiling price. See R & D Maintenance Services, Inc., B-205238, Apr. 6, 1982, 82-1 CPD ¶ 320. Here, the record shows that the Air Force found Hughes' target price realistic only after reviewing all aspects of Hughes' cost estimate. As Universal does not challenge the agency's cost realism determination, and we find no basis to question it, we think the Air Force properly emphasized Hughes' target price, rather than its ceiling price, in determining that Hughes' technical advantage was worth its proposed higher cost.

CONFLICT OF INTEREST

Universal alleges that a former Air Force contracting official, now employed by UTE, improperly used inside information gained during his government service to UTE's advantage and improperly influenced the Air Force in the award selection. Specifically, Universal asserts that the individual was familiar with Hughes' technical approach to Lot III, and used this information in the preparation of Universal's proposal and in negotiations with the Air Force.

Where a conflict of interest involving a former government employee is alleged in a bid protest, the issue is whether any action of the former employee may have resulted in bias in favor of the awardee during the award selection process. HLJ Mgmt. Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375. Exclusion of an offeror because of a conflict of interest must be based upon hard facts and not mere suspicion or innuendo. Id.

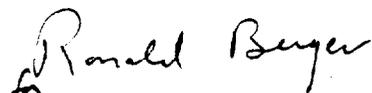
While Universal does not offer the name of the former official, the Air Force states that the individual in question was involved with the MRL Lot III procurement, for which Hughes was the sole source. The official left the Air Force in June of 1989, 3 months before the MRL Lot IV

draft RFP was synopsised in the CBD and 6 months before the Lot IV RFP was issued. The record thus contains no evidence that the former official influenced the Air Force's award selection. Further, as the protester has not furnished the individual's name, there is no basis for concluding that the person represented UTE during negotiations. Moreover, the evaluation records do not suggest that UTE gained any advantage through familiarity with Hughes' operations. In fact, UTE's principal advantage in the evaluation appears to have been its prior successful experience producing the Maverick MRL. We therefore have no basis to object to the award to UTE.

CONCLUSION

We find that, although the Air Force improperly made award for a quantity of MRLs greater than the quantity solicited, Universal was not prejudiced as a result. The record supports the Air Force's evaluation of Universal's proposal as marginal with high risk. Due to its low relative standing among offerors, Universal clearly would not have been in line for award even if it had been afforded an opportunity to submit a proposal for the additional quantity.

The protest is denied.



James F. Hinchman
General Counsel