



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Universal Technologies Inc.;
Spacecraft, Inc.

File: B-248808.2; B-248808.4; B-248808.5

Date: September 28, 1992

Clayton S. Marsh, Esq., Ropes & Gray, and Nicholas A. Della Volpe, Esq., Baker, Worthington, Crossley, Stansberry & Woolf, for the protester, Universal Technologies Inc., and Esad Sipilovic, for the protester, Spacecraft, Inc. William A. Roberts III, Esq., and Brian A. Darst, Esq., Howrey & Simon, for Marvin Engineering Co. Inc., an interested party.

Gary J. Rosnick, Esq., Department of the Air Force, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a negotiated, best value procurement, in which technical considerations were stated to be more important than price, protests against the award to the higher priced, higher rated awardee were not legally insufficient where the protesters not only challenged the awardee's much higher priced proposal, but represented their technical capability to perform the contract work and challenged the agency's evaluation of their respective past performance histories.

2. Protests of an agency's cost/technical tradeoff determination were not required to be filed within 10 working days of the protesters' receipt of the agency's proposed small business set-aside award, where the small business pre-award notice provided no information concerning the intended awardee's price or the basis for selection; protests filed, respectively, within 10 working days of receipt of the award notification that disclosed award price and after the agency's denial of an agency-level protest are timely.

3. Protest allegations challenging an agency's technical evaluation, that were not filed within 10 working days of the agency's debriefing at which the protester learned the basis of these protest allegations, are untimely under the Bid Protest Regulations and will not be considered.

4. Award was properly made to a higher rated, higher priced offeror where the source selection decision was consistent with the solicitation's evaluation factors and the source selection authority reasonably determined that the awardee's evaluated technical superiority and much lower proposal and past performance risk justified its higher price.

5. The awardee's certification that failed to identify, as required, criminal convictions did not make the awardee ineligible to receive award where the miscertification did not appear to be made in bad faith and did not materially influence the agency's affirmative determination of the awardee's responsibility; the agency had previously entered into an administrative agreement in lieu of debarment with the awardee that considered the awardee's convictions and corrective action, and that determined that the awardee had the integrity required of a government contractor.

DECISION

Universal Technologies, Inc. and Spacecraft, Inc. protest the award of a contract to Marvin Engineering, Inc., under request for proposals (RFP) No. F08626-92-R-0011, issued by the Department of the Air Force for training missiles. Universal and Spacecraft contend that their respective proposals, which are lower priced than Marvin's, should have been selected for award. Universal also contends that Marvin is ineligible for award because Marvin falsely certified that it had not been convicted within the past 3 years of making false statements or falsifying documents to the government.

We deny the protests in part and dismiss them in part.¹

The RFP, issued as a total small business set-aside, contemplated the award of a fixed-price contract for captive air training missiles (CATM) for the Air Force and the Department of the Navy. The CATM is an inert device with the same physical characteristics as the AIM-120 tactical missile. This "dummy" missile is used by the Air Force and Navy to provide load training for ground handling crews and flight training for pilots.²

¹Portions of the protest record are subject to a General Accounting Office protective order, to which counsel for Universal and Marvin have been admitted. Our decision, which is based in part upon protected, confidential information is necessarily general.

²The CATM is used with F-14, F-15, and F/A-18 jet aircraft.

Offerors were informed that award would be made to the offeror with the most advantageous proposal, price and other factors considered. Technical evaluation factors were stated to be more important than price, although price was stated to be a substantial consideration. The RFP identified the following technical evaluation factors, in descending order of importance: (1) Manufacturing; (2) Quality Assurance; (3) Systems Engineering; and (4) Program/Configuration/Data Management.

The RFP provided that technical factors, which would be assessed for compliance with the solicitation requirements and soundness of approach, would be evaluated under a color/adjectival and proposal risk evaluation scheme. Offerors were also informed that past performance risk would be evaluated; the RFP requested specific past performance information and stated that "data obtained from other sources [would also be used] in the development of performance risk assessments."³ Performance risk was said to be co-equal in relative importance to the color/adjectival technical rating and proposal risk assessment. Offerors were also informed that the government intended to make award without conducting discussions. See 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1991).

The RFP provided detailed design specifications for the manufacture of the missile and required the contract work to be in compliance with the high quality assurance requirements of military standard MIL-Q-9858A.⁴ The RFP also provided detailed instructions for the preparation of technical and cost proposals that informed offerors of the information required for proposal evaluation.

³Proposal risk assesses the risks associated with an offeror's proposed approach as it relates to accomplishing the requirements of this solicitation. Past performance risk, on the other hand, assesses an offeror's probability of successfully accomplishing the proposed contract work.

⁴MIL-Q-9858A requires a comprehensive quality assurance program, that must be tailored by the contractor to a particular procurement and requires that all work affecting quality (i.e., purchasing, receiving, handling, machining, assembling, fabricating, processing, inspecting, and shipping) be prescribed in written instructions, which provide criteria for performing the work. See generally COSTAR, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509.

For example, for the past performance risk assessment, offerors were asked to submit past contract performance information that demonstrated their ability to perform the proposed contract work; specifically, the RFP requested contract numbers, agency and contracting officer names, descriptions of contract effort (i.e., whether for development and/or production), types of contracts, periods of performance, contract values, and completion dates. In addition, offerors were asked to explain how listed contracts were deemed relevant and were permitted to explain past performance problems.

The Air Force received 21 proposals, including offers from Universal, Spacecraft, and Marvin. The proposals ranged in price from \$24.6 million to \$77.3 million and were evaluated by the source selection evaluation team (SSET) in accordance with the color/adjectival rating and proposal risk assessment scheme stated in Air Force Regulation 70-30.⁵ A separate team evaluated performance risk. The awardee's and protesters' proposals were evaluated as follows:

| | <u>Rating/Risk⁶</u> | | |
|-------------------------------------------|--------------------------------|------------------|-------------------|
| | <u>Marvin</u> | <u>Universal</u> | <u>Spacecraft</u> |
| TECHNICAL FACTORS | E/L | M/M | M/M |
| Manufacturing | E/L | M/M | M/M |
| Quality Assurance | A/L | A/M | M/M |
| System Engineering | A/L | A/M | A/L |
| Program/Configuration/ Data Management | E/L | A/M | A/L |
| PERFORMANCE RISK | L | M-H | H |
| PRICE (Millions) | \$35.6 | \$31.2 | \$29.6 |

Marvin's overall excellent technical rating and low risk assessment reflected the Air Force evaluators' determination that Marvin's proposal contained no deficiencies or weaknesses. Under the most important technical evaluation factor--manufacturing--the agency found that Marvin's proposal contained a number of exceptional strong points, such

⁵Proposals were qualitatively evaluated as either blue/exceptional; green/acceptable; yellow/marginal; or red/unacceptable. Proposal risk was assessed as either high, moderate, or low.

⁶The letters under the technical rating represent the following: "E" for exceptional; "A" for acceptable; and "M" for marginal. Under the risk assessment, the letters represent the following: "H" for high; "M" for moderate; and "L" for low.

as a detailed equipment list (including contingency equipment and back-up facility), an extensive analysis of production processes and flows, a detailed breakout of major assemblies, a detailed discussion of production resources and the firm's contingency plans, and a detailed discussion of required and current manufacturing capacity. Under the second most important evaluation factor--quality assurance--Marvin had an existing MIL-Q-9858A system in place and established statistical process controls (SPC) procedures as used on prior government contracts. Marvin's past performance was assessed as being of low risk⁷ based upon the agency's evaluation of information provided by Marvin and of information the agency received from the Defense Contract Management Command (DCMC) that reported that Marvin had a long-term, excellent government contract performance history, including contracts of similar complexity and value.

Universal's overall marginal technical rating and moderate risk reflected the agency's determination that Universal's proposal contained a number of weaknesses and deficiencies. For example, under the manufacturing factor, Universal's proposal was downgraded and rated marginal with moderate proposal risk because no strengths were found and Universal failed to provide sufficient details to show that the firm had an adequate manufacturing system; that is, the proposal did not demonstrate sufficient available equipment and manpower, or provide other clearly defined information (e.g., current capacity), that would be needed to perform critical manufacturing operations. Under the quality assurance factor, Universal's offer was downgraded and rated acceptable, with moderate proposal risk, because it did not indicate the availability of quality assurance engineering support for the CATM and did not show plans, capability or experience necessary to successfully implement SPC. Universal's past performance was assessed as being of moderate to high risk⁸ because the agency found, based upon information received from DCMC, that Universal had a history of low production rates, rework problems, and delinquent contracts.

⁷Under the agency's performance risk assessment methodology, low risk indicated that little doubt exists, based upon the offeror's performance record, that the offeror could perform the proposed contract work.

⁸A moderate performance risk assessment indicates that some doubt exists, based on the offeror's performance record, that the offeror can perform the proposed contract work, while a high performance risk assessment indicates that there is significant doubt that the offeror can perform the proposed effort.