

BENEJAM



Comptroller General  
of the United States

1237187

Washington, D.C. 20548

## Decision

**Matter of:** TAAS Israel Industries, Ltd.

**File:** B-260733; B-260733.2; B-260733.3

**Date:** July 17, 1995

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.

Robert A. Mangrum, Esq., and Eric J. Marcotte, Esq., Winston & Strawn, for United Defense Limited Partnership, the interested party.

Eileen B. White, Esq., and Catherine L. Horan, Esq., Department of the Navy, for the agency.

Aldo A. Benejam, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Allegation that awardee underestimated the value of government-furnished material (GFM) in developing its prices is denied where, even under the protester's calculations of the value of the GFM, protester would not be in line for award under the evaluation scheme and award approach announced in the solicitation.

2. Protester's contention that agency improperly concluded that the awardee's prices were fair and reasonable is denied where agency's price analysis of awardee's fixed-price offers for varying types and quantities of missile canisters was based on a separate analysis of the awardee's unit prices submitted under the two alternate quantities, including a comparison of proposed prices with historical prices.

### DECISION

TAAS Israel Industries, Ltd. protests the award of a contract to United Defense Limited Partnership (UDLP) under request for proposals (RFP) No. N00024-95-R-5305, issued by the Department of the Navy for canisters used in the MK 41 Vertical Launching System (VLS), and associated

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hardware.<sup>1</sup> TAAS alleges that the Navy failed to consider the impact of government-furnished material (GFM) on UDLP's prices. TAAS also argues that the Navy's price reasonableness analysis was flawed.<sup>2</sup>

We deny the protests.

#### BACKGROUND

The procurement is for the Navy's fiscal years 94 through 96 requirements for the canisters.<sup>3</sup> On October 24, 1994, the Assistant Secretary of the Navy for Research, Development and Acquisition approved a plan to purchase 300 various types of the canisters per year exclusively from UDLP, in order to maintain a domestic source for the canisters.<sup>4</sup> The annual requirement in excess of 300 canisters was to be competed between UDLP and TAAS.

The RFP contemplated the award of up to two fixed-price contracts with an award fee provision covering the requirements for fiscal year 94, with up to two options for fiscal years 95 and 96 requirements. The RFP reflected the Navy's strategy of procuring the set-aside quantity from UDLP and competing the remaining quantities between TAAS and UDLP. For each contract period, section B of the RFP

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<sup>1</sup>The MK 41 VLS is the shipboard missile launching system installed on surface warfare ships for United States and foreign navies. The canisters serve as a secure stowing device for missiles during shore storage and are lowered with the missile encanned into the launcher aboard ship. The RFP calls for different types and quantities of canisters, such the MK 13; MK 14 (for TOMAHAWK missiles); MK 15; MK 21; and MK 22 (for NATO SeaSparrow missiles), and related equipment.

<sup>2</sup>In its initial protest, TAAS also alleged that the submission of multiple offers by UDLP represented an improper restriction on competition, and that UDLP had an unfair competitive advantage under the RFP's pricing scheme. We dismissed these allegations as untimely because they concerned alleged improprieties in the RFP which TAAS should have raised prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

<sup>3</sup>Although the RFP here includes fiscal year 94 requirements, the RFP was not issued until the first quarter of fiscal year 95.

<sup>4</sup>Martin Marietta, Inc., the only other domestic producer, discontinued manufacturing these canisters in 1991.

required UDLP to submit unit and extended prices for the first 300 canisters (alternative 1) and for the total quantity of canisters required by the RFP (alternative 2). TAAS was to submit a price for the quantities in excess of the 300 canisters set aside for UDLP (alternative 3). Technical proposals were not required.

Award was to be made on the basis of the alternative(s) resulting in the lowest total price to the government including options. Section M of the RFP explained that the agency would compare the price for alternatives 1 and 3--i.e., the price of purchasing the first 300 canisters from UDLP and the remaining canisters from TAAS--with the price for alternative 2--i.e., UDLP's price for the total requirement. The RFP stated that if the price for a total award to UDLP was lower than the price of a split award between UDLP and TAAS, the Navy would award to UDLP. On the other hand, if the price of a split award was lower than the price of awarding the total to UDLP, the Navy would award two contracts--one to UDLP and one to TAAS.

Both TAAS and UDLP submitted proposals with the following results by alternative:<sup>5</sup>

	<u>No. 1</u>	<u>No. 2</u>	<u>No. 3</u>
UDLP	\$44,995,792	\$72,551,007	
TAAS			\$36,672,943

The total of alternatives 1 and 3 (a split award) is \$81,668,735, more than \$9 million higher than UDLP's price under alternative 2. After a determination that UDLP's prices were fair and reasonable, the contracting officer concluded that a single award to UDLP (under alternative 2) would result in the lowest overall price to the government, and UDLP was awarded the contract. These protests followed.<sup>6</sup>

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<sup>5</sup>Offerors were also required to include in their prices the rental value of any government production and research property (GPRP) required by the contractor in performing the contract. UDLP calculated a GPRP rental value for each alternative and included those amounts in its prices. TAAS did not include any rental value for GPRP in its proposal. TAAS does not dispute UDLP's rental value calculations.

<sup>6</sup>TAAS filed its initial protest on March 13, and on that same date, the contracting officer issued a stop-work order to UDLP. By letter dated May 15, the Navy informed our Office that the head of the procuring activity responsible for awarding the contract had determined pursuant to  
(continued...)

As relevant to these protests, the RFP stated that the Navy would provide UDLP with expended MK 13 canisters as GFM, and permitted UDLP to use components from the GFM in manufacturing the new MK 13 canisters.<sup>7</sup> UDLP would also be responsible for all costs of managing and disposing of all material from the expended canisters not used in building the new canisters. In this connection, section L of the RFP instructed UDLP that "all costs associated with either incorporating or disposing of the [GFM] MK 13 expended canisters should be clearly and separately identified for analysis."

In response to those instructions, UDLP stated in its proposal that:

"Costs associated with the demilitarizing and scrap[ping] of unfurbishable canisters is \$251,904. The net savings of approximately \$2,750,000 associated with utilization of [GFM] is inclusive in the [unit] [p]rices for each alternative. The number is based on similar refurbishment experience on past canisters. Additional cost detail is available if required."

#### ANALYSIS

TAAS argues that UDLP grossly understated the net savings associated with the use of the GFM, and contends that the Navy should not have accepted UDLP's proposal without requiring the firm to submit more detailed information supporting the \$251,904 and \$2.75 million estimates. According to TAAS, had the agency required such information, it would have discovered that the net savings derived from the use of the GFM is closer to \$7 million,<sup>8</sup> and that UDLP was able to manipulate its pricing to virtually guarantee

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<sup>6</sup>(...continued)

<sup>31</sup>U.S.C. § 3553(d)(2)(A)(i) (1988) that it was in the government's best interest to authorize UDLP to partially perform the contract, limited to 233 canisters.

<sup>7</sup>Attachment B listed by quantity and location GFM made available exclusively to UDLP for remanufacture or disposal as follows: 201 MK 13 expended canisters for fiscal year 94; 258 canisters for fiscal year 95; and 25 canisters for fiscal year 96, applicable equally to alternatives 1 and 2, for a total of 484 expended canisters.

<sup>8</sup>Although this figure also appears as \$7.5 million in one of TAAS's protest documents, throughout its pleadings TAAS relies on its estimate of \$7 million as the "true" value of the GFM.

award to it of the entire quantity of canisters under alternative 2. TAAS also argues that UDLP overstated the cost of scrapping the unused canisters. For the reasons below, we conclude that the agency performed a reasonable analysis of prices, and that even if TAAS is correct about UDLP's estimates, the relative standing of the offerors, and hence the award decision, would not change.

As an initial matter, we note that the protester's submissions generally suggest that the RFP conferred an unfair competitive advantage on UDLP. In this regard, the RFP announced the type, quantity, and location of the GFM that would be made available only to UDLP, and permitted UDLP to decide whether to refurbish or dispose of the GFM. To the extent that TAAS argues that UDLP had an unfair competitive advantage, this argument is directed to the RFP's structure, the evaluation scheme, and the award approach, and hence should have been raised prior to the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1).

With respect to the savings associated with the use of the GFM, TAAS essentially contends that UDLP intentionally underreported the value of the GFM and used the excess savings (\$4.25 million) to reduce its alternative 2 unit prices.<sup>9</sup>

Our review shows that TAAS's claims in this regard, even if accepted at face value, do not support a different award decision. If UDLP, in fact, calculated the value of the GFM as \$7 million, but wrongly disclosed the value as only \$2.75 million in its proposal--using the balance to lower its alternative 2 prices--by TAAS's own reasoning, UDLP has already incorporated the additional \$4.25 million in savings in its alternative 2 price. As TAAS concedes, UDLP's alternative 2 price already reflects the savings, and no recalculation of that price would be required. To the extent that TAAS argues that UDLP improperly failed to reduce its alternative 1 prices by the full value of the GFM--and thus, that UDLP's alternative 1 prices are inflated--even if the alternative 1 price is reduced by the full purported value of the GFM (i.e., \$7 million), the result would not be sufficient to overcome the difference

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<sup>9</sup>While TAAS asserts that UDLP used the value of the GFM to "improperly" reduce alternative 2 unit prices, TAAS does not explain, and we fail to see, how UDLP could have allocated the net savings to the government resulting from its refurbishing of expended MK 13 canisters in any other fashion than by reducing its prices by an amount corresponding to the value of the GFM.

between a split award and the overall lower price of a total award to UDLP.<sup>10</sup>

Likewise, the protester argues that the \$251,904 figure reflecting UDLP's costs of scrapping and demilitarizing unusable GFM is inaccurate. Instead, TAAS claims that the cost of scrapping and demilitarizing one MK 13 canister is approximately \$300. However, even if all 484 canisters were scrapped at a cost of \$300 each, TAAS's contentions would only yield a reduction of \$106,704 to UDLP's prices.<sup>11</sup>

Since prejudice is an essential element of a viable protest, where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130, aff'd, Merrick Eng'g, Inc.--Recon., B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444. Our review here shows that even if we accept the protester's calculations of the value of the GFM and the costs associated with disposing of the unused canisters, TAAS would not be eligible for award. TAAS has thus failed to establish that it was prejudiced.<sup>12</sup>

TAAS next argues that the contracting officer's analysis of the reasonableness of UDLP's prices was flawed. TAAS points

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<sup>10</sup>Under this assumption, the price for alternative 1 becomes \$37,995,792 (\$44,995,792 minus \$7,000,000). Thus, the recalculated total price of alternates 1 and 3 would be \$37,995,792 plus \$36,672,943, or \$74,668,735. Since that total is higher than the price UDLP submitted under alternative 2 (\$72,551,007), TAAS would not be eligible for award.

<sup>11</sup>This amount was calculated by multiplying the number of canisters by \$300 (484 x \$300 = \$145,200), and subtracting the total from \$251,904 (UDLP's estimate of those costs).

<sup>12</sup>TAAS also contends that UDLP's failure to submit detailed cost data explaining how the firm calculated the \$251,904 and \$2.75 million estimates rendered UDLP's proposal "noncompliant" with a material term of the RFP--specifically, the requirement in section L that UDLP identify all costs associated with incorporating or disposing of the GFM--rendering the proposal unacceptable. Even where an agency accepts a noncompliant offer, we will sustain a protest only if the protester is prejudiced as a result. See, e.g., Essex Electro Eng'rs, Inc., B-238207; B-238207.2, May 1, 1990, 90-1 CPD ¶ 438; Connaught Labs., Inc., B-235793, Oct. 11, 1989, 89-2 CPD ¶ 337. As already explained, the record shows that TAAS was not prejudiced by the alleged problems with UDLP's GFM calculations here.

out, for example, that the agency's evaluation of prices failed to consider that some of UDLP's prices under alternative 1 are higher than the unit prices for the same items and quantities under alternative 2. TAAS argues that these differences show that UDLP manipulated its prices to guarantee award to the firm.

A determination of price reasonableness is a matter of agency discretion which we will not question absent a showing that the determination was unreasonable or made in bad faith. Golden Mfg. Co., Inc., B-255347, Feb. 24, 1994, 94-1 CPD ¶ 183. An agency may properly base its price reasonableness determination on comparisons with government estimates, past procurement history, current market conditions, or any other relevant factors, including information revealed by the competition. Federal Acquisition Regulation (FAR) §§ 14.407-2 and 15.805-2; Golden Mfg. Co., Inc., supra. Based on our review of the record, we conclude that the Navy evaluated UDLP's prices in accordance with the standards outlined in FAR §§ 14.407-2 and 15.805-2, and that it reasonably concluded that UDLP's prices were fair and reasonable.

Section L of the RFP instructed as follows:

"Offerors are not required to submit cost or pricing data [unless the contracting officer determined that prices were not based on adequate price competition in accordance with FAR § 15.804-3.] Offerors are, however, required to submit data with their offers that will enable the [g]overnment to analyze the fairness and reasonableness of the prices proposed. This data shall include a [1]-page cost element summary (material, direct, labor, burden pools, and profit) for each [contract line item number] proposed. The level of detail and clarity of this data should be such that it enables the [g]overnment to clearly correlate the available data with the submitted prices."

UDLP submitted with its proposal detailed additional cost data, indicating for each contract line item number (CLIN) material costs and burdens, and manufacturing and engineering costs in support of its unit prices. For each CLIN, each cost category was further broken out by hours, labor, and overhead.

In support of its position, TAAS points to four CLINs for which the production quantity is the same under alternatives 1 and 2, but for which UDLP proposed higher unit prices under alternative 1. These differences range from approximately 10 to 14 percent, and could reasonably be

explained by a number of factors, including the fact that UDLP will provide a greater number of total items under alternative 2.<sup>13</sup> See, e.g., MIL-STD Corp., B-212038; B-212038.2, Jan. 24, 1984, 84-1 CPD ¶ 112. Thus, the fact that UDLP's unit prices under alternative 1 are slightly higher than under alternative 2 does not show that UDLP's alternative 1 prices are unreasonable. Moreover, the protester does not explain why these slight differences compel a conclusion that all of UDLP's alternative 1 prices are unreasonably high.

The contracting officer also compared UDLP's line item prices to prices paid in recent competitive procurements for the same items. These comparisons show that for the MK 13 canisters, for example, UDLP's prices under both alternatives were generally lower than projected from the historical data. Comparison of unit prices for the other types of canister yielded similar results, leading the contracting officer to reasonably conclude that UDLP's prices were fair and reasonable.<sup>14</sup>

Finally, since the contracting officer's price analysis supports a conclusion that UDLP's prices under alternatives 1 and 2 were reasonable, particularly when compared with projected prices based on the historical data for similar competitive procurements, the contracting officer reasonably concluded that adequate price competition existed. See FAR § 15.804-3(b)(3). Accordingly, contrary to the protester's assertions, the agency was not required to obtain additional cost or pricing data from UDLP. See FAR § 15.804-3(a).

The protests are denied.

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for Robert P. Murphy  
General Counsel

<sup>13</sup>Higher production levels logically influence other factors such as learning curves and overhead, which could reasonably explain the minor differences in unit prices here.

<sup>14</sup>To the extent TAAS argues that UDLP's prices under alternative 2 represent a below-cost offer, there is nothing legally objectionable in the submission or acceptance of a below-cost offer in a fixed-price contract setting. Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18.