



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Dual, Incorporated

File: B-280719

Date: November 12, 1998

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Diana G. Richard, Esq., and David R. Johnson, Esq., Gibson, Dunn & Crutcher, for INTELX Corporation, an intervenor.

Walter Batson, Jr., for Camber Corporation, an intervenor.

John E. Lariccia, Esq., Maj. Steven Shoulberg, and Greg Petkoff, Esq., Department of the Air Force, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Air Force evaluation and award decision were improper because they were based upon awardee's representation in its proposal that it owned the division and employed the employees that would perform the contract is sustained, where the record shows that the awardee signed an agreement to sell the division and transfer the employees just days after the agency completed its evaluation and 2 weeks before the contract was awarded.

DECISION

Dual, Incorporated, a small business concern, protests the award of a contract to Camber Corporation by the Department of the Air Force pursuant to request for proposals (RFP) No. F33657-98-R-0008. The protester contends that Camber, one of two small business awardees, misrepresented that it would perform the contract work at its Albuquerque, New Mexico, division when, in fact, Camber was negotiating the sale of that division to another firm while the procurement was being conducted. Dual also contends that the agency's evaluation of Dual's proposal and performance risk was unreasonable; the agency improperly rated Dual's proposal as unsatisfactory based upon financial condition without first obtaining a responsibility determination from the Small Business Administration (SBA), and the agency's best value determination was tainted by evaluation errors. Protest Letter, Aug. 3, 1998, at 1.

We sustain the protest.

Issued on January 23, 1998, the RFP provided for award of several indefinite-delivery indefinite-quantity (IDIQ) contracts (as many as two contracts to small businesses under a partial set-aside and two or more contracts under full and open competition) to meet the training systems needs of the Air Force, Department of Defense customers, and foreign military sales. RFP §§ L-2:1.0, M-2:1.1.2. The scope of the contracts might include design, development, testing, production, modification, upgrade, delivery, and sustainment of training systems. RFP § L-2:1.0b. The RFP provided that all contracts would be identical and would require the contractors to provide a broad range of training systems products, supplies and services specified in task or delivery orders issued by the agency.¹ RFP Executive Summary ¶ 5. The RFP provided that each IDIQ contract would guarantee a minimum of \$75,000 of work over a 5-year ordering period and an 8-year period of performance. RFP § H030.

The RFP stated that the Air Force intended to award the contracts without discussions on the basis of a best value competitive source selection to the responsible offerors whose proposals conformed to the RFP requirements and who demonstrated the management, financial, technical, and facility capabilities necessary to fulfill the contract requirements. RFP § M-2:1.0. The RFP listed, in descending order of importance, the following evaluation factors: capabilities assessment, management, cost, and general considerations. RFP § M-2:2.0. Within each evaluation factor, the RFP listed and described in detail the related subfactors. Non-cost evaluation subfactors combined were significantly more important than cost. See generally, RFP § M-2. The RFP stated that each subfactor under the capabilities assessment and management factors would be given a color/adjectival rating and a proposal risk rating. RFP § M-2:6.0. The color/adjectival rating would depict how well the proposal met the evaluation standards and solicitation requirements, while the proposal risk rating would represent the risks that were identified in a proposed approach to accomplishing the RFP requirements. RFP § M-2:6.1.1. The RFP stated that each evaluation factor, except general considerations, would also receive a performance risk assessment representing the agency's confidence in the offeror's ability to successfully perform the work based upon the offeror's past and present work record. RFP § M-2:6.1.2. The general consideration factor would include a pre-award survey to determine the offeror's ability to meet the requirements and a determination of compliance with RFP terms and conditions, but would not be color/adjectivally rated or assessed for proposal or performance risk. RFP §§ M-2:5.0, M-2:6.1.4.

Eleven offers were evaluated by the source selection evaluation team. Seven of the offers were submitted by small business concerns and were evaluated for the small business partial set-aside portion of the procurement, and two of those were considered unacceptable. The agency conducted its evaluations during May

¹The contracts are referred to as the Training Systems Acquisition or TSA contracts.

and June, the source selection evaluation team briefed the source selection authority (SSA) on its findings and recommendations, and SSA made his selection decision on June 25. The SSA determined that the offers of INTELX Corporation and Camber offered the best value for the small business partial set-aside award and that the offers of McDonnell Douglas Corporation, Lockheed Martin Corporation Information Systems, and Raytheon Training Incorporated represented the best value for the full and open competition awards. Air Force Legal Report at 3; Source Selection Decision Memorandum at 11. On June 28, Camber entered into an agreement to sell its Flight Simulation Division (with a proposed closing date of July 1) and to transfer the employees of that division to the acquiring company, and to lease back a one-third interest in the assets of its former Flight Simulation Division. Asset Purchase Agreement, June 28, 1998, at 1-3, 5, 23; Lease Agreement, June 28, 1998, at 1. On July 15, 1998, contracts were awarded to all five firms.² Air Force Legal Report at 1. After a debriefing, Dual filed this protest.

The protester asserts that Camber's proposal misrepresented that Camber would perform contract work at Camber's Flight Simulation Division, in Albuquerque, New Mexico, but Camber was negotiating to sell that division to another company before the Air Force even completed its evaluation and awarded Camber a contract. Protest Letter at 4-5. The protester asserts that Camber did not notify the Air Force of the impending sale at any time before the evaluations were completed, the selection made, and the contract awarded. *Id.* The protester contends that Camber did not intend to use its Flight Simulation Division to perform the contract as it represented in its proposal and that the Air Force relied upon the representation as its basis for evaluation and selection of Camber. *Id.* Dual contends that Camber's proposing that its Flight Simulation Division would be the main operating location for performing contract work was a material misrepresentation that included the wholesale substitution of facilities, equipment, numerous personnel, and experience associated with the Flight Simulation Division.³ *Id.* at 5; Protester's Comments at 5-7.

We have sustained protests where the awardee failed to disclose material changes in personnel availability which occurred after proposals were submitted, but before award. See, e.g., Mantech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309 at 5; CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5-6. Here, the record shows that Camber agreed to sell the division which it stated would

²Dual's protest concerns only the contract award to Camber. Dual Supplemental Comments at 2 n.2. Therefore, our discussion will be limited to the evaluations of Dual's and Camber's proposals and the selection of Camber for award.

³The Air Force notified Camber of the protest and provided it a copy of the agency's protest report, but Camber has not explained the circumstances of the Flight Simulation Division sale.

perform significant TSA work and to transfer the employees of that division to the acquiring company. Camber did not notify the Air Force of the sale agreement.⁴

The importance of the Flight Simulation Division's employees to Camber's capability to perform is obvious from a review of Camber's proposal. Statements showing Camber's reliance on the Flight Simulation Division and its employees permeate Camber's proposal.

Camber's proposal stated that the firm did not have a centralized quality assurance activity, but explained that it had a full-time quality assurance person assigned to its Flight Simulation Division. Also, Camber's proposal stated that, in addition to quality assurance duties, the full-time quality assurance person functioned as the corporate quality assurance advisor and would provide advisory assistance to the program manager for the TSA contract. Camber Proposal, Vol. I, at 10, Vol. II, at 130. In its capabilities assessment proposal, Camber's Flight Simulation Division quality assurance person described in some detail the division's quality assurance/corrective action procedures and the Flight Simulation Division's quality assurance procedures manual, and indicated that the Flight Simulation Division group would monitor subcontractors' quality assurance activities. Camber Proposal, Vol. II, at 130-138.

Its proposal also highlighted the high level of quality, experience and skills of its in-house staff, many of whom were working at the Flight Simulation Division. Camber listed the software development staffers by name, indicated the total number of years of experience for each, indicated the percent of each staffer's experience acquired while working for Camber's Flight and Sensor Simulation Divisions, and briefly described the type of experience that each staffer had acquired. Notably, at least seven of the named staff members were working in the Flight Simulation Division. Camber Proposal, Vol. II, at 73-74. Camber also pointed out the experience levels and critical skills possessed by a number of its Flight and Sensor Simulation Divisions' employees; the employees were listed by position within those divisions rather than by name. Camber Proposal, Vol. II, at 127-128. Camber pointed out that its retention rate for employees in manufacturing is 88 percent and stated that it had no reason to believe that the retention rate and quality of its personnel would change. Camber Proposal, Vol. II, at 128-129. In addition, large segments of the Camber proposal were written by Flight Simulation Division employees.

It is clear that Camber encouraged the agency to give close scrutiny to the Flight Simulation Division's quality assurance person and procedures, the experience levels and skills of the employees of that division, as well as the high retention rate

⁴The Air Force first learned from a disappointed offeror on July 22 of Camber's sale of the Flight Simulation Division. Air Force Supplemental Legal Report at 3.

for employees of the division. Although Camber agreed to the sale of the division and transfer of its employees on June 28, Camber did not inform the agency of the sale. Even after Camber received notice of the proposed award, it still did not advise the agency of the sale agreement, notwithstanding that the contract was not actually awarded for another 2 weeks.

The record shows that the evaluators relied on Camber's representations in conducting the evaluation. For example, in the general considerations evaluation, the Defense Contract Management Command (DCMC) performed a pre-award survey on several different aspects of Camber's capability to perform the contract successfully. In performing its pre-award survey, DCMC examined the resumes and credentials of certain Camber employees that DCMC considered to be key personnel for the contract if awarded to Camber; notably, several of the key personnel worked at the Flight Simulation Division. Pre-award Survey Report (Camber) at 10-11, 21-37. The agency's field evaluation team visited Camber's main operating location, the Flight Simulation Division, and confirmed the representations Camber had made in its proposal and discussed capability matters with employees of that division. Among other things, the evaluators commented favorably upon the critical/special skills of the Flight Simulation Division's manufacturing personnel and the extremely high retention rate for employees of that division. The evaluators also noted that Camber's quality assurance program relied upon one individual in the Flight Simulation Division. Summary Evaluation Worksheet (Camber), Capabilities Assessment Factor, Hardware Mfg. and Quality Subfactor, at 2-4.

Since Camber's representations regarding the Flight Simulation Division and employees permeated Camber's entire proposal and the agency relied upon those representations in its evaluation, it is clear that, had the firm disclosed the sale of its main operating location, the award decision might have been different. The evaluators never evaluated Camber's actual employees and other capabilities as they existed at the time of award. Camber's failure to disclose to the Air Force the status of its main operating location and of the employees of that division had a material effect on significant aspects of the evaluations. See Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD 139 at 10.

For example, the agency evaluated the proposal risks represented by each proposal in its evaluation of each subfactor of the capabilities assessment and management evaluation factors and performance risks represented by each offeror in its evaluation of the capabilities assessment and management evaluation factors. It is likely that the representation affected the proposal and performance risk ratings assigned on specific facets of the proposal--such as the quality assurance program and procedures, critical skill levels and experience of employees, and the high retention rate of Flight Simulation Division employees--since the evaluators did not know that Camber's main operating division and its employees were being sold/transferred before Camber was awarded the contract. Even though Camber informed the Air Force (after it was awarded the contract) that it has other

resources to perform the TSA work, including a lease of some of the Albuquerque manufacturing facility, the fact is that the agency evaluated Camber's proposal and performance risks on the basis of the Flight Simulation Division and its employees, not on the basis of personnel from other divisions or subcontractors doing the work.

Since the agency's evaluation of Camber's proposal was based upon Camber's representation that it would perform much of the TSA contract with its own employees, when, in fact, that will not be the case, the evaluation is flawed. Therefore, the SSA's best value determination and selection of Camber as the second awardee under the partial small business set-aside, which was based entirely upon the results of the flawed evaluation, is also suspect.

In these circumstances, Camber had an obligation to advise the agency of the sale, at the very latest on June 28, when it agreed to the sale and lease back of facilities. See Professional Safety Consultants Co., Inc., B-247331, Apr. 29, 1992, 92-1 CPD ¶ 404 at 4. See also Mantech Field Eng'g Corp., *supra*. Because Camber did not do so, the agency's evaluation and its selection of Camber were based upon representations concerning Camber's personnel that were no longer true. The award was based on Camber's proposal representations, and to allow such an award to stand in spite of the fact that Camber had not disclosed to the agency that it would not perform the contract as proposed would call into the question the integrity of the competition. See AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287 at 6. Accordingly, we are sustaining the protest on this ground.

The protester next contends that the evaluations of Dual's proposal and performance risks were unreasonable. Our Office will only question an agency's evaluation of proposals if it lacks a reasonable basis or is inconsistent with the stated evaluation criteria for award. DAE Corp., Ltd., B-257185, Sept. 6, 1994, 94-2 CPD ¶ 95 at 4. A protester's mere disagreement with the agency over its technical evaluation does not establish that the evaluation was unreasonable. *Id.*; Cubic Applications, Inc., B-274768 *et al.*, Jan. 2, 1997, 97-1 CPD ¶ 98 at 3. Here, after reviewing the record in light of the protester's arguments, we have no basis to question the agency's evaluation of Dual's proposal.

The protester asserts that the Air Force's performance risk assessment disregarded Dual's high performance ratings on previous contracts for simulators, trainers and programs used for [deleted] aircraft and instead based its ratings exclusively on perceived negative aspects of Dual's performance on contracts for a simulator used with the [deleted] program and a trainer used with the [deleted] aircraft. Protest Letter at 5-6. However, the record does not support the assertion. Dual's proposal included prior performance information for one of Dual's proposed subcontractors, [deleted], for contract performance on the [deleted] aircraft program, and the Air Force obtained additional prior performance information for the same proposed

subcontractor on the [deleted] program. Contracting Officer Statement at 6; Dual Proposal, Volume V, at 41. The record clearly shows that, not only did the evaluators consider the subcontractor's prior performance on the [deleted] and [deleted] programs in conjunction with Dual's performance on the [deleted] and [deleted] programs, but the evaluators specifically noted the subcontractor's high technical performance and outstanding assistance to the government and considered the subcontractor's previous work on the [deleted] programs to be a strength of the Dual team. Proposal Analysis Report at 121-122. We therefore deny this protest ground.

The protester also contends that the agency's performance risk assessment did not consider the most recent contractor performance assessment report (CPAR) on its [deleted]-related contract and the fact that delays and other performance difficulties Dual experienced on the [deleted]-related contract were caused by the Air Force's failure to provide adequate specifications and the Air Force's failure to disclose vital information to Dual, which resulted in Dual's filing a \$[deleted] claim for an equitable adjustment under that contract. Protest letter at 5. Regarding the [deleted] contract, the record shows that the evaluators reviewed the two most recent CPARs (for the periods ending in September 1995 and September 1996) that were contained in the Air Force's database. Contracting Officer Statement at 7; Dual Past and Present Performance Data at 44. However, because the CPAR for the period ending in September 1997 had not yet been approved, it was not included in the Air Force database and was not considered by the evaluators. Contracting Officer Statement at 7. Regarding Dual's claim for an equitable adjustment under its [deleted] contract, the evaluators had no details concerning the monetary claim or Dual's assertion that performance delays and other performance problems were caused by the Air Force. Moreover, the claim has not yet been adjudicated. *Id.*; Air Force Legal Report at 12. Because the CPAR for 1997 was neither approved nor entered into the agency's database until after the assessment was completed and the contracts awarded, and because the claim for an equitable adjustment merely represents Dual's bald assertion that the performance problems Dual encountered were the Air Force's fault, we think that the agency performance risk assessment, which considered a host of other information (including performance information on a total of 17 contracts performed by Dual and its proposed subcontractors) reasonably did not consider this additional information.

The protester further contends that the agency incorrectly rated Dual's proposal risk as high under the management evaluation factor based upon the agency's determination that Dual's proposed flight test for the RFP's AWACS sample task was too short. Protest Letter at 6. Dual's proposal included a total of just 180 days for all phases of flight testing; the evaluation team assigned the proposal a high risk for the sample task because the Air Force estimated that adequate flight testing should take a total of 420 days. Contracting Officer Statement at 6. Dual contends that it knows how long flight testing should take because it has performed similar work under its [deleted] contract. Protest Letter at 6. However, Dual's mere

disagreement with the agency's evaluators is not sufficient to establish that the agency estimate was wrong or the evaluation unreasonable. Astro Pak Corp., B-256345, June 6, 1994, 94-1 CPD ¶ 352 at 4. We also note that, in addition to the short duration of the proposed flight testing, the evaluation team considered several other aspects of Dual's proposal to be weaknesses that appear to increase the proposal risk. For example, the evaluators noted that Dual's description of security processes was incomplete, that Dual's integrated master plan was difficult to understand because some integrated master plan events were not defined, and Dual's integrated master schedule was missing some tasks making it difficult to track scheduling status and how certain events would be achieved. Proposal Analysis Report at 73-74.

Dual also contends that the Air Force improperly rejected its proposal based upon a negative financial report and recommendation made by DCMC which conducted a pre-award survey of Dual. Dual complains that, after completing its pre-award survey, DCMC recommended "no award" to Dual and that the Air Force made a negative nonresponsibility determination on Dual based upon DCMC's recommendation. The protester contends that, since Dual is a small business concern, the agency was required to refer the matter to the SBA for a responsibility determination. Protest Letter at 6-7. This protest argument is without merit.

An agency may use traditional responsibility factors as technical evaluation factors where, as here, a comparative evaluation of those areas is to be made. Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 3. A comparative evaluation means that competing proposals are rated on a scale relative to each other as opposed to a pass/fail basis. Id. In a negotiated procurement, SBA referral is mandatory only where a traditional responsibility-type factor is evaluated on a pass/fail basis and the contracting agency determines that a small business's proposal should be rejected for failure to pass that factor. T. Head and Co., Inc., B-275783, Mar. 27, 1997, 97-1 CPD ¶ 169 at 3.

Here, the RFP specifically stated that successful offerors would have to demonstrate financial capability to fulfill the contract requirements and that a pre-award survey would be conducted as part of the general considerations factor evaluation to determine each offeror's ability to meet the RFP requirements. RFP §§ M-2:1.1.1, M-2:5.1. Contrary to the protester's assertion, the Air Force did not reject its proposal or make a negative determination of Dual's responsibility based upon the DCMC recommendation. In fact, the record shows that Dual's was one of the five proposals submitted by small business concerns that were considered acceptable by the SSA. Source Selection Decision Memorandum at 2, 5. The record further shows that Dual's proposal was determined not to represent the best value--i.e., was considered of lesser value than INTELX's and Camber's proposals--after a thorough evaluation of a multitude of factors within each of the evaluation factors and a comparison of the relative merits, strengths, and weaknesses of proposals. Id. at 3-6. As Dual was not in line for award, the

contracting officer made no determination on Dual's responsibility, and referral to the SBA was not necessary.

For the reasons set forth above, we sustain the protest. We therefore recommend that, if there is a continuing need for a second award, the agency recompetes its requirement for such second small business contract⁵ and, if a firm other than Camber is selected for award, terminate Camber's contract and award the second small business set-aside contract to the small business firm whose proposal does represent the best value.⁶ We also recommend that Dual be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Dual should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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⁵Since the information concerning Camber came to light after the award, this information cannot be considered in any reevaluation without this information being submitted as part of a revised proposal. To permit Camber to submit a revised, materially altered proposal without permitting the other losing small business firms to revise their proposals would afford Camber an unfair competitive advantage.

⁶The Air Force indicated that it may have no requirement for a second small business set-aside contract and, therefore, even if our Office were to sustain the protest and recommend corrective action, the Air Force stated that it might not recompetes the requirement and make a new award decision. Letter from Air Force Counsel to the General Accounting Office Attorney at 1 (October 26, 1998). If it turns out that the Air Force no longer requires a second small business contract and therefore chooses not to recompetes the requirement, we recommend that Dual be reimbursed for its proposal preparation costs. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(2) (1998).