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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: TestVonics Inc.

File: B-406700.3

Date: December 4, 2012

Patrick R. Quigley, Esq., Arent Fox LLP, for the protester.
Ronald S. Perlman, Esq., and Alexander B. Ginsberg, Esq., Holland & Knight LLP, for Custom Manufacturing and Engineering, Inc., an intervenor.
W. Michael Rose, Esq., Charles R. Epperson, Esq., and Jonathan L. Simpson, Esq., Department of the Air Force, for the agency.
Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably and unfairly evaluated the past performance of the protester and awardee is denied where record shows that agency's evaluation was reasonable, consistent with the terms of the solicitation, and not the result of unequal treatment.

DECISION

TestVonics, Inc., of Petersborough, New Hampshire, protests the award of a contract to Custom Manufacturing and Engineering, Inc. (CME), of Pinellas Park, Florida, under request for proposals (RFP) No. FA8533-09-R-21835, issued by the Department of the Air Force for a quantity of flight control system test sets. TestVonics maintains that the agency miscalculated proposals and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP contemplates the award of a fixed-price contract to the firm submitting the proposal deemed to offer the "best value" to the government, considering price and several non-price considerations. RFP at 65. The acquisition is a 100-percent small business set-aside and is being conducted as a commercial product acquisition under Federal Acquisition Regulation (FAR) part 12. The RFP provided

that the agency would make award using a “technically acceptable-risk/performance/price tradeoff” process, whereby the agency would first determine which of the proposals submitted were technically acceptable; once the agency determined which proposals were technically acceptable, the RFP provided that the agency would conduct a tradeoff between technical risk, past and present performance, and cost/price.¹ Id. The RFP provided that price would be evaluated for reasonableness and to determine whether proposed prices were unbalanced. RFP at 69. For source selection purposes, the RFP provided that technical risk and past and present performance were equal in importance and that, when combined, these considerations were significantly more important than price. RFP at 65.

In response to the solicitation, the agency received six proposals. The agency engaged in discussions with the offerors and, at the conclusion of those discussions, the agency determined that five of the proposals were technically acceptable. The agency evaluated those remaining proposals and announced its selection decision, advising the remaining offerors that CME was the apparent successful offeror. After being advised of the agency’s selection decision, TestVonics and two other concerns filed size protests with the contracting officer alleging that CME was not a small business. These protests were forwarded to the Small Business Administration, which, by decision dated April 24, 2012, concluded that CME was a small business. Agency Report (AR), exh. 21.

In the wake of SBA’s determination relating to CME’s size status, the agency made award to it on April 25. After being advised of the agency’s selection decision and receiving a debriefing, TestVonics filed a protest in our Office challenging the award to CME. In response to that protest, the agency advised that it would reevaluate proposals in the past and present performance area (as well as in any other area deemed necessary), and would make a new source selection decision. On the basis of the agency’s proposed corrective action, our Office dismissed TestVonics’s protest as academic on May 31.

The agency reevaluated proposals and assigned the following ratings:

¹ The RFP provided that, for technical risk, the agency would assign proposals an adjectival rating of either low, moderate, high or unacceptable. The RFP further provided that: “A plus ‘+’ rating may be used as an option when risk is evaluated to be in the upper boundaries of a technical risk rating, but not enough to merit the next inferior rating.” RFP at 66-67. For past/present performance, the RFP provided that the agency would assign an adjectival rating of either substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown confidence. RFP at 68-69.

Offeror	Technical Risk	Past/Present Performance	Price
TestVonics	Low	Satisfactory	\$43,130,400
CME	Low+	Satisfactory	\$38,424,862
Offeror A	Moderate	Unknown	\$56,680,307
Offeror B	Low	Unknown	\$43,186,800
Offeror C	Low	Satisfactory	\$44,087,127

AR, exh. 27, at 11. Based on these evaluation results, the agency again made award to CME, concluding that its proposal represented the best value to the government. In this regard, the agency specifically found that TestVonics' lower evaluated technical risk was not worth paying a 12-percent price premium over CME's proposal, even though the CME proposal received a slightly higher risk rating (low+). *Id.* at 37-38. After being advised of the agency's source selection and receiving a debriefing, TestVonics filed the instant protest.

PROTEST

Past/Present Performance Evaluation

The record shows that, in evaluating past/present performance, the agency reviewed three contracts performed by TestVonics, and also reviewed three contracts performed by CME, as well as three other contracts performed by CME's critical subcontractor, GE Measurement and Control Solutions. TestVonics takes issue with all of the agency's evaluation conclusions regarding its contracts, as well as the agency's evaluation conclusions regarding two of GE's contracts, focusing on the relevancy ratings assigned to the contracts reviewed.

We have reviewed all of TestVonics's allegations relating to the agency's evaluation of proposals under the past/present performance evaluation factor and, as illustrated by the following examples, find no merit to its contentions. We note at the outset that the evaluation of past or present performance, including the agency's assessments with regard to the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion, which we will not disturb unless those assessments are unreasonable or inconsistent with the solicitation's evaluation criteria. Yang Enters., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 *et al.*, Apr. 1, 2005, 2005 CPD ¶ 65 at 5; Acepex Mgmt. Corp., B-283080 *et al.*, Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5.

The RFP provided that the agency would assign relevancy ratings to the contracts reviewed of either very relevant, relevant, somewhat relevant or not relevant. The RFP defined "very relevant" and "relevant" as follows:

Very Relevant: Present/past performance efforts that involved essentially the same magnitude of complexities and much of the

magnitude of effort this solicitation requires. Very relevant efforts shall include the design and manufacture of a pitot static test set² which is portable, weighs less than or equal to 100 pounds, and includes remote unit capability meeting RVSM [Reduced Vertical Separation Minimum] compliance requirements.

Relevant: Present/past performance efforts that involved much of the magnitude of complexities and some of the magnitude of effort this solicitation requires. Relevant efforts shall include the design and/or manufacture/remanufacture/rebuild of a portable avionics test set with major components to include a pump.

RFP at 67.

One of the contracts considered by the agency in evaluating TestVonics was a contract that it performed for the Marine Corps under which TestVonics upgraded a quantity of air data test sets over a 5-year period. The record shows that, although the agency found that the magnitude of the contract would have resulted in the assignment of a very relevant rating for this contract (the contract called for the upgrade of over 1,000 units for a dollar value of approximately \$5.7 million), the agency assigned it a rating of only relevant because the units in question weighed more than 100 pounds. AR, exh. 26, at 49.

TestVonics essentially maintains that, because the agency determined that the magnitude of this contract rendered it very relevant, the agency erred in assigning it only a relevant rating. However, as is evident from a reading of the definition of very relevant included in the solicitation, the agency would have been in error had it assigned this contract a rating of very relevant because the units in question did not weigh less than, or equal to, 100 pounds. TestVonics has not alleged or demonstrated that the agency's conclusion relating to the weight of the units was factually incorrect, and we therefore find that the agency appropriately assigned this contract a rating of only relevant based on the weight of the units in question.

In the agency's evaluation of the contracts of CME's subcontractor, GE, the agency assigned a rating of relevant to a contract under which GE manufactured flight line air data test sets for use in calibrating F-16 fighter jet aircraft. The record shows that this contract was rated relevant because:

Technically, this effort is rated as relevant as it involves the manufacture of a pitot static test set which is portable, weighs less than or equal to 100 pounds, and includes remote unit capability

² A pitot static test set is a pressure measurement instrument used to measure fluid flow velocity.

meeting RVSM compliance requirements. This effort could not be determined technically very relevant as it did not involve any design work.

AR, exh. 26, at 8. The record also shows that the agency gave consideration to the number of units manufactured under this contract (six), the duration of the contract (four months), and the dollar value of the contract (\$296,706), in concluding that, together with the finding that the contract was technically relevant, the contract merited an overall rating of relevant. TestVonics takes issue with the agency's finding, maintaining that, because of the comparatively small size of this contract, the agency acted unreasonably in rating it as relevant.

We have no basis to object to the agency's assignment of a relevant rating to this contract. While TestVonics is correct that this contract was for a smaller requirement in comparison to the current contract, the record shows that the agency essentially made a combined finding involving both the magnitude and technical complexity of the contract. Specifically, the evaluators found:

This effort involves some of the magnitude of effort this solicitation requires. Considering the dollar value, quantity, the duration of the program, and the technical characteristics of the units, this effort is determined to be **Relevant** as the effort did involve much of the technical complexities and some of the magnitude of effort this instant solicitation requires.

AR, exh. 26, at 8. In light of the fact that the contract called for the manufacture of units having virtually all of the technical characteristics of the units to be furnished under the contract to be awarded (*i.e.*, pitot static test sets which are portable, weigh less than or equal to 100 pounds, and include a remote unit capability meeting RVSM compliance requirements), the fact that the contract being evaluated was for the manufacture of fewer units during a shorter period of time does not provide a basis for our Office to find the agency's conclusion unreasonable; rather, the protester's objection amounts to no more than disagreement with the agency's evaluators.³ General Dynamics Info. Tech., Inc., B-407057, Oct. 12, 2012, 2012 CPD ¶ 293 at 4.

TestVonics also asserts that the agency treated it and CME unequally in considering their respective past performance questionnaires. In this connection, the RFP included past performance questionnaires that were to be filled out and submitted to the agency by the points of contact identified in the offerors' proposals. RFP at 158-61. The questionnaires included a rating scheme that called for the

³ We point out that one of TestVonics's contracts found to be relevant was for the manufacture of only one unit for a total value of \$33,000. AR, exh. 26, at 50.

respondents to rate various aspects of the offerors' performance using an adjectival rating system that included ratings of either not applicable, unsatisfactory, marginal, satisfactory, very good, or exceptional. The questionnaires also included detailed instructions regarding how the respondents were to complete them. In particular, the questionnaires provided as follows:

If respondent does not provide information to support any marginal, very good, or exceptional ratings that it may assign, the Government will interpret the rating as being a satisfactory one. Should your response be other than "satisfactory," please provide supporting documentation in "Additional Remarks" on page 3 of 4.

RFP at 159. The record shows that, for two of TestVonics's contracts, although the respondents had assigned adjectival ratings above satisfactory, the agency, consistent with the terms of the questionnaires, only gave TestVonics ratings of satisfactory in evaluating its proposal because the higher ratings were not supported with narrative explanations. AR, exh. 26, at 49-50.

The record also shows that, with respect to one of the GE contracts evaluated, the agency did not receive a questionnaire from the identified respondent. Because the agency did not receive a questionnaire, it contacted the identified point of contact for the contract in an effort to obtain some feedback. AR, exh. 26, at 9. TestVonics asserts that this amounts to unequal treatment of the two offerors because the agency made no attempt to contact its points of contact in those instances where the narrative information supporting ratings higher than satisfactory were not included in its past performance questionnaires.

We find no merit to this aspect of the protest. The record shows that, with respect to all offerors, the agency attempted to make--and in some instances succeeded in making--contact with the identified point of contact in every instance where the agency did not receive a questionnaire in connection with a past/present performance reference. AR, exh. 26, at 1-2, 9, 16-17, 18, 19, 27-30, 42. Significantly, in none of those instances where the agency succeeded in contacting the point of contact--including in its review of the GE contract--did the agency assign a rating higher than satisfactory after interviewing the point of contact. Id. Additionally, in those instances where the agency did not succeed in contacting the point of contact, the agency did not use the contracts in question to evaluate the offeror's past/present performance. Id. at 18, 19, 20, 28. Thus, the record shows that all offerors were treated consistently in terms of the agency making an effort to obtain feedback from the point of contact where no questionnaire was received.

Similarly, the record also shows that the agency treated all offerors equally where it received a questionnaire, but the questionnaire did not include narrative information to support a rating other than satisfactory; in every instance, the agency made no attempt to obtain additional information, and instead assigned a satisfactory rating

to the past/present performance example, even though the respondent may have assigned a higher adjectival rating. Id. at 7, 17, 39, 40, 49-50.⁴ Of significance, the record shows that, with respect to one of GE's questionnaires, although the respondent assigned ratings above satisfactory, the questionnaire did not include narrative materials in support of the ratings and, consequently, the agency assigned GE a rating of satisfactory for evaluation purposes. Id. at 7.

As illustrated by the foregoing examples, we have no basis to find the past performance evaluation of the TestVonics and CME proposals unreasonable, inconsistent with the RFP, or the result of unequal treatment.⁵

CME's Technical Risk Rating

TestVonics asserts that the agency unreasonably assigned CME a technical risk rating of low+, even though the firm has never manufactured flight control system test sets, and is relying on the technical data and assistance of GE, its critical subcontractor to perform the requirement. TestVonics maintains that the agency never considered the risks associated with the possibility that GE might be unwilling or unable to provide CME with the necessary information and assistance.

This aspect of TestVonics's protest fails to state a valid basis, inasmuch as it is based on no more than TestVonics's unsupported speculation that GE may be unable or unwilling to provide the necessary information and assistance to CME in performance of the contract. In the absence of some factual basis derived from the CME proposal that would suggest or demonstrate that GE might be unwilling or unable to provide CME with the information and assistance it has offered to provide, we have no basis to further consider this aspect of TestVonics's protest.

Price Realism Evaluation

TestVonics asserts that the agency failed to conduct a price realism evaluation in connection with its award to CME. According to the protester, CME's prices are unrealistically low.

This aspect of TestVonics's protest also fails to state a valid basis because the RFP did not provide for the conduct of a price realism evaluation. Given the fixed price nature of the contract, the agency was under no obligation to conduct a price

⁴ We point out that, where one of TestVonics's references did provide narrative details supporting ratings higher than satisfactory, TestVonics was given credit by the agency for the higher ratings. AR, exh. 26, at 50.

⁵ We have reviewed all of TestVonics' challenges to the past performance evaluation and find that none provide a basis to sustain the protest.

realism evaluation in the absence of a solicitation provision expressly calling for such an evaluation.⁶ A&T Sys., Inc., B-407152, Nov. 16, 2012, 2012 CPD ¶ ____ at 5-6.

The protest is denied.⁷

Susan A. Poling
General Counsel

⁶ TestVonics suggests that, because all of the offerors were cautioned by the agency during discussions against “buying in” to the requirement, this imposed an obligation on the agency to perform a price realism evaluation. Simply stated, nothing in the agency’s cautionary statement to the offerors imposed such an obligation on the agency.

⁷ TestVonics also suggests that the agency improperly failed to give adequate weight to the non-price considerations because the source selection decision concludes that the flight control system test sets are not a critical piece of equipment, but instead are modified commercial items. According to the protester, this finding shows that the agency per se failed to give adequate weight to the non-price considerations. The record shows that the agency’s source selection official found, consistent with the terms of the solicitation (a commercial item acquisition conducted under FAR part 12), that the flight test sets being acquired were modified commercial items. AR, exh. 27, at 38. Such a finding does not demonstrate that the agency gave inadequate weight to the non-price factors, but, rather, only that the source selection official was accurately characterizing what was being acquired.