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## Decision

**Matter of:** New Mexico State University

**File:** B-409566

**Date:** June 16, 2014

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Daniel E. Chudd, Esq., and Damien C. Specht, Esq., Jenner & Block LLP, for  
Orbital Sciences Corporation, an intervenor.  
Alexander T. Bakos, Esq., Daniel C. Hymer, Esq., and James A. Vatne, Esq.,  
National Aeronautics and Space Administration, for the agency.  
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging solicitation's terms that call for the normalization of certain costs among all prospective offerors is denied where record shows that such normalization is intended to promote competition among prospective non-incumbent offerors.

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### DECISION

New Mexico State University (NMSU), of Las Cruces, New Mexico, protests the terms of request for proposals (RFP) No. NNG14436908R, issued by the National Aeronautics and Space Administration (NASA) for operation and maintenance of the agency's Columbia Scientific Balloon Facility (CSBF), as well as several other balloon launch facilities at various locations worldwide. NMSU maintains that the RFP improperly excludes from competition or evaluation the cost of various elements of the agency's requirements.

We deny the protest.

### BACKGROUND

The RFP contemplates the award of a hybrid type contract that combines a cost-plus-fixed-fee (CPFF) element for the agency's core requirements, plus an indefinite-delivery, indefinite-quantity (IDIQ) element under which the agency can issue additional delivery orders for a base period of 20 months, an option period of

24 months, and a second option period of 16 months. RFP at BATES 175, 186.<sup>1</sup> Essentially, the RFP requires the successful contractor to provide facility operation and maintenance for the CSBF which includes operational balloon flight support (encompassing launching, tracking, and recovery of the scientific balloons and payloads), and engineering services for operational support, quality control, and balloon research and development. RFP Cover Letter, at BATES 172.

As is relevant here, the RFP includes a table that identifies certain “non-proposed” costs for the core requirements. RFP at BATES 180; Agency Report (AR), exh. 7, RFP Amendment No. 4, at BATES 650.<sup>2</sup> The table lists 10 categories of costs<sup>3</sup> and provides offerors with “plug” numbers for each category. In total, the value of the non-proposed costs amounts to approximately \$69.2 million. Agency Report (AR), exh. 7, RFP Amendment No. 4, at BATES 650. By the agency’s calculations, this represents approximately [deleted] percent of the CPFF value for the core requirements, and approximately [deleted] percent of the CPFF value for the core requirements and IDIQ requirements combined. Contracting Officer’s Statement of Facts at 10.<sup>4</sup>

NMSU is the longstanding incumbent contractor for the agency’s requirements. On March 6, 2014, the firm filed a timely protest in our Office challenging the solicitation’s terms, specifically with respect to the RFP’s inclusion of non-proposed cost elements. For the reasons discussed below, we deny the protest.

## DISCUSSION

NMSU asserts that the agency improperly is excluding the non-proposed cost elements from competition for its requirements. Although NMSU takes issue with all of the agency’s exclusions, it has focused particular attention on the balloons that will be used to perform the requirement. In this connection, all parties agree that

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<sup>1</sup> NASA used a BATES numbering system in preparing the agency report. All citations in our decision use the BATES numbers assigned by the agency.

<sup>2</sup> Amendment No. 4 added the cost of balloons to the list of non-proposed costs.

<sup>3</sup> The 10 categories are: balloons, helium isopaks, expendable gases, freight, equipment, range expenses, flight hardware/flight electronics, ground support equipment, materials and services. Agency Report (AR), exh. 7, RFP Amendment No. 4, at BATES 650. In addition to the table, the RFP includes a narrative description of each cost category. Id. at BATES 650, 651.

<sup>4</sup> The agency estimates the value of the core requirement to be approximately \$[deleted] million, and the value of the core requirement plus the IDIQ requirements to be approximately \$[deleted] million. AR, exh. 2, Independent Government Cost Estimate, at BATES 84-85.

there is only one manufacturer of balloons that meet NASA's requirements, a concern referred to as Raven/Aerostar. Contracting Officer's Statement of Facts, at 3.

NMSU has an exclusive teaming agreement with Raven/Aerostar. By the terms of that teaming agreement, NMSU enjoys a [deleted] percent price advantage over any other concern wishing to purchase balloons from Raven/Aerostar for purposes of meeting NASA's requirements under the contemplated contract. Teaming Agreement, exh. A. NMSU maintains that the agency's exclusion of the cost associated with acquiring balloons in particular, and, more generally, the agency's exclusion of the other costs identified in the RFP, improperly deprives NMSU of a competitive advantage it properly has obtained through its teaming agreement, and more generally, its experience as the incumbent contractor for this requirement.

NASA responds that it is using non-proposed cost plug numbers in order to foster competition for its requirement. As with NMSU, NASA's position focuses principally on the cost associated with acquiring balloons from Raven/Aerostar, although it also argues more generally that excluding the other costs it has identified in the RFP also will promote competition. According to the agency, it included a plug number for the balloon cost element because of concerns raised by other potential competitors. In this connection, NASA has provided information presented by other potential competitors about their inability to obtain pricing from Raven/Aerostar that is as favorable as the pricing offered by Raven/Aerostar to NMSU. See generally, AR, exhs. 11, 13, Correspondence Between NASA and Other Prospective Competitors.<sup>5</sup>

NASA explains that the protester has been the contractor for its balloon launching requirements for more than 25 years, and has been awarded a total of 4 contracts since 1987. NASA points out as well that only the protester submitted a proposal for the last solicitation it issued for these requirements and, as noted, the record includes correspondence from two other potential competitors in which they outline their essential inability to compete effectively for the agency's requirements because of the existence of the NMSU-Raven/Aerostar teaming agreement. NASA concludes that its actions are necessary in order for it to obtain effective competition for its requirements.

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<sup>5</sup> These exhibits to the agency report include letters written to NASA by prospective contractors, as well as various materials furnished to NASA by these prospective competitors in support of their view that NMSU's teaming agreement may constitute a possible violation of applicable antitrust laws. In its brief to our Office, NASA argues as well that Federal Acquisition Regulation § 9.604 prohibits teaming arrangements that are in violation of antitrust statutes, or that limit the government's rights to pursue policies on competitive contracting or subcontracting. NASA Legal Memorandum at 4.

As for the other non-proposed costs included in the RFP, NASA contends that there has been disagreement between NASA and NMSU concerning whether historical data relating to NMSU's performance of the predecessor contracts could potentially be made available to the other competitors. In this connection, the record includes correspondence between NMSU and NASA that reflects a difference of opinion among the parties concerning the proprietary nature of the historical cost information for various contract elements, principally NMSU's unburdened labor rates, but also, secondarily, information relating to its historical costs for certain materials and services. AR, exh. 12, Correspondence Between NASA and NMSU. NASA therefore takes the position that, in order for other potential competitors to be able to prepare proposals, and in order to ensure that NASA does not release information that NMSU views as proprietary, it has included plug numbers for the other costs identified in the RFP.

While as a general rule, agencies are not required to structure acquisitions in order to neutralize the competitive advantage of an incumbent, agencies may nonetheless use an evaluation method that attempts to foster competition by increasing the feasibility of a proposal being submitted by non-incumbent offerors. See Int'l Computaprint Corp., B-207466, Nov. 15, 1982, 82-2 CPD ¶ 440 at 3. In our view, NASA's actions are consistent with the broad intent of the Competition in Contracting Act's (CICA) central mandate that agencies use full and open competition to fulfill the government's requirements. See 41 U.S.C. § 3301. These actions are also consistent with the central underlying policy of our Bid Protest function, which requires our Office to ensure that federal government contracts are awarded in a manner consistent with CICA's broad mandate for full and open competition. 31 U.S.C. § § 3551-3556.

The record here amply demonstrates the difficulties faced by NASA in obtaining competition for its requirements. As noted, other potentially viable competitors for NASA's requirement have expressed their inability effectively to compete because of the NMSU-Raven/Aerostar teaming agreement. NASA's use of a plug number for the cost of balloons has the effect of enabling these other offerors to submit proposals that will be competitive with a proposal submitted by NMSU, at least insofar as the balloon element of the requirement is concerned.<sup>6</sup>

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<sup>6</sup> We note that the NMSU-Raven/Aerostar teaming agreement, by its terms, [deleted]. Teaming Agreement at ¶ 18(c). It follows that, if a concern other than NMSU wins the competition, [deleted]. In fact, NASA's approach of using a plug number for the cost of the large balloons used at the CSBF is based on the reasonable assumption--given that Raven is the only source for these balloons--that "Raven will supply the same types of balloons in the same quantity to the prime contractor, regardless of which prime offeror is selected...." NASA Legal Memorandum at 6-7.

With respect to the other non-proposed costs, the record also supports NASA's decision to use plug numbers for these elements of its requirements. This decision emerges from a concern that NASA would be required to release potentially proprietary historical information relating to performance of the predecessor contracts. As noted, in correspondence between NASA and NMSU, NMSU has been adamant about the allegedly proprietary nature of the historical cost information. The protester cannot, on the one hand, insist that this information be withheld from other competitors because it is proprietary, and on the other hand, insist that other concerns prepare proposals with what essentially would amount to inadequate information to intelligently respond to NASA's requirements.

In the final analysis, we conclude that NASA has structured the subject solicitation in a manner that attempts to promote, rather than stymie, competition. While the agency's chosen method for leveling the playing field has the effect of reducing or eliminating NMSU's incumbent advantage, we find that unobjectionable in view of NASA's broader objective, which is consistent with the overarching mandate of CICA to obtain full and open competition for the government's requirements. In fact, we note that the broad discretion given agencies to increase and maintain competition includes, when necessary, excluding an offeror to develop a second source. See, e.g., Hawker Externacell, Inc., B-283586, Nov. 23, 1999, 99-2 CPD ¶ 96 at 4. We see no violation of procurement law or regulation in these more modest and reasonably-tailored actions taken by NASA here to increase competition. We also decline, as a matter of policy, to allow NMSU to use our Bid Protest function essentially to restrict, rather than promote, competition for NASA's requirements. Honeywell Technology Solutions, Inc., B-407159.4, May 3, 2012, 2012 CPD ¶ 110 at 3.

The protest is denied.

Susan A. Poling  
General Counsel