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United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: HMX, Inc.

File: B-291102

Date: November 4, 2002

William L. Walsh, Jr., Esq., J. Scott Hommer, III, Esq., and Julia M. Kiraly, Esq., Venable, Baetjer and Howard, for the protester.
Sumara M. Thompson-King, Esq., Louis R. Durnya, Esq., and Jerry L. Seemann, Esq., National Aeronautics and Space Administration, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under a procurement conducted by the National Aeronautics and Space Administration (NASA) under a NASA research announcement (NRA) that required proposals to include detailed cost/price and technical data, and did not identify the procurement as one for commercial items under either Federal Acquisition Regulation Part 12 or the Commercial Space Act of 1998, a protest challenging the agency's rejection of a proposal for a commercial item that took exception to the NRA's stated data requirements is an untimely challenge to the terms of the NRA where the protest is first filed with the agency after the closing time for submitting proposals.

2. Agency evaluation reasonably found significant weaknesses in a proposal that failed to provide adequate data to support material aspects of the proposal, reasonably determined that proposal deserved a low overall rating, and reasonably rejected that proposal from further consideration.

DECISION

HMX, Inc. protests the evaluation and rejection of its proposal by the National Aeronautics and Space Administration (NASA) under NASA research announcement (NRA) 8-30 Cycle II for second-generation reusable launch vehicle systems engineering and risk reduction.

We deny the protest.

This launch vehicle program, also known as the U.S. Space Launch Initiative, is one of three major programs that include safety upgrades to the Space Shuttle (i.e., the first generation reusable launch vehicle) under NASA's Integrated Space Transportation Plan.[1] The second generation reusable launch vehicle program has two phases: phase I was the solicitation of a wide range of research ideas regarding possible reusable launch vehicle architectures and appropriate risk reduction tasks, and phase II will be for more focused activities to finalize architecture preliminary design and advanced development of high risk, high priority items. NRA 8-30 implements phase I. The NRA was issued under NASA's broad agency announcement (BAA) authority contained in NASA Federal Acquisition Regulation Supplement (NFARS), 48 C.F.R. §§ 1835.016, 1835.016-71 (2001).[2] An NRA is used to announce research interests in support of NASA's programs and, after peer or scientific review using factors listed in the NRA, to select proposals for funding.[3] The NRA was organized into two cycles, with each cycle further organized by numerous technology areas (TA). Cycle II covered four TAs---TA-8 through TA-11.

NASA issued the NRA on October 12, 2000, with Cycle II being initiated by amendment 8 on January 18, 2001. Agency Report at 3-4. It invited industry, educational institutions, non-profit organizations and U.S. government agencies (acting as part of a team led by industry or academia) to submit proposals for a broad range of systems engineering and risk reduction research activities. Agency Report, Tab G, NRA 8-30 Cycle II, at 4-5. NRA Cycle II was divided into two parts: part I contains instructions and evaluation factors common to all proposals, and

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[1] The other two programs are third generation reusable launch vehicle technologies and an in-space transportation system.

[2] A BAA is a contracting method by which agencies can acquire basic and applied research to fulfill requirements for scientific study and experimentation directed towards advancing the state of the art or increasing knowledge and understanding, rather than focusing on a specific system or hardware solution. It is considered a competitive procedure meeting the requirements for full and open competition if the BAA is general in nature identifying areas of research interest including criteria for selecting proposals, solicits the participation of offerors capable of satisfying the government's needs, and provides for peer or scientific review. Federal Acquisition Regulation (FAR) § 6.102(d)(2); Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 1-2.

[3] Unlike a request for proposals, which contains a statement of work or specifications to which offerors are to respond, an NRA provides for the submission of competitive project ideas, conceived by the offerors, in one or more program areas of interest. An NRA is not to be used when the requirement is sufficiently defined to specify an end product or service. NFARS, 48 C.F.R. § 1835.016-71(a).

part II contains the specific TA proposal instructions.[4] Id. at 5, 13. The current protest concerns only TA-10. TA-10 of the NRA solicited proposals for flight demonstration of key areas of risk reduction technology development. Id. at 406.

The part I common instructions identified four evaluation factors of "approximately equal importance": (1) relevance to NASA's objective, (2) intrinsic merit, (3) cost, and (4) past performance. Id. at 37. The instructions stated that "[t]o be considered for award, a submission must, at a minimum, . . . contain sufficient technical and cost information to permit a meaningful evaluation . . . not merely offer to perform standard services . . ." Id. at 26-27.

More specifically, the NRA stated detailed requirements for the submission of cost data in cost proposals over $550,000. The NRA stated that such cost proposals "must contain certifiable cost or pricing data" and that cost proposals "shall be in sufficient detail to allow direct and indirect rate verification . . . [and] must include sufficient detail to support and explain all costs proposed, giving figures and narrative explanation." Id. at 30-31. Furthermore, the NRA included attachment 3, work breakdown structure (WBS), and attachment 19, element of cost details, and the NRA stated that offerors "shall submit cost/price data" by these attachments. Id. at 32, 106-109, 373-376. The NRA also stated technical data requirements. Id. at 25, 29, 131-137.

The NRA stated that discussions would be conducted "only with those offerors that submit the most meritorious proposals." The NRA stated that the most meritorious proposals would be those that meet the launch vehicle program goals and objectives in accordance with the evaluation factors set forth in the NRA. Id. at 39. The closing date for submitting proposals was March 27, 2002. Id. at 5.

The agency received five proposals under TA-10. HMX submitted a proposal to be both a prime contractor and a subcontractor under a proposal submitted by [DELETED]. Contracting Officer's Statement at 9. [DELETED] submitted a proposal under TA-10 for an orbital flight demonstration of a winged flight vehicle, the [DELETED] flight demonstrator.[5] As a prime contractor under this NRA, HMX

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[4] Part II covered the TAs under Cycle I and was not applicable to or included in the NRA for Cycle II.

[5] The [DELETED] is being developed under an existing cooperative agreement between [DELETED] and NASA. This project was integrated into the second generation launch vehicle program in fiscal year 2001, and tests of key technologies and relevant atmospheric flight environments are planned by releasing the [DELETED] from aircraft. However, the launch vehicle program also needs an orbital test bed to demonstrate certain key technologies. [DELETED]'s proposal for an orbital flight demonstration under Cycle I of this NRA was not selected. [DELETED]'s Cycle II proposal again proposed an orbital flight demonstration of the

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proposed the "Titan II ILV Pathfinder Flight Demo," which would essentially be a single demonstration launch of a simulated [DELETED] airframe attached to a refurbished Titan II missile for a fixed price of $26.3 million. Agency Report, Tab L, HMX's Proposal, at cover page, iii-1, B-21, C6-1. Under [DELETED]'s proposal, HMX would provide X-37/Titan II launch services as a subcontractor. Id. at iii-1.

HMX's proposal also contained what HMX characterized as a "major deviation" from the requirements stated in the NRA. Id. at H-1. HMX proposed to provide "commercial item" launch services, and asserted that the Commercial Space Act of 1998, 42 U.S.C. § 14701 et seq., applies to the NRA, such that HMX provided in its proposal "only limited cost and pricing data as appropriate to a commercial item procurement," rather than the cost and pricing data specifically required by the NRA. The proposal also took exception to "the full panoply" of data requirements of the NRA, stating that the requirements, though relevant to technology development contracts or research and development efforts, were not applicable to HMX's proposal to provide a commercial item. Id. at H-1 through H-4.

The agency evaluated proposals by identifying, under each of the four evaluation factors stated in the NRA, significant strengths, strengths, weaknesses, and significant weaknesses. Based on the various strengths and weaknesses identified, the consensus evaluation rated the proposals on a five-place adjectival scale with ratings of excellent, very good, good, fair and poor. Agency Report, Tab S, Presentation to the Source Selection Official (SSO), at 28-31.

For HMX's proposal, the agency identified significant weaknesses under every evaluation factor except past performance, and overall identified only a small number of strengths and a large number of weaknesses; the agency did not identify any significant strengths under any factor. The adjectival rating for HMX's proposal was rated "poor" under all factors except past performance, for which it was rated "good." Overall, the agency rated HMX's proposal "fair," which was the lowest rating among all the TA-10 proposals evaluated. Id. at 52-57.

The significant findings of the evaluation of HMX's proposal presented to the SSO consisted of all of the significant weaknesses identified in the evaluation. Those findings are: (1) relevance to the NRA goals/objectives was not substantiated because the proposed effort does not effectively demonstrate any technology; (2) the [DELETED]-month schedule proposed was highly unrealistic and did not provide adequate margin for probable schedule delays; (3) the technical approach--one flight test with limited verification data or analyses prior to launching the actual [DELETED], a high value asset--does not adequately address technical risk; (4) HMX

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[DELETED]. Contracting Officer's Statement at 8-9. The proposal had a number of options for a launch vehicle, including HMX's proposed Titan II missile conversion.

failed to respond to NRA requirements and model contract recommendations and instead proposed commercial item terms and conditions with an inadequate rationale for its failure to respond; (5) numerous critical cost items were not priced, including launch facility build-up, and storage and disposal of Titan II assets; and (6) HMX provided inadequate information to determine cost reasonableness because the proposal did not provide elements of cost, cost by work breakdown structure or by base and option periods, as well as because the proposed price for one flight of the launch vehicle and the cost for software development were unrealistically low as compared to government estimates. Agency Report, Tab S, Presentation to the Source Selection Official (SSO), at 59-60.

Based on this evaluation, NASA determined that HMX's proposal was not among the most meritorious proposals selected for negotiations. NASA notified HMX of this determination on June 7, 2002. On June 15, the agency received a written request from HMX for a debriefing. Following a debriefing on June 24, HMX filed an agency-level protest. Contracting Officer's Statement at 19. On July 29, NASA denied that protest. This protest followed.

HMX alleges that the agency misapplied, arbitrarily applied, or used unstated evaluation factors, or otherwise unreasonably evaluated HMX's proposal. The specific examples presented by HMX are as numerous as the weaknesses identified in the agency's evaluation of HMX's proposal. Many of the protest allegations arise from the protester's claim that it did not need to submit all of the information required by the terms of the NRA because the Commercial Space Act applies, which allegedly permitted HMX to respond to the NRA with a proposal for a commercial item. Indeed, the protester states that "the vast majority, if not all" of the evaluated weaknesses "directly result" from NASA's failure to comply with the Commercial Space Act. Protester's Comments at 20.

The agency first asserts that all of the protest allegations that are based on the contentions that the Commercial Space Act applies and/or that the NRA solicited proposals for commercial items should not be considered because they constitute an untimely protest under our Bid Protest Regulations.[6] Essentially, the agency states that the terms of the NRA are contrary to the protester's contention, and the protest is thus a challenge to the terms of the solicitation, which must be protested prior to the time for submitting proposals. We agree.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged

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[6] Although the agency's decision denying HMX's agency-level protest addressed all of the protest allegations on the merits, the decision first stated that the basis for the protest was an untimely challenge to the terms of the NRA. Agency Report, Tab Y, Agency-Level Protest Decision, at 5.

improprieties in a solicitation, which are apparent prior to the time set for receipt of proposals, must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2002). These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129 In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. Id.

Here, HMX's proposal explicitly takes exception to the solicitation's requirements for proposal information, such as cost and pricing data and technical data requirements. Agency Report, Tab L, HMX's Proposal, at H-1 through H-4. This portion of the proposal sets forth HMX's position that the NRA's proposal preparation instructions do not comply with the Commercial Space Act, and that the Act permitted HMX to deviate from the terms of the NRA to comply instead with the standards for proposals for commercial items as reflected in FAR Part 12, Acquisition of Commercial Items. However, the NRA did not reference the Act or FAR Part 12. Therefore, even if we accept the protester's interpretations of the Act as both applying to this NRA by operation of law and requiring acquisition of the launch services proposed by HMX consistent with the regulations governing the acquisition of commercial items, there remains the unavoidable fact that the express terms of the NRA are inconsistent with HMX's interpretation of the Act. This obvious conflict can only be viewed as an alleged impropriety apparent on the face of the solicitation. Since HMX did not protest until after its proposal was rejected--i.e., well after the time set for receipt of proposals--the protest is untimely.

Nevertheless, the protester contends that, prior to receiving the agency's denial of HMX's agency-level protest, it could not know that the agency would interpret either the NRA or the Commercial Space Act contrary to the protester's position, and thus the protest was timely filed within 10 days of learning of the agency's interpretation. The argument is unpersuasive. HMX's proposal expressly took exception to the terms of the NRA. By rejecting the proposal from further consideration, the agency declined to accept the proposed deviation from the express terms of the NRA. That was a risk that HMX assumed by submitting such a proposal rather than formally challenging the terms of the NRA at that time.[7] By its actions, HMX relinquished its power to protest the issue. See The Charles E. Smith Cos., B-277391, Sept. 25, 1997, 97-2 CPD ¶ 88 at 6 (cannot protest the statutory authority of an agency's announced

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[7] FAR Part 12 prescribes policies and procedures regarding whether an acquisition should be conducted through the issuance of a solicitation incorporating commercial item procedures. We find no law or regulation that requires the retroactive application of the requirements applicable to acquisitions conducted under commercial item procedures to acquisitions not issued under commercial item procedures in circumstances where a proposal purporting to offer a commercial item response is submitted.

procurement methodology after proposal due date); Tomasz/Shidler Inv. Corp., B-250855, B-250855.2, Feb. 23, 1993, 93-1 CPD ¶ 170 at 3-4 (terms of a proposal that conflict with solicitation requirements do not constitute a protest).[8]

To the extent the protest challenges the agency's evaluation on bases independent from the Commercial Space Act/commercial item acquisition issue, the protester fails to show that the evaluation was unreasonable.

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them and must bear the burden of any difficulties arising out of a defective evaluation. Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 4. In reviewing an agency's technical evaluation, we will not reevaluate the proposals; we will only review the evaluation to determine whether the evaluation was reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. Id.; Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 3. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Microcosm, Inc., supra.

As indicated, many of the evaluated weaknesses of HMX's proposal were inextricably linked to the protester's decisions to take exception to the NRA's significant requirements for cost/price and technical data, and to interpret the TA-10 requirement as one for commercial launch services and not for research projects. As such, the proposal was not only missing significant portions of information contemplated by the NRA, it was also ill matched to the NRA's stated goal of engaging the creativity and ingenuity of industry and academia by requesting proposals for research and development activities as opposed to acquiring commercial services or items. Agency Report, Tab G, NRA, at 15. Therefore, even if

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[8] Alternatively, the protester requests that we consider this aspect of the protest as a "significant issue" exception to the timeliness requirements under our Bid Protest Regulations, 4 C.F.R. § 21.2(c). Under this exception, our Office may consider an untimely protest that raises issues significant to the procurement system that have not been considered previously; however, in order to prevent the timeliness rules from becoming meaningless, this exception is strictly construed and seldom used. Invoking the exception is appropriate only where the untimely issue directly concerns the interpretation or application of the procurement statutes or regulations on a matter of widespread interest to the procurement community. DePaul Hosp. and The Catholic Health Assoc. of the U.S., B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173 at 5. While the protester states that the issue of whether the Commercial Space Act applies to procurements such as the present one is of widespread interest to the procurement community, it has provided no evidence or argument to support this claim.

the protester could show material defects in the agency's evaluation related to the surviving remnants of this protest, it is difficult to imagine that any such defects could call into question the reasonableness of the agency's determination that HMX's proposal was not one of the most meritorious proposals selected for further consideration. Nevertheless, we have reviewed the protester's allegations and, as the following examples show, the record does not support the protester's allegations of an unreasonable evaluation.

The protester alleges that it was unreasonable for the agency to evaluate as unreasonable HMX's proposed price of $26 million. NASA found that HMX's proposed price did not account for the cost of a number of critical items,[9] and the proposal did not provide adequate information to support the significantly lower proposed price.[10] Agency Report at 18-19; Tab Q, TA-10 Consensus Evaluation, at 1-2. Indeed, the agency's independent cost analysis concluded that a reasonable cost for this effort would be over $58 million. Agency Report, Tab M, NASA Cost Estimate; Tab Q, TA-10 Consensus Evaluation, at 1. This estimate is consistent with the historical cost of converting the Titan II from an intercontinental ballistic missile to a space launch vehicle of $45 million per missile (1987 dollars), as identified in HMX's proposal. In its proposal, HMX stated that it determined this figure was twice the cost of new production ($21 million in 2001 dollars), and contended that "refurbishment naturally costs less than new production," so that the historical refurbishment costs should be discounted. Agency Report, Tab L, HMX Proposal, at B-2. The proposal, however, did not provide concrete support for the significantly reduced Titan II refurbishment costs reflected in HMX's low price.[11] Id. at B-2, C6-1.

In sum, the proposal presented only a largely unsupported, summary cost estimate for its proposed price that was substantially lower than historical costs. Under the circumstances, the agency could reasonably find as significant weaknesses that HMX's price was unsupported, did not include certain costs, and appeared to be unreasonably low.

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[9] For example, the proposal stated that an environmental assessment or review would likely be required, but the proposal did not account for the cost of such a review. Agency Report, Tab L, HMX Proposal, at B-5, C6-2; Tab Q, TA-10 Consensus Evaluation, at 1.

[10] As noted, HMX declined to supply such data, even though the NRA specifically required it.

[11] Instead, the proposal essentially speculated that the flight computer should be less expensive than in the prior Titan II refurbishment (which the proposal identified as $5 million), and stated that another missile class, the Minuteman, was refurbished for less than the original production price, thus implying that the Titan II refurbishment costs should be similar. Agency Report, Tab L, HMX Proposal, at B-2, C6-1.

Another example is HMX's proposed performance schedule of [DELETED] months. The evaluation criteria stated in the NRA under the intrinsic merit factor included the soundness of the implementation plan and the acceptability of schedule risks. Agency Report, Tab G, NRA, at 37. NASA determined that [DELETED] months was a "highly unrealistic" schedule that did not provide adequate margin for probable schedule delays. Agency Report, Tab Q, TA-10 Consensus Evaluation, at 3. NASA cites historical requirements of 24 months for such an effort and identified several specific areas where HMX's proposed performance appeared unduly optimistic.[12] Id.; Contracting Officer's Statement at 11-12, 27. For example, without supporting documentation, the proposal stated that, based on an analysis by its subcontractor (the original equipment manufacturer), the refurbished engines would be available [DELETED] months after program start. Agency Report, Tab L, HMX Proposal, at B-3, B-4, C2-35. This left only 1 month for integration activities. Contracting Officer's Statement at 12. The proposal did not identify risks associated with this tight schedule. From this record and given NASA's experience with schedule delays, we find NASA's concerns to be reasonable.

The protester basically challenges all of the agency's concerns about the proposed [DELETED]-month schedule, claiming that there was no rational basis to object to the schedule, given that the Titan II missiles were manufactured in less than [DELETED] months and missiles on active silo duty were refurbished every few years in a few months time or less. In response, the agency stated that the previous regular refurbishing of active intercontinental ballistic missiles was not relevant to HMX's proposal because HMX is proposing to restore missiles that have been inactive and stored in the desert for 15 years. The proposed refurbishing effort will be more complex because the missiles have not been subject to a regular maintenance schedule, they have to be refurbished to perform a different function

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[12] In its proposal, HMX stated that "[a] program to refurbish the Titan II . . .will require approximately twenty-four months. This schedule is consistent with past Titan II experience." Agency Report, Tab L, HMX Proposal at C2-35. The protester claims that this was an obvious mistake that should have read "[DELETED] months," and that this was the only "mistaken reference to 24 (rather than [DELETED]) months." Protest at 18. However, the proposal elsewhere stated that "HMX Titan II launches will be available at [the proposed launch facility] 24 months after [authority to proceed,]" but went on to state that its proposed performance schedule was for [DELETED] months. Agency Report, Tab L, HMX Proposal at B-20. While the proposal's references to 24-month periods may have been unintended, it is not obvious from reading the proposal that these are mistakes. Neither reference to 24 months states that HMX was proposing a 24-month schedule; rather, these are aspects of the proposal that lend credence to the agency's assessment that the proposed [DELETED]-month schedule was unduly optimistic. See Contracting Officer's Statement at 27.

than they were serving when they were placed into storage, and they would have to be re-certified. Contracting Officer's Statement at 28. Although these concerns seem reasonable on their face, the protester dismisses these concerns as "red herrings" without explanation. Protester's Comments at 24. The protester's objections thus do not rise above mere disagreement with the agency's judgment.

Based on the foregoing, we find reasonable the agency's evaluation of HMX's proposal and the determination that it was not one of the most meritorious proposals.

The protest is denied.

Anthony H. Gamboa
General Counsel