



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: CAS, Inc.

File: B-260934.2; B-260934.3

Date: September 12, 1995`

Howell Roger Riggs, Esq., for the protester.

James S. Roberts, Jr., Esq., Townes, Woods & Roberts, P.C., for Mevatec Corporation, an interested party.

Robert R. Hamilton, Esq., Department of the Army, for the agency.

Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protest contains general allegations of improper cost evaluation which are only supported with detailed reasons in subsequent comments on an agency report that were filed by the protester more than 10 working days after receipt of the agency report, General Accounting Office will dismiss the protest grounds as untimely.
2. Where selection officials reasonably regard proposals as essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations.
3. Given the inherently subjective nature of the technical judgments of agency evaluators, it is within their reasonable discretion whether a particular proposal deserves a "good" as opposed to a "very good" rating, or a "very good" as opposed to an "exceptional" rating. Stated differently, agency evaluators' judgments, for example, about the slight qualitative differences which can render a proposal "very good" as opposed to "good" are not subject to rational legal objection unless a clear showing of unreasonableness is made.

DECISION

CAS, Inc. protests the award of a contract to Mevatec Corporation under request for proposals (RFP) No. DASG60-94-R-0036, issued by the U.S. Army Space and Strategic Defense Command, Huntsville, Alabama, for technical and programmatic

support for the Program Executive Office, Missile Defense programs and projects.¹ The protester principally contends that the agency improperly evaluated cost proposals, including the offerors' award fee, which was given greater weight than permitted by the terms of the solicitation; that the agency's determination that CAS's and Mevatec's technical proposals were essentially equivalent was unreasonable; and that Mevatec allegedly engaged in "bait and switch" techniques.²

We dismiss the protest in part and deny it in part.

BACKGROUND

The RFP, issued August 28, 1994, contemplated the award of two level-of-effort, cost-plus-award-fee contracts pursuant to a small disadvantaged business (SDB) set-aside and a small business set-aside.³ The RFP specified the total number of labor hours required and defined the labor categories and hours within each contract line item number. The RFP stated that the government would select the proposal which was most advantageous and represented the best value to the government. The RFP contained three evaluation areas: (1) technical (including technical approach factor, technical direction planning factor, and qualifications and availability of personnel factor); (2) management (including management approach factor, and past performance factor); and (3) cost (including cost realism and total evaluated probable cost). The RFP stated that the technical area was more important than the management and cost areas combined and that the management area was less important than the technical area and more important than cost. Concerning cost realism, the RFP stated that poor cost realism may result in a

¹Programs and projects required to be supported include National Missile Defense, PATRIOT, Corps Surface to Air Missile, Theater High Altitude Area Defense, Ground Based Radar, and Joint Tactical Ground Station. The successful contractor must monitor, assess, and analyze programs and activities, provide systems integration, systems engineering, and technical assistance support.

²In its initial and supplemental protests, CAS raised numerous other issues which it abandoned in its comments on the agency report. Specifically, CAS, in its comments on the agency report, only "asserts [three] principal grounds upon which [this] protest" is based. In this decision, we will consider only the protest grounds which the protester itself considers in its comments on the agency report. See Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶140.

³The award under the SDB set-aside is not now at issue in this protest. Accordingly, we will only discuss the competition between CAS and Mevatec for the small business set-aside award.

lower evaluation of the technical and management areas. The RFP also stated as follows concerning cost:

"The government may select for award the offeror whose total evaluated probable cost is not necessarily the lowest, but whose technical and management proposals are sufficiently more advantageous to the government so as to justify the payment of additional costs. Conversely, the government may select for award the offeror whose total evaluated probable cost is the lowest, when other proposals are not sufficiently more advantageous so as to justify the payment of additional costs."

Finally, the RFP stated that the government would evaluate for award purposes by adding the total cost for all options (such as labor surge requirements) to the total cost for the basic requirement.

Seven proposals were received, five of which were included in the competitive range. After discussions with the offerors and receipt of best and final offers (BAFO), the agency's source selection evaluation board (SSEB) issued a final evaluation report of the BAFOs which was presented to the agency's source selection authority (SSA). A cost analysis report was also issued and made available to the SSA. The final evaluation results presented by the SSEB were as follows:⁴

Offeror	Technical Rating	Management Rating	Overall Rating	Evaluated Cost
Mevatec	Exceptional	Exceptional	Exceptional	[Deleted]
CAS	Exceptional	Exceptional	Exceptional	[Deleted]

As between Mevatec and CAS, the SSA selected Mevatec after determining that both firms were "essentially equivalent" from a technical standpoint. The SSA specifically found as follows:

"While the results of the SSEB evaluation give CAS a slight advantage over Mevatec, they are both rated Exceptional overall [while CAS's costs are [deleted] higher than Mevatec's]. I find that the slight difference in technical merit is not worth the difference in cost. . . . Of importance, Mevatec did better in the indicator of the ability to perform the Technical Direction factor. This slight advantage in Mevatec's proposal virtually balances the small advantage which may be afforded by CAS's slight edge in technical approach. Moreover, Mevatec

⁴The agency employed adjectival ratings for the technical proposals. These ratings were as follows: exceptional, good, acceptable, and unacceptable, in descending order of merit.

rated slightly better than CAS in management because of its proactive approach. . . . Finally, I note that part of the difference between CAS and Mevatec's total evaluated probable cost is in CAS's fee, which overall is higher than Mevatec's."

The SSA determined Mevatec's proposal to be the "best buy" for the government; the agency awarded the contract to that firm. This protest followed.

COST EVALUATION

As stated above, the agency's cost realism resulted in a total evaluated probable cost of approximately [deleted] for CAS and [deleted] for Mevatec. CAS first argues that the agency improperly evaluated CAS's maximum proposed award fee (which included award fees for its subcontractors and which was substantially in excess of Mevatec's award fee) despite the fact that the RFP allegedly did not provide that the evaluated "most probable cost" would include an offeror's maximum proposed award fee. According to the protester, this evaluation of a maximum proposed award fee resulted in displacement of CAS as the low evaluated offeror.

We will not consider this issue. The record shows that CAS, at the very latest, was advised during its debriefing on March 23, 1995, that the agency's cost evaluation included the maximum award fee proposed by each offeror. However, this protest basis was not raised until CAS filed its first supplemental protest on May 12, 2 months after the firm knew or should have known of the basis for this protest. Accordingly, we dismiss this ground of protest as untimely filed. See 4 C.F.R. § 21.2(a)(2) (1995).

In its initial protest, CAS challenged the cost/technical tradeoff decision and generally alleged, concerning the cost evaluation, that in a "head to head cost evaluation [of] cost realism and most probable cost, CAS should have won this area" since raw labor rates in the Huntsville area are similar and its indirect burden rates are low. The agency report in response to these allegations, dated April 27, 1995, and containing all cost evaluation documentation, was furnished to the protester under a protective order at that time.

In its comments filed with our Office in response to the agency report, the protester, for the first time, presents specific detailed cost arguments that Mevatec's cost proposal should have been upwardly adjusted by approximately [deleted]. Several other very specific allegations of cost exceptions are made which would generally require our Office to obtain another agency report to resolve these matters.

We find these allegations to be also untimely. Where a protest contains general allegations of improper agency evaluation or actions which are only supported with

detailed reasons in subsequent comments on an agency report that are filed more than 10 working days after the protester's receipt of that report, we will dismiss the subsequent protest grounds as untimely filed. See Dial Page, Inc., B-256210, May 16, 1994, 94-1 CPD ¶ 311. Here, the protester knew or should have known of the specific and detailed bases of its protest concerning the cost evaluation upon receipt of the agency report in April; since it did not file these protest grounds within 10 working days of its receipt of the report, we dismiss them as untimely.⁵

ESSENTIALLY EQUIVALENT DETERMINATION

CAS next argues that the SSA unreasonably determined the Mevatec and CAS proposals to be essentially equal in technical merit because of his finding that the "slight" difference in technical merit in CAS's favor did not sufficiently offset the advantages to Mevatec's lower cost. CAS principally bases its argument on the following statement in the SSEB's report:

"While the overall adjectival ratings show a three-way tie [among CAS, Mevatec, and an 8(a) firm] at the exceptional level, it is the consensus opinion of the SSEB that there is a separation between the top three offerors that is not visible in the [final summary adjectival ratings]. This is caused, to some extent, by the lack of an additional adjectival rating between good and exceptional. . . . [In the] technical area CAS [is] first, [and] Mevatec second. . . . For the management area, the ranking is Mevatec first [and] CAS second. . . . Since the technical

⁵As mentioned previously, this protest was subject to a protective order under which counsel for the protester and the interested party were admitted. At the protester's request, we also admitted an expert consultant, a certified public accountant, who was employed by the protester to present expert opinion to our Office concerning the cost issues in the protest. The consultant relied upon the exhibits, statements, and information contained in the agency report which the protester had received much earlier. These opinions by the expert apparently formed the basis for the specific and detailed cost adjustment complaints subsequently raised by the protester in its comments on the agency report. While the expert may have received this information late, we think receipt of the agency report by the protester's counsel started the 10-day period for purposes of our timeliness rules. See Dial Page, Inc., *supra*. In any event, even if we accept all the cost adjustments proposed by CAS's expert, we note that Mevatec still remains the low evaluated offeror by a significant amount. Finally, the protester argues that the agency will incur "transition costs" to bring Mevatec "up to speed" and which should have been evaluated. The short answer is that we do not find this cost factor as an evaluation item in the RFP.

area was designated as more important than management and cost combined, the overall ranking is CAS first [and] Mevatec second."

According to the protester, because of the "coarseness" of the adjectival ratings, the SSA could not make appropriate "fine gradient distinctions" between the two proposals.

Where selection officials reasonably regard proposals as being essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. Contrary to the protester's assertions, strict equality is not required. For example, we have upheld determinations that technical proposals were essentially equal despite significantly great technical differentials. See, e.g., Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where the technical differential was more than 15 percent); Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332. Moreover, given the inherently subjective nature of the technical judgments of the evaluators, we think it is best left to their discretion whether a particular proposal, for example, deserves a "good" as opposed to a "very good" rating. Stated differently, agency evaluators' judgments about the slight qualitative differences which can render a proposal "very good" (or exceptional) as opposed to "good" are not subject to rational legal objection unless a clear showing of unreasonableness is made. See Mevatec Corp., B-260419, May 26, 1995, 95-2 CPD ¶ 33. We find no such showing here.

The record shows that the SSA did not simply rely on the evaluators final adjectival ratings. Rather, the SSA had available the detailed technical report of the SSEB. This report showed, for example, that CAS's technical approach for the programmatic support effort demonstrated exceptional understanding of the requirements. The SSEB presented detailed technical narrative findings supporting this determination, including positive evaluations of CAS's cost/schedule risk assessments, cost data estimating and modeling effort, international program support, system integration, and operational exercises. Similarly, the SSEB presented detailed narrative findings supporting its exceptional rating of Mevatec in these same technical areas. The record shows no substantial difference in the evaluators findings concerning the two proposals. Further, CAS has failed to show any substantial discriminating technical factor which would put into question the agency's determination that the proposals were essentially equal. In the absence of any attempt by the protester to show significant or substantial technical superiority of its proposal, we deny this basis of protest for failure of proof by the protester.

MISCELLANEOUS ISSUES

Finally, CAS alleges that Mevatec engaged in "bait and switch" techniques by recruiting and hiring substantial numbers of CAS employees after award of the contract. First, CAS refers to a Mr. Barnett, a key personnel under the RFP, who CAS hired on November 1, and who also permitted Mevatec to use his resume in competing for this contract.⁶ In response, the agency states, and we agree, that there is nothing wrong with a person employed by one company from committing himself to work with another company contingent upon the future award of a contract.

Second, contrary to CAS's assertions that after award of the contract substantial numbers of its employees were hired by Mevatec at significantly higher salaries, the record shows that Mevatec hired only seven employees of CAS out of a total work force of 60 full time employees (amounting to about 10 percent of the work force).⁷ CAS has presented no evidence that Mevatec intended prior to award to change its personnel to gain any advantage. In this regard, the agency states, and the record shows, that the contracting officer reviewed the impact of these individuals' labor rates on the composite labor rates provided by Mevatec during the evaluation of proposals; his review shows that the pay rate for these individuals is less than the composite rates and therefore did not affect proposed costs or the cost standing of the offerors. We therefore do not find any deliberate intent by Mevatec to engage in "bait and switch" techniques, and we also do not find any cost or other prejudice to CAS by Mevatec hiring these seven personnel after award.

The protest is dismissed in part and denied in part.

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⁶The letter of intent from Mr. Barnett, dated October 8, 1994, that Mevatec submitted to the agency, stated unequivocally that Mr. Barnett "agree[d] to work for Mevatec Corporation as an independent consultant for the PEO Missile Defense support effort" and that Mevatec was "authorized to use [his] name in the proposal."

⁷Further, the record shows that Mevatec hired these personnel only after Mevatec was "approached by the incumbent CAS personnel."