



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Xeno Technix, Inc.

File: B-278738; B-278738.2

Date: March 11, 1998

William F. Hanlon for the protester.

Michael J. Gardner, Esq., Clark & Stant, P.C., for George G. Sharp, an intervenor.

David H. Turner, Esq., Department of the Navy, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency determination not to credit protester with the experience and performance of its proposed subcontractor is denied where protester's proposal indicated that subcontractor would perform less than 1 percent of the expected effort; agency could reasonably conclude that subcontractor's proposed contribution did not significantly bear on the likelihood of successful performance by protester such that attribution of subcontractor's record to protester was appropriate.

2. Composition of technical evaluation panel is within the discretion of the agency, and where protester has not shown actual bias on the part of particular evaluators there is no basis to question the composition of the panel.

DECISION

Xeno Technix, Inc. protests the Department of the Navy's award of a contract to George G. Sharp, under request for proposals (RFP) No. N00140-97-R-1754, for shipboard troubleshooting, repair, and maintenance services in the vicinity of Norfolk, Virginia. Xeno primarily challenges the evaluation of technical proposals.

We deny the protest.

The solicitation contemplated award of a time-and-materials contract for a 1-year base period, with 4 option years, for troubleshooting, repair, and maintenance services for main and auxiliary, hull, mechanical and electrical (HM&E) systems aboard government vessels. The majority of work to be performed involves shipboard HM&E systems. Award was to be made to the responsible offeror whose conforming offer was most advantageous to the government, with technical considerations more important than price. The solicitation listed, in descending

order of importance, the following five technical factors: (1) corporate experience and (2) past performance, which were of equal weight; (3) technical approach and (4) management plan, which were of equal weight; and (5) personnel resources.

The Navy received proposals from four offerors. Those submitted by Sharp, Xeno, and a third offeror (not relevant here) were included in the competitive range. At the conclusion of discussions, the Navy requested best and final offers (BAFO). While Sharp's proposed price (\$30,207,758) was approximately 5.1 percent greater than Xeno's (\$28,666,119), the Navy determined that Sharp's proposal was technically superior. Sharp's proposal received a highly acceptable rating both overall and under each of the technical factors, while Xeno's received only an acceptable rating under each technical factor and overall. The agency found that Sharp, the incumbent contractor, had "demonstrated extensive experience . . . directly related to all aspects of the requirements set forth in the statement of work" (SOW), including performing 1,096,000 hours of tasking which was identical in magnitude and complexity to the work required under the SOW, and that its work under the current contract was "consistently very good . . . quality work and . . . on schedule." Selection Decision Memorandum at 2; Declaration of [DELETED] at 1-2. The Navy further determined that Sharp's proposal demonstrated "a clear and [thorough] understanding of the [SOW] as well as a [thorough] knowledge of the main and auxiliary hull, mechanical and electrical systems," such that when considered with Sharp's extensive, successful experience and performance, the proposal indicated "a high probability of success," with "the capability to satisfy all program areas immediately with no loss of planning continuity nor loss of time because of learning curve." Source Selection Decision Memorandum at 1-2. The Navy concluded that the "significant technical superiority [of Sharp's proposal] far outweighs the additional cost" such that Sharp's proposal was most advantageous to the government. *Id.* at 4. Upon learning of the resulting award to Sharp, Xeno filed this protest with our Office.

PAST PERFORMANCE

Xeno questions its past performance rating (acceptable), arguing that the agency failed to take into account additional information furnished during negotiations and Xeno's proposed use of Colonna Shipyard, Inc. in performing the contract.

The evaluation of proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method of accommodating them. Bannum, Inc., B-271075 et al., May 22, 1996, 96-1 CPD ¶ 248 at 3. Our Office will question an evaluation only where it lacks a reasonable basis or conflicts with the stated evaluation criteria. *Id.*

The Navy reasonably determined that Sharp's proposal was superior in the technical area; there is no basis to question the agency's determination that Sharp's proposal was superior under the experience and performance factors, the two most

important technical factors. As noted above, Sharp's proposal was found to demonstrate extensive, successful experience and performance; its proposal's highly acceptable ratings for both experience and performance therefore appear reasonable. In contrast, the agency found that, while Xeno had successfully performed under several large Navy contracts, much of the experience cited in Xeno's proposal was engineering, design and technical support work, rather than the HM&E work that was the focus of the requirement here. Further, with respect to the much more limited relevant experience cited by Xeno, the agency determined that, while Xeno generally had performed adequately on small jobs, it had experienced difficulties with large task orders or with tight performance schedules. Xeno's schedule difficulties were viewed as particularly significant since much of the work under the contemplated contract was expected to be "emergent repairs" with tight performance schedules. Declaration of [DELETED] at 2.

As for the agency's alleged failure to consider the additional information Xeno furnished during discussions, we note that Xeno's performance rating actually increased from unacceptable based on its initial proposal to acceptable after BAFOs; this indicates that the agency did favorably consider the additional information. In any case, Xeno has made no showing that it was entitled to a performance rating equivalent to Sharp's rating. Rather, the record supports the agency's determination that Xeno's performance record on relevant contracts was mixed. For example, the agency was advised that: 1 month after Xeno replaced tubes in two boilers on the USS Grasp, both boilers required complete retubing; equipment on the USS Grasp was sandblasted without adequate containment measures; Xeno's inability to quickly perform HM&E repairs on the USS Conolly necessitated transferring the work to Sharp, which successfully completed the work; and Xeno had performed unsatisfactory repairs on a beaching ramp on the USS Saipan and other repairs reportedly were performed very slowly.

Xeno also questions the Navy's determination not to credit it with the experience and performance of its proposed subcontractor, Colonna Shipyard. In this regard, however, Xeno's proposal indicated that Colonna would perform less than 1 percent of the expected effort (.87 percent, or 1,040 of 120,224 hours per year). BAFO Schedule Allocation of Hours. The agency could reasonably conclude from this relatively minor commitment that Colonna's performance experience did not significantly bear on the likelihood of successful performance by Xeno such that attribution of Colonna's record to Xeno was appropriate. ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161 at 3 (in determining whether one company's performance should be attributed to another, the agency must consider whether the work force, management, facilities, or other resources of one may affect contract performance by the other). We conclude that the Navy reasonably

determined that Sharp's proposal was superior under the experience and performance factors.¹

SUBCONTRACTING

Xeno generally argues that Sharp lacks the skilled trades work force and industrial facilities required by the solicitation and needed to perform the contemplated work. However, the solicitation did not preclude the use of a subcontractor's work force and facilities in performing the contract. Indeed, the solicitation specifically contemplated the use of "subcontracting capabilities, administration, and management to accomplish repairs which may require highly specialized skills beyond the contractor's internal workforce." SOW section C.1.2(d). Sharp proposed to perform the contract with an integrated team that included two primary subcontractors, and Xeno has made no showing that Sharp, which had been successfully performing the same requirements for the Navy as the incumbent contractor, lacked the requisite work force and facilities when the resources of the proposed subcontractors were considered.

Xeno argues that Sharp's reliance on subcontractors will violate the provisions of Federal Acquisition Regulation (FAR) standard clause 52.219-14, entitled Limitations on Subcontracting (JAN 1991), which the solicitation incorporated by reference. This clause provides, in relevant part, as follows:

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

FAR § 52.219-14. The Navy responds that there was no basis for it to reach this conclusion, since Sharp's proposal did not indicate that Sharp would not or could

¹While Xeno also challenges the evaluation under the personnel factor, asserting that its proposal should have received the same rating (highly acceptable) as Sharp's proposal received, our review of the record indicates that Sharp's proposal was reasonably found to be somewhat more advantageous than Xeno's with respect to personnel. Specifically, the record supports the agency's determination that while the project managers proposed by both Sharp and Xeno exceeded the minimum experience requirements in an advantageous manner, and thus were both properly rated as highly acceptable, Sharp's project manager possessed significantly more advantageous experience, having 15 more years of relevant experience (40 versus 25 years) than Xeno's manager.

not comply with the limitation on subcontracting. Further, the agency reports that upon receiving Xeno's protest in this regard, it contacted Sharp to investigate Xeno's claim. According to the agency, Sharp advised that it would primarily use its existing work force, but would supplement that work force to meet surge requirements by hiring temporary personnel from the large pool of specialized labor available for hire in the Norfolk area. In this regard, the Navy reports that Sharp verified that under the incumbent contract, [DELETED] percent of the labor had been performed by Sharp personnel. Legal/Contracting Officer Statement of December 23, 1997 at 31.

Xeno's argument is without merit. Sharp's proposal specifically allocated the estimated labor hours for each labor category (as set forth in the solicitation) among Sharp and its two subcontractors/team members, specifying that Sharp would perform [DELETED] percent of the total contract hours. Best and Final Price Proposal, Attachment 2. Nothing else in the proposal indicated that Sharp did not intend to meet the requirement. This being the case, by signing its offer, Sharp agreed to comply with the limitation on subcontracting.

Whether Sharp can comply with the limitations on subcontracting is a matter of responsibility, Corvac, Inc., B-254757, Jan. 11, 1994, 94-1 CPD ¶ 14 at 4; we will not review an affirmative determination of responsibility absent a showing of possible bad faith on the part of contracting officials or that definitive responsibility criteria in the solicitation were not met. Bid Protest Regulations, § 21.5(c), 4 C.F.R. § 21.5(c) (1997). Definitive criteria are not in issue, and the record provides no basis to conclude that the contracting officer's determination in this regard was motivated by bad faith. Xeno notes that its president advised an executive director at the contracting activity--apparently in a meeting unrelated to this procurement which occurred 2 months prior to the award to Sharp--that it believed Sharp was circumventing the limitation on subcontracting by directly employing personnel under its contracts that were also employees of its subcontractor. This does not by itself evidence bad faith on the part of agency officials for failing to investigate the matter. The executive director states that Xeno's president characterized the discussion as "off the record," and that, although he advised the president to provide in writing any information supporting its allegation, the president never submitted a written statement detailing and supporting the allegation and otherwise failed to pursue the matter. Declaration of [DELETED]. Under these circumstances, there is no basis to question the Navy's affirmative determination of responsibility.

Further, whether Sharp in fact complies with the subcontracting limitation in performing the contract is a matter of contract administration which is within the ambit of the contracting agency, not our Office. 4 C.F.R. § 21.5(a); Lockheed Martin Fairchild Sys., B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 at 5.

TECHNICAL EVALUATION COMMITTEE

Xeno also challenges the composition of the technical evaluation committee (TEC), arguing that the TEC lacked adequate technical qualifications to evaluate proposals. In addition, Xeno claims that the TEC's findings may have been biased in favor of Sharp as a result of an alleged conflict of interest created by the fact that the TEC was comprised of two subordinates of [DELETED] at the user activity, whose wife works for Sharp [DELETED].

The composition of a technical evaluation panel is within the discretion of the contracting agency. In the absence of evidence of bad faith, conflict of interest, or actual bias, we have no reason to question the composition of the panel. Alcan Envtl., Inc., B-275859.2, Apr. 11, 1997, 97-1 CPD ¶ 139 at 6; Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588 at 3-4; Johns Hopkins Univ., B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240 at 7. In particular, we note that the opportunity for bias is not a sufficient basis to question an award of a contract; where, as here, a protester infers that evaluators are biased because of their past experiences or relationships, we focus on whether the individuals involved exerted improper influence in the procurement on behalf of the awardee, or against the protester. Advanced Sys. Tech., Inc.; Engineering and Professional Servs., Inc., B-241530, B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153 at 15.

We find no evidence of improper conduct. The record indicates that [DELETED] was not a member of the TEC and, although he approved the contract data requirements lists included in the solicitation, he did not participate in the source selection process. In this regard, the Navy reports that [DELETED] was not authorized to have access to source selection information under the solicitation; his subordinates on the TEC signed nondisclosure agreements that precluded them from revealing source selection information to unauthorized persons, including [DELETED]; and there is no evidence that [DELETED] in fact was given access to source selection information. Supplemental Agency Report of January 7, 1998, at 4. In support of its position, the agency has submitted declarations from the

individuals in question. Further, our review of the evaluation record reveals no evidence of bias; rather, as discussed, the record indicates that Sharp's proposal was reasonably found to be technically superior to Xeno's.²

The protest is denied.

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²Although Xeno's challenge to the technical qualifications of the evaluators provides no basis to question the evaluation, we note that one of the two TEC members was the Supervisory Production Controller (Ships) for the user activity, in which capacity he acted as the contracting officer's representative on the incumbent contract.