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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: DME Corporation

File: B-401924; B-401924.2

Date: December 22, 2009

J. William Koegel, Esq., Steven J. Barber, Esq., Paul R. Hurst, Esq., and Saad Gul, Esq., Steptoe & Johnson LLP, for the protester.
David Z. Bodenheimer, Esq., Shauna E. Alonge, Esq., Jonathan Baker, Esq., Crowell & Moring LLP, for Aeroflex Wichita, Inc., the intervenor.
Elliot S. Avidan, Esq., and David P. Ingold, Esq., United States Marine Corps, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's determination that awardee's proposal was technically superior to protester's properly reflects the agency's consideration of matters that were reasonably encompassed within the solicitation's stated evaluation factors.
 2. Protester's various arguments regarding the agency's judgments and ratings constitute mere disagreement with those judgments, and provide no basis for sustaining the protest.
 3. Protest that awardee improperly obtained protester's proprietary information from protester's former employee will not be reviewed where protester failed to comply with the statutory 14-day reporting requirement regarding an alleged procurement integrity violation.
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DECISION

DME Corporation, of Orlando, Florida, protests the U.S. Marine Corps' award of a contract to Aeroflex Wichita, Inc., of Wichita, Kansas, pursuant to request for proposals (RFP) No. 67854-09-R-3002 to provide ground radio maintenance automatic test systems (GRMATS) for software-defined radios. DME protests that the agency failed to properly evaluate DME's and Aeroflex's proposals with regard to the solicitation's non-price evaluation factors. DME also protests that Aeroflex

violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (2000), in connection with Aeroflex's hiring of a former DME employee.¹

We deny the protest with regard to the agency's evaluation of proposals; we dismiss the protest with regard to the alleged procurement integrity violation.

BACKGROUND

In December 2008, the agency released the solicitation at issue, seeking proposals to provide automatic test systems for the diagnosis and repair of new generation software-defined radios;² this system is intended to have the flexibility to support future communications platforms, such as the joint tactical radio system (JTRS).

The solicitation provided for award of an indefinite-delivery/indefinite-quantity, fixed-unit-price contract for a maximum of 700 units over a 60-month period. Agency Report (AR), Tab 4, RFP at 2. Offerors were advised that the source selection decision would be made on a "best value" basis considering price and the following non-price evaluation factors, listed in descending order of importance: technical,³ management,⁴ integrated logistics support (ILS), and past performance.⁵ The RFP further provided for a two-phase evaluation process, noting that, following evaluation of initial proposals (phase I), the agency would establish a competitive range and conduct discussions with the competitive range offerors—to include

¹ DME also initially protested the agency's actions with regard to discussions, the evaluation of past performance, and the price analysis, but subsequently withdrew those bases for protest.

² A software-defined radio is a communications system that is generally capable of converting signals between digital and analog formats, and uses software to perform functions that were previously performed by hardware.

³ Under the technical evaluation factor, the solicitation established the following subfactors: system capability with regard to performance specifications; software engineering capability; technical shortfall mitigation plan; and demonstration unit.

⁴ Under the management evaluation factor, the solicitation established the following subfactors: management program; program time-phased schedule; subcontractor/supplier management; risk management; quality; and contractor facilities.

⁵ The solicitation also provided for evaluation of the offerors' small business subcontracting plans on a "Pass/Fail" basis; both DME's and Aeroflex's proposals were rated "Pass" under this evaluation factor. The proposals and/or agency's evaluation with regard to the subcontracting plan evaluation factor is not an issue in this protest and is not further discussed.

product demonstrations (phase II)--followed by submission of final revised proposals.

With regard to contract performance requirements, the solicitation advised offerors that their proposed systems must be “maintainable,” elaborating that “[s]ustainment level maintenance shall consist of complete repair, major overhaul, or complete rebuild of the parts, assemblies, subassemblies and end items,” and providing that such maintenance “shall be performed by the Government for those items unique to the [contractor’s system].”⁶ AR, Tab 3, RFP Statement of Work (SOW), at 9, 11.

On or before the February 3, 2009 closing date, proposals were submitted by three offerors, including Aeroflex and DME,⁷ and were thereafter evaluated by the agency’s technical evaluation board (TEB).⁸ Following the initial evaluation, Aeroflex’s and DME’s proposals were rated as follows:

	Aeroflex	DME
Technical	Exceptional	Exceptional
Management	Exceptional	Acceptable
ILS	Marginal	Exceptional
Past Performance	Low Risk	Low Risk
Price	\$92,750,487	\$82,427,853

Agency Report (AR), Contracting Officer’s Statement, at 14.

Thereafter the agency established a competitive range consisting of DME and Aeroflex, and by letters dated June 18, 2009, opened discussions with those two offerors, identifying various aspects of each proposal that needed to be addressed, and setting dates for demonstration of their respective systems. AR, Tab 13.

⁶ Consistent with the requirements regarding system maintainability, the solicitation also provided, under the heading “System Architecture,” that the selected system “shall be integrated to make the maximum use possible of COTS, modified COTS, and NDI equipment.” AR, Tab 17, RFP Performance Specification, at 5.

⁷ The third offeror’s proposal is not relevant to resolution of this protest and is not further discussed.

⁸ With regard to the technical, management and ILS factors and their respective subfactors, the agency assigned adjectival ratings of Exceptional, Acceptable, Marginal and Unacceptable. With regard to past performance, the agency assigned risk ratings of Low, Moderate, High, or Unknown.

Each offeror demonstrated its proposed system on July 8; final revised proposals were submitted on July 21. Thereafter, the agency performed an evaluation of the final proposals with the following results:

	Aeroflex	DME
Technical	Exceptional	Exceptional
Management	Exceptional	Acceptable
ILS	Acceptable	Exceptional
Past Performance	Low Risk	Low Risk
Price	\$76,387,469	\$82,427,853

AR, Contracting Officer's Statement, at 20.

The TEB summarized its evaluation of Aeroflex's proposal, stating:

Aeroflex's demonstrated unit evidenced a high degree of modularity and expandability that will facilitate virtually unlimited future system upgrades and configuration changes for future test requirements. Aeroflex's modular, open-architecture solution will enable the Marine Corps to upgrade the systems as needed to support future test requirements. The modularity, expandability and open-architecture configuration are decisive strengths that will provide undoubted benefits to the Marine Corps. The Aeroflex design will enhance maintainability of the systems, allowing the Marine Corps to procure compatible components on the open-market to support system repairs and mitigate obsolescence issues with little or no reliance on the OEM as a sole source supplier.⁹ This is a key technical advantage of the Aeroflex system.

AR, Tab 2, TEB Final Evaluation Report, at 2-3.

⁹ More specifically, the TEB explained that:

[T]he Aeroflex proposal is based on a COTS product currently being manufactured. . . . The [COTS product] can be used in multiple configurations based on the capability required. . . . Aeroflex's common platform has virtually unlimited expansion and configuration capabilities for future test requirements, including JTRS. . . . Aeroflex's open architecture design incorporates state-of-the-art PCI [peripheral component interconnect] extensions for Instrumentation (PXI) suite of modular instruments to perform required system functions.

AR, Tab 2, TEB Final Evaluation Report, at 6.

In contrast, while also rating DME's proposal as Exceptional under the technical evaluation factor, the TEB stated:

DME's design is limited in expandability and modularity. The inherent limitations imposed by their hardware design and use of largely proprietary, non-standard components will significantly restrict the Marine Corps' ability to perform future upgrades and modifications independent of the OEM.

Id. at 3.

Thereafter, the agency's source selection advisory council (SSAC) reviewed the TEB's evaluation record, concurred with the evaluation, and concluded: "While both [DME's and Aeroflex's] products were rated as technically exceptional, the capabilities and potential benefits associated with the Aeroflex product exceed those of DME by a considerable margin." AR, Tab 8, SSAC Memorandum to Source Selection Authority, at 6. The SSAC elaborated on this conclusion by comparing and contrasting various aspects of the two proposals, thereafter reiterating that "the Aeroflex proposal was technically superior to DME by a significant margin." Id. at 7.

Based on the agency's determination that Aeroflex's proposal was technically superior and offered the lowest price, a contract was awarded to Aeroflex on August 25. This protest followed.

DISCUSSION

Evaluation of Non-Price Factors

DME first protests that the agency's consideration of Aeroflex's "open architecture" and "modularity" was an improper application of unstated evaluation factors. Supplemental Protest, Oct. 5, 2009, at 22-27. In this regard, DME complains that the agency's reference to those aspects of Aeroflex's proposal "represents a significant departure from the RFP's evaluation criteria." Id. at 24-25. We disagree.

In evaluating proposals, agencies may properly consider the degree to which the proposals exceed the solicitation's stated objectives and requirements. E.g., IAP World Servs., Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 2-3. While a solicitation must advise offerors of the bases on which proposals will be evaluated, this does not mean that a solicitation must specifically describe considerations that are reasonably and logically related to, or encompassed within, the stated factors. See, e.g., ORI Servs., Corp., B-261225, July 28, 1995, 95-2 CPD ¶ 55 at 2-3; Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 at 4.

Here, as discussed above, the solicitation specifically advised offerors that their proposed systems must be “maintainable,” elaborating that “[s]ustainability level maintenance shall consist of complete repair, major overhaul, or complete rebuild of the parts, assemblies, subassemblies and end items,” and providing that such maintenance “shall be performed by the Government for those items unique to the [contractor’s system].” AR, Tab 3, RFP Statement of Work (SOW), at 9, 11. Further, the solicitation provided, under the heading “System Architecture,” that the selected system “shall be integrated to make the maximum use possible of COTS, modified COTS, and NDI equipment.” AR, Tab 17, RFP Performance Specification, at 5.

In our view, the references to Aeroflex’s “open architecture” and “modularity” were made in the context of the agency’s assessments regarding the degree to which each proposed system will meet or exceed the solicitation requirements regarding maintainability and system architecture. Thus, DME’s assertions that the agency used unstated evaluation factors are wholly without merit.

DME also protests other aspects of the agency’s evaluation under the non-price evaluation factors. For example, DME complains that the agency accorded too much weight to the product demonstrations; failed to properly evaluate data rights; and was unreasonably concerned about potential supplier delays in connection with DME’s proposal.

The evaluation of technical proposals is a matter within the agency’s discretion, since the agency is responsible for defining its needs and for identifying the best methods for accommodating those needs. *E.g.*, U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In this regard, our Office will not reevaluate technical proposals; rather, we will review a challenge to an agency’s evaluation only to determine whether the agency acted reasonably and in accord with the solicitation’s evaluation criteria and applicable procurement statutes and regulations. *E.g.*, Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 4. A protester’s mere disagreement with the agency’s judgments regarding the relative merits of competing proposals does not establish that the evaluation was unreasonable. *E.g.*, SDS Int’l, Inc., B-291183.4, B-291183.5, Apr. 28, 2003, 2003 CPD ¶ 127 at 6.

We have reviewed the agency’s contemporaneous evaluation documentation and find no basis to question the determination that Aeroflex’s proposal was technically superior to DME’s proposal. Among other things, in addition to the conclusions discussed above, the agency reasonably determined, and contemporaneously documented, that Aeroflex’s proposal was superior to DME’s with regard to supplier management, noting that Aeroflex will manufacture a majority of the subassemblies in-house, thereby reducing risks of delays. The agency also noted that Aeroflex proposed significantly greater bandwidth than DME and proposed user interface features, including screen size and touch-screen capabilities, that were superior to those proposed by DME. AR, Tab 2, at 6-15. On the record here, DME’s various

arguments regarding alleged flaws in the agency's evaluation of both proposals reflect mere disagreement with the agency's judgments, and provide no basis for sustaining the protest.

Procurement Integrity

DME states that, during the procurement, Aeroflex hired a (now-former) DME employee who had access to DME's proprietary pricing data. DME asserts that, because Aeroflex lowered its proposed price between submission of initial and final revised proposals, the former DME employee must have provided DME's pricing information to Aeroflex. Accordingly, DME maintains that Aeroflex violated the statutory procurement integrity provisions, 41 U.S.C. § 423 (2000), which prohibit an offeror's unauthorized acquisition of a competitor's proprietary information.¹⁰ Based on this allegation, DME asserts that award to Aeroflex was improper.

Both our Bid Protest Regulations and the statutory procurement integrity provisions require--as a condition precedent to our consideration of an alleged procurement integrity violation--that a protester have reported the matter to the contracting agency within 14 days of becoming aware of the possible violation.¹¹ This 14-day

¹⁰ The procurement integrity provisions provide, in pertinent part, that an offeror "shall not, other than as provided by law, knowingly obtain contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(b).

¹¹ In this regard, the statutory provisions state:

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection . . . (b) . . . of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

41 U.S.C § 423(g).

Similarly, our Bid Protest Regulations provide that:

For a Federal procurement, GAO will not review an alleged [procurement integrity] violation . . . where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.

(continued...)

reporting requirement affords procuring agencies an opportunity to timely investigate alleged improprieties before completing a procurement and, in appropriate circumstances, to take remedial action. See 41 U.S.C. § 423(e)(3); Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 9.

Here, DME failed to comply with the statutory and regulatory reporting requirements that constitute a condition precedent to our jurisdiction. Specifically, the record contains a letter from counsel for DME to Aeroflex, dated June 9, 2009, expressly accusing the former DME employee of disclosing DME's proprietary information (including pricing) to Aeroflex, stating:

[The former DME employee] owed DME a duty not to appropriate DME's confidential information. We are concerned, therefore, that while at DME, [the former DME employee] had full access to DME's work on the U.S. Marine Corps System Command for the Ground Radio Maintenance Automatic Test System, or "GRAMATS," a project in which we understand Aeroflex is interested. . . .

[The former DME employee], of course recently left DME's employment and joined Aeroflex. **DME has discovered that while employed with DME [the former DME employee] was in communication with Aeroflex about aspects of his forthcoming employment with Aeroflex and, then or later, shared with Aeroflex information about DME's customers, products and pricing.** [Emphasis added.]

AR, Tab 21, Letter from Counsel for DME to Aeroflex, June 9, 2009, at 1-2.

Notwithstanding DME's specific assertion in June 2009 that the former DME employee had "shared with Aeroflex information about DME's customers, products and pricing," DME failed to report this matter to the agency until September. That is, DME delayed complying with the reporting requirement until after it learned it had not been selected for award, and more than 3 months after, by its own admission, it "discovered" information leading DME to conclude that its former employee had provided DME's pricing information to Aeroflex.

(...continued)
4 C.F.R. § 21.5(d) (2009).

On this record, DME clearly failed to comply with the 14-day reporting requirement regarding the alleged procurement integrity violation. Accordingly, we will not consider DME's allegations in this regard.¹²

The protest is denied in part and dismissed in part.¹³

Lynn H. Gibson
Acting General Counsel

¹² We note that, despite DME's failure to timely bring its concerns to the agency's attention, Aeroflex has submitted affidavits to the agency and to this Office representing that the former DME employee provided no information to Aeroflex, and did not participate in this procurement in any way on behalf of Aeroflex.

¹³ In the various submissions DME has filed in pursuing this protest, it has presented additional arguments to, and/or variations of, the arguments specifically discussed above. We have considered all of DME's arguments and find no basis to sustain its protest.