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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Raytheon Company

File: B-403110.3

Date: April 26, 2011

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Susan C. Murray, Esq., and John M. Sabatino, Esq., Department of Homeland Security, for the agency.

Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision not to select protester's proposal for award is denied, where the proposal was reasonably evaluated as having weaknesses that were within the stated evaluation criteria, and additional discussions were not required given that the weaknesses stemmed from proposal revisions made by the protester after the completion of discussions.

DECISION

Raytheon Company, of Waltham, Massachusetts, protests the award of contracts to Telephonics Corporation, of Farmingdale, New York, and ICx Technologies, Inc., of Alpharetta, Georgia, by the Department of Homeland Security, Customs and Border Protection, under request for proposals (RFP) No. HSBP1010R2914, for mobile surveillance capability equipment, as part of the agency's secure border initiative, known as SBINet. Raytheon argues that the agency miscalculated the firm's final proposals, failed to hold meaningful discussions, and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP, issued on December 28, 2009 as a commercial item procurement, sought proposals to supply up to 215 mobile surveillance capability (MSC) units. RFP amend. 9 at 7, 44. These MSC units will allow the operator (a Border Patrol agent) to drive the unit to a site where surveillance is needed. Once at the site, the operator will erect the system on the back of a truck and power up its radar, infrared camera, laser illuminator, and a supporting computer system, and then operate the equipment to detect, identify, and classify “items of interest,” ranging from animals to illegal immigrants and drug cartel operations. See RFP, MSC System Operational Description; RFP amend. 9, at 16.

The RFP provided that fixed-price contracts would be awarded to one or more firms for a base year and up to four option years. RFP amend. 9 at 7. The RFP specified that contracts would be awarded on a best value basis, considering three factors, in descending order of importance: technical, price, and past performance. Id. at 97. The technical factor consisted of eight subfactors: detection, identification, tracking, ruggedization, reliability and maintainability, ease of use, mobility, and delivery. The detection subfactor was listed as the most important subfactor, the delivery subfactor was listed as the least important subfactor, and the remaining six subfactors were stated to be of equal importance. Id. at 99. The RFP provided that proposals would be assigned both adjectival ratings (outstanding, excellent, good, satisfactory, or poor) and risk ratings (low, medium, or high) in the evaluation of the technical factors and subfactors. Id. at 100-01.

Seven of the technical subfactors were divided into capabilities,¹ and then further divided into parameters. The RFP provided a total of 25 capabilities and 193 parameters, which were listed in a matrix (essentially a table). For many parameters, the RFP specified a “threshold acceptable value,” short of which a proposal would be rejected, and a “nominal desired value (objective),” which described the desired level of capability. RFP amend. 5, MSC Matrix, at 2.

As is relevant here, the matrix listed eight capabilities for the ease of use subfactor, including C.17 (i.e., capability 17), which provided as follows:

C17. The MSC does not subject operator or maintenance personnel to dangerous conditions during erection, operation, stowing, or maintenance.

Id. at 14-15. This capability included nine parameters, the first of which required that

¹ The delivery subfactor was not divided into capabilities.

the MSC unit be “[s]afe to set up, operate, and stow.”² Six others parameters addressed the “operator’s work space,” such as providing good ergonomics; suitable cooling, heating, and lighting; and window shading. The final two parameters required that the MSC unit support close proximity site security, and include automation to reduce workload. *Id.* at 14.

For the mobility subfactor, the matrix identified one capability (C.26), which required that the MSC unit be capable of being rapidly erected and stowed. The parameters for this capability established 4 hours as the threshold acceptable time to set up and stow the MSC unit, and 0.5 hours as the nominal desired time. *Id.* at 16.

Raytheon’s technical approach contemplated the integration of the MSC unit onto the back of a flat-bed truck, with the operator’s control devices located inside the cab of the truck. AR, Tab 5, Raytheon’s Initial Technical Proposal, at 8, 26. Raytheon’s MSC unit (the portion to be installed on the back of the truck) consisted of a deployable mast, ground surveillance radar, an infrared camera, and laser pointer/illuminator. *Id.* at 13, 16, 19, 25. In its initial proposal, Raytheon stated that, for ease of use, its MSC system was designed so that the [DELETED]. In this regard, the [DELETED]. AR, Tab 5, Raytheon’s Initial Technical Proposal, at 11.

After discussions, Raytheon revised its proposal so that the [DELETED]. AR, Tab 6, Raytheon’s Final Technical Proposal (Base), at 11. Raytheon submitted two final proposal revisions (FPRs) based on this revised design—one with a basic [DELETED] (base FPR) and one with an enhanced [DELETED] (optional FPR).

Raytheon’s proposals were evaluated by a technical evaluation team (TET), who assigned both of the FPRs a rating of satisfactory with moderate risk. The moderate risk rating was because the [DELETED] the MSC unit was deployed or stowed. The TET noted that this “significant design change” posed a “high risk of damage and/or loss of equipment,” and therefore was a weakness in connection with the ease of use and mobility subfactors.³ AR, Tab 15, Final Technical Evaluation Report, at 8, 10. As compared to the five other proposals included in the competitive range, Raytheon’s FPR with the enhanced [DELETED] was ranked third from last, and its FPR with the base [DELETED] was ranked last. *Id.*, attach. Rating Chart.

² The first parameter, “safe to set up, operate, and stow,” specified that the offeror should “propose [a] solution and any metrics appropriate for [its] solution.” RFP amend. 5, MSC Matrix, at 14.

³ Although not included in the final technical evaluation report, an earlier drafted consensus report stated that the TET also was concerned that Raytheon’s revised design posed a risk of “offset errors” (*i.e.*, alignment) between the [DELETED]. AR, Tab 15, TET Consensus Report of Raytheon’s Base FPR, at 4; *id.*, TET Consensus Report of Raytheon’s Optional FPR, at 3.

The TET's evaluation was reviewed by a source selection advisory Board (SSEB) and source selection advisory council (SSAC).⁴ The SSEB concurred with the TET's findings in total. AR, Tab 16, SSEB Report, at 1. The SSAC agreed with the TET's assignment of a satisfactory rating, but disagreed with the TET's risk rating assessment, finding that Raytheon's FPRs should have been rated low risk. Notwithstanding, the SSAC agreed that Raytheon's approach—requiring the operator to assemble and disassemble [DELETED] was a “potential safety hazard” and a “significant concern” that caused the proposals to be “unattractive in respect to mobility and ease of use.” AR, Tab 20, SSAC Report, at 9-11.

The source selection authority (SSA) reviewed the evaluations and concluded that Raytheon should not be awarded a contract. The SSA explained his reasoning as follows:

Based on cost alone, the Raytheon proposals appear attractive.^[5] However, the SSEB and SSAC identified several Weaknesses in the Raytheon proposals that would significantly compromise the operational effectiveness of the Raytheon systems. Most significantly, the Raytheon systems require extensive operator effort to set up and break down the system. This results in a loss of effective operational time while the operator is completing assembly. It also leaves the operator in a vulnerable position during assembly. The SSAC noted that this issue, alone, might well have eliminated Raytheon from the competitive range if it had appeared in Raytheon's initial proposal. I concur. Because of this significant weakness and its operational implications, and given that Technical is the most important evaluation factor, I do not conclude that either Raytheon proposal represents the best value to the government. . . .

AR Tab 21, Source Selection Decision, at 3.

The SSA selected ICx and Telephonics for award. Raytheon requested and received a debriefing, and this protest followed.

DISCUSSION

Raytheon argues that the agency unreasonably evaluated its FPRs. Specifically, Raytheon contends that the SSA's concerns over operator vulnerability and operational effectiveness, and the TET's concerns about damage to the equipment and offset errors, are unreasonable, based on unstated criteria, and should have been raised during discussions. Protest at 24-55; Raytheon's Comments at 12-29.

⁴ The SSEB and SSAC also considered the evaluation of past performance and price.

⁵ Raytheon's FPRs were lower in price than all other proposals.

In considering Raytheon's evaluation challenges, we will not substitute our judgment for that of the agency regarding the merits of proposals; we will review the evaluation only to determine whether it was reasonable and consistent with the stated evaluation criteria, and with applicable laws and regulations. Hospital Klean of Texas, Inc., B-295836, B-295836.2, Apr. 18, 2005, 2005 CPD ¶ 185 at 6. With regard to allegations of unstated criteria, solicitations must inform offerors of the basis for proposal evaluation; however, procuring agencies are not required to specifically list under the stated factors every area that may be taken into account, provided the areas considered in the evaluation are reasonably related to or encompassed by the stated criteria. Raytheon Co., Space and Airborne Sys., B-298626.2, B-298626.3, Sept. 27, 2007, 2007 CPD ¶ 185 at 11.

During a hearing that our Office conducted, the SSA explained why Raytheon's FPR, with more [DELETED] than the initial proposal, resulted in the evaluated concerns. With regard to vulnerability and operational effectiveness, the SSA explained that "in the real world, sometimes connections don't go very smoothly" and it could take "two or three tries" before the parts can be connected, especially at night. Tr. at 31. While trying to connect the multiple parts, "the operator's hands and attention [are] occupied [and] the operator is not able to be situationally aware of what's going on around him or her." A greater number of [DELETED] requires more manual activity, making the operator more vulnerable because he has "no freedom to respond." Tr. at 32; see also Tr. at 33, 39. If a border control agent is occupied or unable to respond, he could be ambushed and possibly killed.⁶ Tr. at 87.

We find that the SSA's concerns about operational effectiveness and vulnerability are within the stated evaluation criteria, and they are reasonable. In this regard, under the ease of use subfactor, capability C.17 provides that the MSC unit must "not subject the operator . . . to dangerous conduction during erection, operation, stowing, or maintenance." One of the parameters under C.17 requires that the unit be "safe to set up, operate, and stow." Both Raytheon's initial and final proposals address "operator safety" as being "of paramount importance with the MSC system" and further discuss the "operational effectiveness" of the system as being an issue of operator safety related to ease of use. AR, Tab 5, Raytheon's Initial Technical Proposal, at 107; Tab 6, Raytheon's Base FPR, at 118; Tab 6, Raytheon's Optional FPR, at 117-18. On these facts, we do not find credible Raytheon's argument that the documented weaknesses were unstated criteria. Furthermore, we find that the SSA's concerns here reflected a reasonable exercise of the agency's evaluation judgment

⁶ Similarly, the SSAC determined that the assembly design was a "potential safety hazard," thereby detracting from ease of use and mobility. AR, Tab 20, SSAC Report, at 10.

about safety issues resulting from Raytheon's design change. To the extent Raytheon disagrees, its disagreement does not provide a basis to sustain the protest.⁷

With regard to the TET's concerns about the risk of damage to the [DELETED] components and offset errors, we note that these concerns are not reflected in the SSA's decision, but he did consider them. Tr. at 27. The SSA acknowledged that Raytheon's design with [DELETED] components creates a "much more significant" risk that those parts will be damaged by the repeated process of setting up and stowing the MSC unit. Tr. at 64. The SSA stated that he was especially concerned with the risk of damage to the [DELETED], because the [DELETED] was an "operationally critical element of the system."⁸ *Id.* Similarly, with regard to offset errors, the SSA explained that having to repeatedly [DELETED] increases the risk that the [DELETED] will not be aligned properly, so the [DELETED]. Tr. at 65. In the SSA's opinion, a [DELETED] is "a lot more sound, technically" than [DELETED] that has to be connected. Tr. at 23.

To the extent they were considered in the evaluation, we find that the TET's concerns were reasonable and encompassed within the stated evaluation criteria. In this regard, it is axiomatic that the MSC unit must be properly working in order to meet any one of the capability or parameter requirements listed under the nine subfactors. Moreover, the RFP specifically identified that risk would be evaluated for, among other things, the potential for degradation of performance. RFP at 101.

⁷ Raytheon also contends that it was unreasonable to consider the evaluated concern of operational effectiveness because the time to set up and stow the MCS unit did not change between Raytheon's initial proposal and FPRs. In this regard, all of Raytheon's proposals identified the set up and stow time to be [DELETED] minutes, which was less than the 30 minute objective listed under the relevant parameter in the RFP's matrix. Protest at 24-25; Raytheon's Comments at 12-13. However, the SSA stated that he did not believe that no additional time would be required to assemble a greater number of components, and "even if [the additional time is] seconds, that's a big deal to a Border Patrol agent" who is vulnerable during the set up and stow process. Tr. at 187; *see also* 188, 191, 212 (threat situations are "measured . . . in seconds and minutes, not [tens] of minutes and hours"). We note that Raytheon's FPRs were found to have met the objective time for setting up and stowing the MSC unit, and thus the FPRs received a rating of satisfactory. However, we also find, based on the record, that the FPRs were properly assessed proposal risk because additional time setting up and stowing the MSC unit could result in a loss of operational effectiveness. We find no inconsistency in these evaluation conclusions.

⁸ The SSA explained that the risk of damage was not a concern with respect to Raytheon's initial proposal because [DELETED]. Therefore, the SSA explained, the MSC unit loses greater "operational utility" without [DELETED]. Tr. at 60-63.

Accordingly, we find nothing objectionable about the TET's consideration of these weaknesses as technical risk in the evaluation.

Raytheon next argues that each of the weaknesses evaluated in its FPRs should have been identified during discussions. The protester asserts that since the initial proposal included [DELETED], weaknesses involving [DELETED] parts should have been identified and raised during discussions. Raytheon's Comments at 26-29.

In a negotiated procurement where the agency conducts discussions, those discussions must be meaningful—that is, they must be sufficiently detailed so as to lead the offeror into the areas of its proposal requiring revision. Honeywell Tech. Solutions, Inc., B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 10. However, where proposal defects are first introduced either in a response to discussions or in a post-discussion proposal revision, an agency has no duty to reopen discussions or conduct additional rounds of discussions. Id.

Here, the weaknesses identified by the agency were the result of design changes that Raytheon introduced for the first time in its FPRs, and none of the changes were prompted by the agency's discussion questions. The changes were not minor, as the protester contends, but were significant design changes that, among other things, now required the operator to [DELETED], each time the MSC unit had to be moved. AR, Tab 5, Raytheon's Initial Technical Proposal, at 11; Tab 6, Raytheon's Base FPR, at 11; Tab 6, Raytheon's Optional FPR, at 11. The issues of concern, which we have discussed in detail above, did not exist when only [DELETED]; as stated by the SSA, if something happened to the [DELETED], the MSC unit could still be effectively used. Tr. at 60. Since Raytheon introduced the areas of concern through its FPRs at no prompting from the agency, we find that the agency was not required to reopen discussions with Raytheon here.

In sum, we find that the agency's evaluation of Raytheon's proposals was reasonable. Since the protester's challenge to the source selection decision is based on its arguments attacking the evaluation of its own proposals, we find no basis to overturn the selection decision.

The protest is denied.

Lynn H. Gibson
General Counsel