



**The Comptroller General  
of the United States**

Washington, D.C. 20548

*Van Schick*

## **Decision**

**Matter of:** AeroVironment, Inc.

**File:** B-233712

**Date:** April 3, 1989

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### **DIGEST**

1. Experience requirement in solicitation set aside for small business was an evaluation factor not a definitive responsibility criterion, and the agency's consideration of large business subcontractor's experience under the relevant evaluation factor was proper where solicitation allowed use of subcontractors to perform the contract and did not prohibit use of a subcontractor to satisfy experience requirement.

2. Protest that small business' use of a large business subcontractor contradicts Small Business Administration (SBA) size status determination and is a matter which the SBA has conclusive authority to decide.

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### **DECISION**

AeroVironment, Inc., protests the award of a contract by the Department of the Air Force to Odessa Engineering under request for proposals (RFP) No. FO8606-88-R-0016, a 100-percent small business set-aside for the design, fabrication, installation, integration and testing of a doppler acoustic sounder network. We deny the protest in part and dismiss it in part.

The solicitation indicated that the agency's objective was to obtain a fully operational doppler acoustic sounder network installed by the contractor at the Kennedy Space Center. Doppler acoustic sounders are used to define vertical wind profiles. The network called for by the solicitation includes three sounders mounted on mobile platforms and linked by a computer system. The solicitation also included line items for software, spare parts and training and optional line items for additional sounders, a computer system and spare parts.

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Award under the solicitation was to be made to the offeror determined best able to satisfy the agency's requirements. The evaluation was to include consideration of technical factors and price, with technical factors of greater importance. In the section of the RFP entitled "evaluation factors for award," four technical evaluation factors are listed: (1) experience, (2) soundness of approach, (3) understanding of the requirements and (4) documentation. Under the experience criterion, which was considered the most important, "[E]vidence of experience in the successful design and fabrication of a Doppler Acoustic Sounder Network" was to be evaluated.

Three proposals were submitted in response to the solicitation, including proposals from Odessa and AeroVironment. Odessa's proposal indicated that it would use Radian Corporation, a large business, as a subcontractor. In the initial evaluation, the technical evaluation panel concluded that Odessa and Radian have "excellent experience" with doppler acoustic sounder networks and together meet the experience criterion.

The agency requested and received best and final offers from all three initial offerors and conducted a final technical evaluation. Based on Odessa's highest ranked technical proposal and lowest price of \$666,115, the contracting officer by letter of September 12, 1988, informed the offerors that Odessa was the apparent successful offeror. Award was made to Odessa on November 18.

In response to the contracting officer's September 12 letter, AeroVironment filed an agency protest on September 16. Among other issues, AeroVironment complained that Radian is not eligible as a small business under the solicitation, Odessa has not demonstrated previous experience in doppler sounder system design and installation and is not capable by itself of certifying the performance of such systems since it possesses no experience beyond that of Radian.

On October 3, although the agency continued to consider a number of issues raised by AeroVironment, the Air Force referred AeroVironment's protest to the Small Business Administration (SBA) as a challenge to Odessa's size status. The SBA's Region VI ruled on October 27 that Odessa is a small business for this procurement.

On November 7, AeroVironment filed an appeal of the size status determination with SBA's Office of Hearings and Appeals. The third firm that competed under the solicitation, Climatronics, also appealed the SBA's decision. In

its appeal, among other issues, AeroVironment argued that Radian, not Odessa, is the manufacturer of the system to be procured and Odessa fails to meet the requirement of 15 U.S.C. § 644(o)(1)(B) (Supp. IV 1986) that under a 100-percent small business set-aside, at least 50 percent of the manufacturing cost must be performed by a small business. The SBA denied the appeals.

On November 17, the contracting officer denied AeroVironment's agency protest. In response to the contention that Odessa did not have previous experience with doppler sounder system design and installation, the contracting officer stated that Odessa "teamed" with Radian met the solicitation's experience evaluation criterion. According to the contracting officer, Odessa's proposal included "adequate information about the capabilities of both Odessa and Radian in both managerial and technical qualifications."

On November 28, AeroVironment protested to this Office that Odessa is not qualified to perform the work as required by the solicitation. AeroVironment maintains that, contrary to representations in its proposal, Odessa told the SBA that it will not rely on Radian's experience to meet its contract obligations. For instance, in its December 6 response to Climatronics' SBA appeal, Odessa stated that it "[C]learly has the requisite technical capabilities and experience to perform the work" and that "Odessa Engineering possesses many years of related experience in the design, fabrication, testing, installation, operation and training of acoustic systems . . . ." Also, in its December 7 response to AeroVironment's appeal, Odessa stated "Odessa's employees are experienced and knowledgeable in all areas of technical expertise required by the contract." and that "Radian is not filling a critical void in Odessa's capabilities."

AeroVironment maintains that the SBA regional office denied AeroVironment's size status protest based on Odessa's misrepresentation that the critical expertise in the procurement was to be provided by Odessa, and not by Radian. Further, according to AeroVironment, the SBA's conclusion was expressly based on Odessa's representations that it will not rely on Radian's expertise to meet its contract obligations, that it alone will manufacture the network and that it will acquire only "raw components" from Radian.

AeroVironment contends that, in light of Odessa's representations to the SBA and the SBA's determination that Odessa will provide the critical expertise to perform the contract, the contracting officer should not rely on a teaming

arrangement between Odessa and Radian to determine that Odessa meets the experience criterion of the solicitation. Rather, AeroVironment argues that the contracting officer must determine whether Odessa meets the experience requirement based on Odessa's experience alone. AeroVironment says that the Air Force never considered whether Odessa alone has sufficient experience but instead explicitly relied on the combined experience of Odessa and Radian. AeroVironment asserts that Odessa alone does not have the required experience and Radian's experience was a critical element of the contracting officer's determination that Odessa's proposal met the RFP requirement.

AeroVironment also argues that the contracting officer cannot ignore inconsistent statements in Odessa's proposal and to the SBA of how it plans to perform the contract. Rather, the protester maintains that the contracting officer was required to consider the most current information available, including Odessa's representations to the SBA.

We find there is no merit to the protest. First, in our opinion, the protest relates not to Odessa's responsibility, as the Air Force argues, but to the reasonableness of the agency's evaluation of the technical proposals, in particular under the experience criterion. Where, as here, responsibility-type factors such as experience are included among the technical evaluation criteria in a negotiated procurement, as they properly may be, we do not regard them as definitive responsibility criteria. LD Research Corp., B-230912.3, Sept. 9, 1988, 88-2 CPD ¶ 223. As with any other evaluation factor, an agency's assessment and scoring of experience must be reasonable and in accord with the RFP's evaluation scheme. Supreme Automation Corp., et al., B-224158 et al., Jan. 23, 1987, 87-1 CPD ¶ 83. In this case, the Air Force considered this factor as part of the technical evaluation and found Odessa's proposal was acceptable.

Although AeroVironment argues that the agency and Odessa could not rely at all on Radian to meet the experience criterion, the solicitation allowed the use of subcontractors in general and did not specifically prohibit the use of a subcontractor to satisfy the experience requirement. Further, AeroVironment does not contend that Odessa and Radian together do not have the appropriate experience.

AeroVironment alleges that Odessa's teaming arrangement with Radian contradicts the SBA's size status determination and argues that Odessa proposed Radian, a large business, to

perform too large a portion of the contract. In our view, these allegations amount to a challenge of Odessa's size status and eligibility for a small business set-aside, matters which our Office generally will not review. See Creativision, Inc., 66 Comp. Gen. 585 (1987), 87-2 CPD ¶ 78. The SBA has conclusive statutory authority to determine whether a firm is a small business for federal procurements. 15 U.S.C. § 637(b)(6); Id. The contracting officer fulfilled his obligation under the regulations by forwarding AeroVironment's size status protest to the SBA. The SBA determined that Odessa, with Radian as a subcontractor, is a small business for this procurement.

In any event, contrary to the protester's contention, we do not consider the contracting officer's determination that Odessa's proposal was acceptable to be inconsistent with Odessa's representations to the SBA or the SBA's resolution of the size status protest. Based on Odessa's proposal, the contracting officer determined that Odessa, with Radian as a subcontractor, has the required experience.<sup>1/</sup> Although, as the protester argues, Odessa initially stated in its submissions to the SBA that it has the capability to do the work itself, Odessa also indicated to the SBA that Radian would provide assistance as a subcontractor. Moreover, the firm later submitted a statement to the SBA to clarify that it did not intend to represent that it is capable of performing or will perform all of the contract itself. Odessa indicated in this respect, that it possesses the capability and experience to perform those portions of the contract which it tasked to itself, amounting to more than 50 percent of the cost of the contract.

The SBA's Region VI determined, based in part on Odessa's representations that, although Radian will supply components and provide installation assistance and training, Odessa qualifies as the manufacturer of the network and will perform in excess of 50 percent of the cost of the contract line items. Contrary to AeroVironment's contention, the SBA did not conclude, either at the regional level or on appeal,

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<sup>1/</sup> As a practical matter, in reaching that technical conclusion, the contracting officer could not have been influenced by Odessa's submissions to the SBA or by the SBA's size status determination since these occurred after the technical evaluation was finished.

that Odessa will not rely on Radian at all to perform the contract. Thus, the technical evaluation is not inconsistent with either Odessa's SBA submissions or with the SBA's determination on the size status protest.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel