



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Science Systems and Applications, Inc.

File: B-240311; B-240311.2

Date: November 9, 1990

Marc F. Efron, Esq., Crowell & Moring, for the protester.
Louvonina P. Wilson, and Harry M. Howton for Kestrel
Associates, Incorporated, an interested party.
Harriett Halper, Esq., and Linda Oliver, Esq., Department of
the Navy, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protester is an interested party under Bid Protest Regulations to protest alleged improper evaluation of its proposal, even though the challenged evaluation ranked the protester's proposal fifth overall, because the protester has a chance of being awarded the contract if the protest is sustained and the protester's proposal is reevaluated.
2. Protest that an agency improperly evaluated protester's and awardee's proposals is denied where review of the agency's evaluation documentation shows that the agency's scoring of the proposals was reasonable and related to the solicitation's stated evaluation criteria.
3. Protest that an agency failed to conduct meaningful discussions is untimely under the General Accounting Office Bid Protest Regulations when it was first filed in the post-conference comments, more than 10 working days after the protester learned the basis of protest.
4. Even where an agency fails to give required pre-award notice of award to allow size protest, the General Accounting Office will not find the award improper unless a timely post-award size protest was filed and the awardee was found to be other than small.

DECISION

Science Systems and Applications, Inc. (SSAI) protests the award of a contract by the Department of the Navy, Naval Research Laboratory (NRL) to Kestrel Associates, Incorporated, under request for proposals (RFP) No. N00014-9-R-HB02, for computer and network support services. SSAI contends that the agency improperly evaluated the proposals, did not conduct meaningful discussions, and improperly withheld information concerning the award from the protester.

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

The solicitation sought technical personnel (systems analysts, technicians, engineers, operators, and business analysts) to support both NRL's totally integrated computer facility--a CRAY X/MP supercomputer and lesser ancillary computers--and NRL's local area network.

The RFP was set aside for small disadvantaged businesses (SDB) and solicited proposals for a 1-year delivery order, time-and-materials type contract with four 1-year options. The RFP advised that award would be made to the offeror presenting the most advantageous proposal, and that proposals would be evaluated to determine the offeror presenting the greatest overall value in terms of both meeting the government's needs and proposed cost. The RFP stipulated that meeting the government's technical needs was more important than cost, but cautioned offerors that "the closer the technical scores of the various proposals are to one another, the more important cost considerations become." The technical evaluation factors, listed in descending order of importance, were:

"(1) Company experience

(a) Adequacy of previous experience for similar or related contract.

(b) Adequacy of ability to prepare monthly status reports in accordance with contract requirements.

(2) Understanding the requirements of the Statement of Work

(3) Ability to Obtain Qualified Personnel

The experience and qualification of the supervisor that will be assigned to the contract. Ability to obtain experienced personnel meeting the requirements in the Statement of Work."

On the February 26, 1990, closing date, the Navy received 25 proposals which were evaluated and ranked by March 12. The offerors' total scores--combining technical and cost evaluations--ranged from a high of 86 to a low of 41 on a 100-point scale. SSAI ranked fifth with a total score of 82.

	Tech	Cost	Total	Total Amount Proposed
Kestrel	51	35	86	\$6,831,415
SSAI	45	37	82	6,480,050

On March 26, the Navy, after recognizing that the RFP lacked necessary technical personnel educational requirements, issued an amendment (No. 0003) correcting the omission, with an April 20 closing date for receipt of revised offers. Kestrel and 10 other firms revised their initial proposals. On May 2, the Navy finished evaluating the revised proposals but no technical ratings changed.

On May 9, the Navy opened discussions with an identical letter to all 25 offerors advising that their proposals were technically acceptable and announcing an opportunity to revise proposals. Offerors were given until May 24 to revise their offers. The May 9 letter only mentioned specific facets of the offerors' cost proposals; no mention was made of any deficiencies or weaknesses in the offerors' technical proposals.

On June 1, the Navy requested offerors to submit best and final offers (BAFO) by June 8. After BAFOs, SSAI was rated fifth overall, considering both cost and technical factors, and Kestrel was still the top rated offeror. Kestrel's BAFO lowered its price to \$92,000 below SSAI's BAFO price. (SSAI raised its BAFO price by \$93,000 over its initial price.) The BAFOs were rated in pertinent part as follows:

	Tech	Cost	Total	Total Amount Proposed
Kestrel	51	37	88	\$6,476,830
SSAI	45	37	82	6,573,215

On June 22, the Navy awarded Kestrel the contract. The Navy selected Kestrel for award on the basis that its total score indicated its proposal was most advantageous to the government.

On July 5, SSAI protested to our Office objecting to the Navy's failure to provide information concerning the award^{1/} and alleging that the Navy "may have" underrated SSAI's technical proposal.

On August 7, the Navy debriefed SSAI. SSAI was advised that while the Navy found aspects of its proposal very good, the proposal was considered deficient for (1) not providing a sample status report; (2) giving little emphasis to the topic of interaction with the users; and (3) presenting a long and difficult to understand presentation of SSAI's understanding of the statement of work's requirements. On August 9, the Navy submitted its report on the protest to our Office.

On August 15, SSAI filed a second protest with our Office contending that Kestrel did not have adequate experience and the credit it received was attributable to the experience of its large business subcontractor, Cincinnati Bell Systems, Inc. (CBSI).

On September 10, following the August 29 bid protest conference at our Office, SSAI again challenged the failure to give pre-award notice of the award and the propriety of the Navy's evaluation of the proposals, and also contended that meaningful discussions were not conducted with SSAI.^{2/}

As a preliminary matter, the Navy asserts that SSAI is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990). The Navy argues that SSAI has no direct economic interest which will be affected by the award of the contract, since SSAI was the fifth ranked offeror, it did not protest the solicitation evaluation criteria that resulted in that ranking, it did not challenge the eligibility of the intervening offerors, and it is not next in line for award in accordance with the stated evaluation criteria.

^{1/} SSAI protested that the Navy (1) did not give SSAI the pre-award notification required by Federal Acquisition Regulation (FAR) § 15.1001 (FAC 84-13), (2) did not state the general reasons why SSAI's proposal was not successful in the post-award notification as required by FAR § 15.1001(c)(v), and (3) did not give SSAI a requested post-award debriefing.

^{2/} The protester first orally raised the issue of meaningful discussions at the August 29 conference.

We disagree. SSAI has from the start challenged the agency's evaluation of its proposal. Were SSAI to prevail on this issue, we could recommend the reevaluation of SSAI's and other offerors' proposals, and SSAI would have another opportunity for award. Thus, SSAI has sufficient direct economic interest to maintain its protest. See Sach Sinha & Assocs., Inc., B-236911, Jan. 12, 1990, 90-1 CPD ¶ 50.

SSAI contends that the Navy improperly downgraded SSAI's proposal, even though it had superior experience, for lacking information that was not required by the solicitation, and that it overrated Kestrel's proposal. The evaluation of technical proposals is a matter within the discretion of the contracting agency since that agency is responsible for defining its needs and the best method of accommodating them. Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203. In reviewing an agency's technical evaluation, we will not reevaluate the proposal, but instead will examine the agency's evaluation to ensure that it was reasonable and not in violation of the procurement laws and regulations. Id. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

We have reviewed SSAI's arguments, its proposal, the awardee's proposal, the evaluators' worksheets, the source selection evaluation reports, the agency report and other Navy submissions, and discern no basis for finding the evaluation of either SSAI's or Kestrel's proposals unreasonable.

The record shows that the Navy found SSAI to be acceptable, but with a number of notable weaknesses. For example, SSAI's proposal was downgraded under the company experience criterion for failing to provide a sample status report and because it lacked Navy experience on similar contracts. SSAI does not contend that its proposal should not have been downgraded for omitting the sample status report.^{3/} In contrast, Kestrel submitted sample status reports of previous contracts, as requested by the RFP, as well as a status report it could use on this contract, all of which the Navy rated as superior.

^{3/} SSAI does argue in its post-conference comments that the missing report should have been the subject of discussions. As discussed below, the argument that the Navy failed to conduct meaningful discussions is untimely under our Bid Protest Regulations and will not be considered.

SSAI argues that it was improper to downgrade it for a lack of Navy experience because the RFP did not mention Navy experience as a topic to be covered under company experience. We disagree. In making an award decision, the agency may properly take into account specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated evaluation criteria. Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441. While SSAI is of the view that the work required by RFP is virtually identical to the work the protester performs on its other government contracts, we think there is merit in Kestrel's observation that in a close competition a firm demonstrating experience that includes an understanding of a particular agency's "world, their acronyms" might reasonably be viewed as more efficient since "[t]his Navy experience is subtle but without it, operations would move slower in a very fast environment." We think that any offeror having Navy experience would likely document it in its proposal since such experience is logically encompassed in the agency's request for offerors' experience on similar contracts.^{4/} In contrast, Kestrel did have good applicable Navy experience.

The Navy downgraded two aspects of SSAI's proposal under the understanding of the statement of work criterion. The Navy observed that SSAI's proposal placed too little emphasis on interaction required with users. The Navy also stated that "[t]his section of proposal was quite lengthy and it was difficult to determine if the requirements were understood."

SSAI only takes issue with the second criticism. Focusing on the agency's remark concerning the length of the proposal section, SSAI argues that it is unreasonable to downgrade a "very good" proposal because of its length. We need not decide that issue here since it is clear that the agency's criticism is directed to the 16-page length of SSAI's Chapter 3 (Understanding of Requirements) and the agency's difficulty in understanding Chapter 3's contents, and not to the length of SSAI's proposal.^{5/} Our review of Chapter 3 did not show the Navy's criticism of Chapter 3's length and content to be unreasonable, nor do we think that such specific criticism of Chapter 3 is inconsistent with the Navy's overall conclusion that SSAI submitted an acceptable or "very good" proposal.

4/ The Navy points out that SSAI may not have lost any technical points as a result of its lack of Navy experience. The weakness is not mentioned in the evaluators worksheets and only appears in the evaluation summary.

5/ The RFP contained an overall 50-page limitation on technical proposal length, which SSAI exceeded.

SSAI contends that the Navy's criticism, under the ability to obtain qualified personnel criterion, that SSAI had "[v]ery few people (110) from within company to draw from" is irrational. SSAI states that its review of the RFP's estimated requirements lead it to conclude that 25 people could fulfill the requirement. SSAI planned to staff the work primarily with incumbent employees so in SSAI's view its employee pool of 110 people sufficiently meets the requirements.

The record shows that the Navy reasonably gave more credit to offerors, like SSAI and Kestrel, that were willing to hire staff from among the incumbent contractors employees. We similarly believe it is reasonable to consider offerors' current employees in determining an offeror's ability to obtain qualified personnel, since current employees are already hired, trained, have known capabilities and have demonstrated a willingness and ability to work in the offeror's organization. It follows that it is reasonable to give more credit to an offeror, such as Kestrel, with CBSI as its subcontractor, with a larger pool of current employees to draw from.

SSAI questions the Navy's evaluation of Kestrel's proposal. First, although SSAI claims that Kestrel has no experience of its own, the record shows otherwise.

SSAI also contends that the Navy should have investigated Kestrel's proposed use of CBSI, a "large, majority owned business to meet and perform significant contract functions," since, in SSAI's view, an SDB's use of such a subcontractor is "antithetical to the Small Disadvantaged Business set-aside nature of this procurement." The record shows that the Navy did review the propriety of Kestrel's proposed use of CBSI and found it proper. See Eagle Design and Mgmt., Inc., B-239833 et al., Sept. 28, 1990, 90-2 CPD ¶ _____. SSAI has not cited any precedent supporting its apparent position that an SDB may not subcontract, as Kestrel did, less than half of the proposed work (i.e., dollar value of labor costs) of a government contract to a large business, and we are unaware of any authority to that effect. Id. Since Kestrel's proposed subcontract was not objectionable, the Navy could properly consider the expertise and experience of Kestrel's technically qualified subcontractor. See Hardie-Tynes Mfg. Co.--Recon., B-237938.2, June 25, 1990, 90-1 CPD ¶ 587. Thus, the agency reasonably considered CBSI's experience, e.g., its CRAY computer experience, in evaluating Kestrel's proposal.

SSAI further complains that the Navy improperly failed to downgrade Kestrel's proposal for being "a little lacking in networking experience." Our review of the record does not support this contention. Only one of the three evaluators had this perception of Kestrel's proposal--"Looks like they're light on networking"--and that evaluator gave Kestrel the lowest of the three scores Kestrel received under the company experience factor. This was appropriately accounted for in Kestrel's evaluation.

Consequently, based on our review of the record, the Navy reasonably evaluated Kestrel's and SSAI's proposals.

SSAI next contends that the Navy failed to conduct meaningful discussions with SSAI, as required by Federal Acquisition Regulation (FAR) § 15.610(c)(2) (FAC 84-16), because the Navy identified and discussed an apparent deficiency in the awardee's and other offerors' cost proposals without identifying and discussing perceived deficiencies in SSAI's technical proposal.

We consider this argument to be untimely raised under our Bid Protest Regulations, which require the filing of protests "not later than 10 days after the basis for a protest is known or should have been known." 4 C.F.R. § 21.2(a)(2); Atlantic Sys. Research and Eng'g Int'l Inc., B-239744, June 7, 1990, 90-1 CPD ¶ 537. On August 7, SSAI learned that the Navy evaluators perceived three deficiencies in SSAI's technical proposal. The Navy reports that SSAI received its copy of the agency report on August 10. The agency report discloses that the Navy opened written discussions with its May 9 letter to afford offerors an opportunity to address what the Navy perceived as deficiencies in some offerors' cost proposals. Therefore, on August 10, SSAI knew, or should have known, that the Navy had conducted discussions without mentioning any of the deficiencies enumerated at SSAI's August 7 debriefing. If SSAI objected to this, it had until August 24 to make its objections known, by filing a protest raising the issue of an alleged lack of meaningful discussions. SSAI first raised the issue orally at the August 29 bid protest conference, and later first documented this objection in its September 10 conference comments.

SSAI contends that the argument regarding the lack of meaningful discussions is timely because SSAI raised a "fairness of the negotiation process" issue in its July 5 protest when SSAI observed that the Navy's May 9 letter promised to hold discussions but SSAI was unaware of any discussions being conducted prior to contract award. SSAI asserts that the issue of meaningful discussions is encompassed within that broader issue.

We do not think SSAI's statement in the July 5 protest was sufficient to raise the issue of a lack of meaningful discussions. Golden Triangle Mgmt. Group, Inc., B-234790, July 10, 1989, 89-2 CPD ¶ 26. Rather, we regard the belated raising of this issue in the post-conference comments as an unwarranted, piecemeal presentation or development of the protest issues because it was not raised within 10 working days of when SSAI was aware of the facts on which its contention is based. Id. Thus, the issue is untimely raised and is dismissed.

SSAI next asserts that it was prejudiced in its ability to seek redress by the agency's failure to provide both the pre-award notification required by FAR § 15.1001, and a debriefing at the "earliest feasible time after contract award" as required by Department of Defense FAR Supplement § 215.1003. Specifically, SSAI claims that these procedural deficiencies denied it "an opportunity to investigate and file a protest with . . . [the General Accounting Office] and/or file a size protest in time to stay award of the contract pending the resolution of the protests."

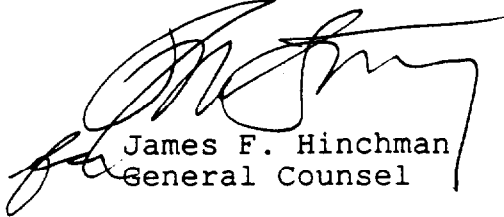
The Navy admits that it did not give the required pre-award notice of the apparent successful offeror. An agency's failure to provide such pre-award notice can result in an improper award if it is timely protested to the Small Business Administration and the awardee is determined to be other than small. Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558.

In order to file a timely protest of Kestrel's size status with SBA, SSAI had 5 working days from June 28, the date of the post-award notice of award, or until July 5. 13 C.F.R. § 121.1603 (1990). However, SSAI did not file a size protest with SBA until August 13, apparently after learning the identity of Kestrel's subcontractor. SBA rejected the protest as untimely filed. Thus, there is no basis to find that the award to Kestrel is improper as a result of the Navy's failure to give pre-award notice of the award.

The Navy also argues, and we think correctly, that neither the lack of pre-award notice nor the lack of an earlier debriefing prejudiced SSAI's SBA size protest. In this regard, SSAI's time to protest was measured from June 28, and there was no legal obligation for the Navy to more promptly notify SSAI that CBSI was Kestrel's subcontractor--the fact which formed the basis of SSAI's untimely size protest.

With regard to SSAI's argument that the Navy's failure to more speedily inform SSAI of the award to Kestrel prejudiced SSAI's ability to enjoy the benefits of the Competition in Contracting Act's stay provision, the Navy points out that SSAI received notice on Thursday the 28th and had until close of business the following Monday to file a protest and obtain the benefits of the statutory stay. In any event, since the protest is without merit, the protester was not prejudiced.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel