REDACTED VERSION*

Matter of: Engineering Incorporated

File: B-257822.5

Date: August 18, 1995

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DIGEST

1. In evaluating technical proposals under a solicitation for a pavement testing machine, an agency reasonably gave credit to statements in the offerors' proposals concerning how existing machines would be updated and customized so as to comply with the specification requirements.

2. In evaluating the awardee's experience, the agency properly imputed subcontractors' experience to the awardee, where the solicitation did not prohibit the use of subcontractors to perform the contract; the agency reasonably downgraded awardee's proposal for its reliance on subcontractors under another relevant evaluation factor.

DECISION

Engineering Incorporated protests the reinstatement of the award of contract No. DACA39-94-C-0097 to Dynatest

*The decision issued on August 18, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions are indicated by "[deleted]."

Engineering, Inc. by the U.S. Army Corps of Engineers for a pavement testing machine to be used by the U.S. Army Cold Regions Research and Engineering Laboratory (CRREL), Frost Effects Research Facility (FERF), Hanover, New Hampshire.

We deny the protest.

The RFP contemplated the award of a firm, fixed-price contract to furnish and deliver an automatic loading machine (ALM) for testing pavement. An ALM applies simulated traffic loads on truck and aircraft tires to various types of pavement test sections under different conditions. By simulating the passage of many vehicles or aircraft over pavement in a short period of time, an ALM enables the accelerated testing of road and airfield surfaces, so that researchers can more accurately forecast the durability of particular types of pavement surfaces under actual weather and traffic conditions. Section C of the RFP, specifications/work statement, as amended, listed numerous features required by the Corps in the solicited ALM.

The RFP stated that award would be made to the offeror whose proposal is determined to be most advantageous to the government, cost and other criteria considered, and that:

> "[t]he combined technical factors are significantly more important than cost. Cost is not expected to be the controlling factor in the selection of a contractor for this solicitation. The degree of importance of cost as a factor could become greater depending upon the equality of the proposals for other factors evaluated; where competing proposals are determined to be substantially equal, total cost and other cost factors could become the controlling factor."

The technical factors were

> "a. Demonstrated experience and expertise by the offeror in developing, constructing, and operating an [ALM] as described in the specifications in Section C of this solicitation or test equipment of similar or comparable complexity.
>
> "b. Demonstrated understanding of the requirement as specified in the scope of work.
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> "c. Adequacy of the offeror's own resources (personnel and equipment) to construct the type of machine described herein as opposed to dependence on subcontracting.

> "Factor (a) is significantly more important than factors (b) and (c). Factor (b) is slightly more important than factor (c). Factor (c) is slightly less important than factor (b)."

Offerors were required to submit sufficient information with their proposals to permit evaluation in accordance with the stated factors; there was no specific requirement that offerors demonstrate compliance with all specification requirements.

The Corps received nine proposals by the closing date for receipt of proposals, including Engineering Incorporated's and Dynatest's.

Engineering Incorporated offered its Mk IV Accelerated Loading Facility (ALF) for $[DELETED]. The ALF is basically a 90-foot long steel structural frame containing a moving test wheel carriage that travels longitudinally at specified speeds back and forth on rails attached to the frame. Loads of weights are applied to the test wheel carriage, whose test wheels are fitted with either truck or aircraft tires, to achieve the desired load on the pavement test section.

Dynatest offered its Mark IV Heavy Vehicle Simulator (HVS) for $[DELETED]. Dynatest's model is based on a South African product and will be manufactured at the facilities of Dynatest's South African subcontractor. The HVS resembles a large truck and is comprised of an approximately 74-foot long steel frame with a cab mounted on tires at either end. Suspended beneath the chassis frame is a test beam which moves laterally and vertically by means of hydraulic cylinders. A test wheel carriage, between the side frames of the test beam and supported on rollers which run on rails, moves back and forth in a longitudinal direction. During testing, the HVS is lifted off the pavement by built-in hydraulic jacks, the test wheels lowered to the pavement, the desired load applied by hydraulic cylinders, and the test wheels then traverse the pavement test section.

The Corps's technical evaluation board (TEB) rated Engineering Incorporated's proposal the highest with a technical score of 94 out of a possible 100 points, and Dynatest's proposal second highest with a technical score of 93 points. The Corps conducted written discussions and requested best and final offers (BAFO) from the four offerors with the highest technical scores, including Engineering Incorporated and Dynatest. Based on the BAFOs, the TEB rated the Engineering Incorporated and Dynatest proposals as technically equal, with both receiving the

highest technical score of 93 points.[1] Dynatest's BAFO price was $[DELETED] and Engineering Incorporated's BAFO price remained $[DELETED]. In evaluating Dynatest's price, the Corps applied the 50-percent Buy American Act surcharge to the foreign portion of Dynatest's offer. Dynatest's evaluated price of $[DELETED] was $[DELETED] less than Engineering Incorporated's $[DELETED] price.[2] The Corps determined that Dynatest's technically equal and lower evaluated priced offer was most advantageous to the government, and made award to Dynatest in the amount of $1,525,000.[3]

On July 7, 1994, after receiving notice of the award to Dynatest, Engineering Incorporated protested to our Office that the Corps failed to adequately evaluate the proposals. Because of the protest, the Corps issued a stop-work order to Dynatest. After receiving the agency's report on the protest defending the award, Engineering Incorporated raised additional grounds for protest, including the Corps's alleged failure to conduct meaningful discussions and the Corps's alleged misapplication of the Buy American Act surcharge to Dynatest's offer.

In considering Engineering Incorporated's supplemental protest, the Corps agreed that it had misapplied the Buy American Act surcharge to Dynatest's offer and that the surcharge should have been applied to Dynatest's total offered price. Under this calculation Dynatest's evaluated price exceeded Engineering Incorporated's price, such that Dynatest's proposal could no longer be considered most advantageous to the government. As award could not be made to Engineering Incorporated because that firm's price exceeded the funds available for the project, the contracting officer canceled the RFP with the intention of resoliciting the agency's needs at a later date. Based on the Corps's proposed corrective action, our Office dismissed Engineering Incorporated's protest as academic on October 11.

Dynatest then protested to our Office the termination of its contract, contending that the Buy American Act surcharge was properly applicable only to the South African manufactured

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[1]The other two offerors' proposals were significantly lower rated.

[2][DELETED].

[3]The amount of the award was less than the price of Dynatest's BAFO because the Corps waived applicable customs duties that had been included in Dynatest's price.

equipment portion of its price, not its total price, and that Dynatest's award was improperly terminated.

On March 1, 1995, we sustained Dynatest's protest, finding that the Corps, in its corrective action in response to Engineering Incorporated's protest, incorrectly applied the Buy American Act surcharge to Dynatest's total price, instead of that portion representing Dynatest's nondomestic manufacturing costs. Dynatest Consulting, Inc., B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167. Because Dynatest had not provided sufficient information in its BAFO to enable the Corps to determine which elements of its costs were subject to the Buy American Act surcharge, we recommended that the Corps obtain clarification from Dynatest as to the costs associated with the South African portion of its HVS, and reevaluate Dynatest's price by applying the Buy American Act surcharge only to the South African portion to determine Dynatest's evaluated price. We noted that if Dynatest's evaluated price exceeded Engineering Incorporated's price, the contract was properly terminated, but, if Dynatest's evaluated price remained lower than Engineering Incorporated's, the Corps should reinstate the award to Dynatest and Engineering Incorporated could then reinstate its other protest grounds. Id.

Subsequently, the Corps obtained the additional cost information from Dynatest and determined that the portion of Dynatest's original price to which it had initially applied the Buy American Act surcharge was correct and that Dynatest's offer remained most advantageous to the government. Thus, the Corps reinstated the award to Dynatest on April 7. Engineering Incorporated then timely reinstated its other protest grounds, which are the subject of this decision.

Engineering Incorporated primarily protests the evaluation of its and Dynatest's proposals as technically equal, asserting that its proposal should have been considered superior. In reviewing protests against the propriety of an agency's evaluation of proposals, it is not the function of our Office to independently weigh the merits of the offers. Microeconomic Applications, Inc., B-258633.2, Feb. 14, 1995, 95-1 CPD ¶ 82. Rather, the evaluation of proposals is a matter within the discretion of the procuring agency since the agency is responsible for defining its needs and the best method of accommodating them and must bear the burden of any difficulties resulting from a defective evaluation. Data Sys. Analysts, Inc., B-255684; B-255684.2, Mar. 22, 1994, 94-1 CPD ¶ 209. Consequently, we will question an agency's evaluation only where the record clearly shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria listed in the RFP.

S.T. Research Corp., B-233115, Feb. 15, 1989, 89-1 CPD ¶ 159. A protester's mere disagreement with the agency does not render the evaluation unreasonable. South Capitol Landing, Inc., B-256046.2, June 20, 1994, 94-2 CPD ¶ 3.

Engineering Incorporated first argues that Dynatest's proposed HVS fails to comply with numerous material specification requirements.[4] We have reviewed Engineering Incorporated's contentions in this regard and find them without merit.

For example, Engineering Incorporated complains that Dynatest's machine does not offer uni-directional capability as required by specification C.3. Specification C.3 requires that, for the lighter traffic loads to be tested (less than 25,000 pounds), the ALM's test wheel be able to travel over the pavement test surface uni-directionally (i.e., the load is applied in only one direction and the test wheel is lifted off the pavement on its return in the other direction).[5] Specifically, Engineering Incorporated contends that the test wheel on Dynatest's machine, after applying the test load in one direction, maintains a static weight of 4,500 pounds on the pavement surface during its return in the other direction, which does not comply with the uni-directional testing requirement that loads be applied in only one direction. Engineering Incorporated's contention that Dynatest's machine will maintain a static load of 4,500 pounds is based on what it believes to be the characteristics of Dynatest's earlier Mark III model--which

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[4]The specifications which Engineering Incorporated alleges Dynatest's HVS does not satisfy concern the machine's uni-directional testing capability, test wheel speed and ability to maintain a constant speed, pavement test section length, automatic operation, lateral movement, replication of traffic wander, noise level, operational temperature range, uniform wheel load, monitoring of load/tire pressure/temperature, and compliance with industry standards. The TEB evaluated the offerors' proposed machines' compliance with the specifications under the "demonstrated understanding of the requirement as specified in the scope of work" evaluation factor.

[5]The specification further requires that the test wheel be able to apply all loads, including high loads of between 25,001 pounds and 45,000 pounds, bi-directionally (i.e., the wheel applies the load to the pavement in both directions). Uni-directional testing replicates vehicular traffic on a road since traffic normally goes in the same direction in each lane. Bi-directional testing allows accelerated testing of pavement, and, at the higher loads, replicates the wear and tear on airport pavement surfaces.

is not the machine offered here. In any case, in Dynatest's proposal, the offered Mark IV version is expressly represented as having the required uni-directional capability, and there is no indication in Dynatest's proposal that this machine is not capable of applying a load in one direction only.[6]

As another example, Engineering Incorporated argues that Dynatest's test wheel does not achieve the required minimum speeds, does not travel at a constant speed, and does not carry a load over the minimum 20 feet of test section, as required by specifications C.3 and C.5.[7] Here, again, Engineering Incorporated's contentions are based on the perceived characteristics of Dynatest's Mark III model, which is not being offered here. In its proposal, Dynatest states that it is upgrading the hydraulic components of the Mark III HVS to achieve the required test wheel speed for the Mark IV and promises that its machine will be able to test the specified loads at the specified speeds. Likewise, the proposal indicates that the updated hydraulic system will enable the HVS test wheel to maintain a constant speed over the required distance of 20 feet, rather than the 16 feet achievable by the Mark III, since the upgraded hydraulic system will allow the test wheel to be accelerated and decelerated over shorter distances.[8]

Based on our review and as illustrated by the foregoing examples, there is no merit to Engineering Incorporated's numerous contentions of Dynatest's machine's noncompliance with the specification requirements, which were primarily based on its analysis of the Mark III's capabilities or

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[6]We note that Dynatest's proposal indicates that its Mark III model also has the required uni-directional capability. Moreover, subsequent to award, Dynatest confirmed that its test wheel can be lifted off the pavement in one direction, so that no load would be applied as required for uni-directional testing.

[7]In this regard, specification C.5 requires that:

> "The machine will be capable of . . . constant speed and constant load for a minimum of a 20 linear [foot] test section. Up to 5 [feet] for acceleration and deceleration will be allowed at either end of the 20 [foot] test section on the same surface."

[8]Dynatest also clarified for the Corps during discussions that its machine will comply with the minimum 20-foot test section.

unreasonable interpretations of Dynatest's proposal. Further, we find that the TEB reasonably accepted Dynatest's assurances that the upgraded features of its Mark IV machine will meet each of the specification requirements. While Engineering Incorporated objects to these assurances by Dynatest as being merely blanket statements of compliance, we note that the RFP did not expressly require offerors to demonstrate in their proposals how they would comply with each specification requirement and that Engineering Incorporated's proposal also merely states that it will comply with several of the specification features, which Engineering Incorporated's previous ALMs did not have, e.g., high load and bi-directional capability.[9] Indeed, the record indicates that neither Dynatest's Mark IV HVS nor Engineering Incorporated's Mk IV ALF have yet been fabricated. In this regard, we understand that the market for ALMs is very limited and that only a handful of Dynatest's and Engineering Incorporated's earlier models have been produced, which, beyond their basic designs, appear to be fabricated according to the performance features requested by each customer.

Engineering Incorporated also objects to the 1-point reduction in its technical score under the "demonstrated understanding of the requirements as specified in the scope of work" factor after submission of its BAFO because of the agency's concerns that Engineering Incorporated had not identified an adequate longitudinal moving technique for its ALM. In this regard, specification C.6 requires that the ALM be capable of longitudinal movement from one pavement test section to another at least 25 feet away within 2 hours. During discussions, the Corps told Engineering Incorporated that it was "concerned with [Engineering Incorporated's] proposed method to meet [specification C.6] because [DELETED] is not available at [FERF] for moving the machine longitudinally" and "[w]e would prefer an alternative system." Engineering Incorporated responded in its BAFO with further explanations and assurances as to how longitudinal movement would be achieved without [DELETED]. In evaluating Engineering Incorporated's BAFO response, the TEB members were unanimously concerned about the acceptability of Engineering Incorporated's proposed method

[9]In its proposal, Engineering Incorporated stated that the ALF's operational software "will be upgraded for two-direction operation"; this evidences that bi-directional capability had not previously been incorporated in Engineering Incorporated's ALM. The record indicates that Engineering Incorporated had merely conducted a shop test to demonstrate that its machine could be operated in two directions and completed engineering analyses to indicate that its machine could accommodate high loads.

of moving its machine longitudinally, in light of the conditions at FERF, where the machine would be in operation. The Chairman of the TEB also points out that the FERF does not have the "strong, smooth floor conditions" found in the Engineering Incorporated shop (which members of the TEB had visited), and thus the method used by Engineering Incorporated to move its ALM might not be successfully implemented at the FERF. Under the circumstances, we think the agency reasonably found Engineering Incorporated's proposed method for moving its ALM longitudinally to be problematic, and appropriately downgraded that firm's proposal.

Engineering Incorporated also contends that the Corps improperly gave Dynatest too much credit and Engineering Incorporated too little credit for experience and expertise in developing and constructing ALMs. The TEB awarded Engineering Incorporated a score of 51 and Dynatest a score of 53 out of a possible 55 points under the experience/expertise factor.

Although Dynatest itself was only recently incorporated, the other members of Dynatest's team, Ermetek Pty., Ltd., and the South African Council for Scientific and Industrial Research (CSIR), have substantial experience in the fabrication, design, and operation of ALMs. [DELETED].

We note that the experience and expertise of the members of Dynatest's team are not dissimilar to Engineering Incorporated's own experience in developing and constructing ALMs. [DELETED].

Engineering Incorporated's proposal did not receive full credit under the experience/expertise factor primarily because the proposal did not demonstrate that the critical bi-directional and high load capabilities had been reduced by that firm to an ALM design or that Engineering Incorporated had manufactured a machine with such capabilities. While, as indicated above, Engineering Incorporated had substantiated its capabilities (as opposed to its experience/expertise) to add these features through shop tests and engineering analyses, it does not appear that these features had been included in an ALM. Instead, Engineering Incorporated refers to some 1981 design experience with "full-scale" aircraft landing loads and to its experience with bi-directional capabilities with regard to control systems, as demonstrating its experience/expertise.[10] Under the circumstances, we cannot

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[10]Engineering Incorporated's proposal indicates that the control technology derived from its SAFARI system--an

(continued...)

find the agency acted unreasonably in downgrading Engineering Incorporated's proposal because that firm has not incorporated these capabilities into an ALM.[11]

Given the extensive experience/expertise of Dynatest's team and Engineering Incorporated's limited experience/expertise regarding incorporation of the bi-directional and high load capabilities into an ALM, we cannot find that the TEB acted unreasonably in rating Dynatest slightly higher than Engineering Incorporated for the experience/expertise factors. While Engineering Incorporated asserts that Dynatest is a new company with limited experience/expertise of its own, an agency may consider an offeror's subcontractors' experience under relevant evaluation factors where, as here, the RFP allows for the use of subcontractors to perform the contract and does not prohibit the consideration of subcontractors' experience in the evaluation of proposals. Decision Sys. Technologies, Inc.; NCI Info. Sys., Inc., B-257186 et al., Sept. 7, 1994, 94-2 CPD ¶ 167.

Engineering Incorporated also contends that the Corps scored Dynatest too highly in the evaluation category "adequacy of resources (personnel and equipment) to construct the ALM as opposed to dependence on subcontracting." As described above, Dynatest's HVS will be built in South Africa by

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[10](...continued)
automated robotic maintenance system of comparable complexity to an ALM which is used to wash and paint aircraft--permits the addition of operator selection of bi-directional capability. Engineering Incorporated's proposal merely refers to the incorporation of this type of control system (without specific discussion of the bi-directional capability) in an ALM built for the [DELETED], which was delivered to that customer after submission of Engineering Incorporated's proposal.

[11]Engineering Incorporated contends that the Corps failed to conduct meaningful discussions by not seeking clarification of these points. Where, as here, a proposal is considered to be acceptable and in the competitive range, the agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible rating. Northern Virginia Serv. Corp., B-258036.2; B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36; Specialized Technical Servs., Inc., B-247489.2, June 11, 1992, 92-1 CPD ¶ 510. In any case, Engineering Incorporated has not shown that its experience in this regard was not as evaluated, such that its rating would have improved with discussions on these points. See John Brown U.S. Servs., Inc., B-258158 et al., Dec. 21, 1994, 95-1 CPD ¶ 35.

Dynatest's subcontractors, namely, Ermetek, which will fabricate the machine at its plant, and CSIR, which will provide technical support. Production of the Mark IV HVS will be under the direct, full-time supervision of Dynatest personnel to ensure that the modifications to the existing design comply with the Corps's requirements. Dynatest is also responsible for support services for its machine, such as ensuring parts availability, training Corps's personnel, and [DELETED]. Because of Dynatest's dependence on subcontracting, the TEB downgraded its proposal by 4 points (i.e., 16 out of 20 points). In contrast, Engineering Incorporated received a perfect 20 point score. Given Dynatest's critical responsibilities and team relationship with the fabricator of the offered machine, we cannot say that its score for this factor is too high.

Engineering Incorporated also contends that the Corps failed to consider the lower operating costs associated with Engineering Incorporated's machine in evaluating proposals.[12] This contention has no merit. Even though the RFP did not provide for the consideration of such costs in the price evaluation, the TEB considered the operating cost savings claimed by Engineering Incorporated in its proposal, and gave Engineering Incorporated appropriate credit in its technical score.[13]

Finally, we find no merit to Engineering Incorporated claims that the award resulted from a pattern of unequal treatment to favor Dynatest throughout the procurement process, inasmuch as each of the examples cited by Engineering

[12]Engineering Incorporated is not contending that Dynatest's offered price is unrealistic.

[13]The Corps also determined that the actual cost savings were considerably less than the amount claimed by Engineering Incorporated because the Corps will operate its machine less than the amount of time upon which Engineering Incorporated based its cost estimate, and concluded that Engineering Incorporated's operational cost savings did not in any case justify the significant additional cost of Engineering Incorporated's machine.

Incorporated is either an untimely protest contention and/or does not substantiate Engineering Incorporated's claims.[14] The protest is denied.

Robert P. Murphy
General Counsel

[14]For example, Engineering Incorporated notes that complaints by Dynatest caused this procurement to be issued on an unrestricted basis rather than as a small business set-aside. While this may be true, this does not evidence unequal treatment and, in any event, constitutes an untimely protest of an alleged solicitation defect not for consideration by our Office. 4 C.F.R. § 21.2(a)(1) (1995).