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# Decision

**Matter of:** Aviation Training Consulting, LLC

**File:** B-417151; B-417151.2; B-417151.3

**Date:** March 11, 2019

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Colonel C. Taylor Smith, Lieutenant Colonel Damund Williams, and Kevin P. Stiens, Esq., Department of the Air Force, for the agency.  
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest alleging that agency improperly awarded a contract to a concern owned by a federal government employee is denied where record shows individual in question is a state government employee, not a federal government employee.
  2. Where solicitation contemplated award without discussions, there is no basis to object to an agency's award on the basis of initial proposals.
  3. Protest challenging agency's evaluation of proposals is denied where record shows that agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations.
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## DECISION

Aviation Training Consulting, LLC (ATC), of Altus, Oklahoma, protests the award of a contract to Avix-BGI Joint Venture, LLC (AB), of Yorktown, Virginia, under request for proposals (RFP) No. FA4890-18-R-0006, issued by the Department of the Air Force for aircrew training and courseware development services. ATC argues that the agency miscalculated proposals, failed to engage in discussions, and unreasonably made award to AB.

We deny the protest.

## BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a fixed-price contract to perform the solicited requirements for a 2-month phase-in period, a base year, and four 1-year option periods.<sup>1</sup> RFP at 5-61. Firms were advised that proposals would be evaluated considering price, and several non-price considerations. The evaluation factors were: technical capability (deemed most important and significantly more important than the remaining two factors); risk (deemed second in importance) and price (deemed the least important, but of increasing importance as proposals were deemed relatively equal under the non-price factors).<sup>2</sup> RFP at 128. Firms also were advised that the agency intended to make award based on initial proposals without conducting discussions, but the RFP reserved to the government the right to engage in discussions should they be determined to be in the government's best interests. Id. In terms of price, the RFP advised offerors that prices would be evaluated for reasonableness, realism and balance. Id. at 133-134.

In response to the solicitation, the agency received a number of proposals, including those of the protester and the awardee. The agency evaluated the proposals and, as is pertinent to this decision, assigned the ATC proposal a rating of unacceptable/high risk under the human resources management subfactor (the most important of the subfactors), and marginal/moderate risk ratings under the remaining two subfactors. Agency Report (AR), exh. 16, Source Selection Evaluation Board (SSEB) Report, at 13. In assigning it these ratings, the agency identified three deficiencies in the ATC proposal under the human resources management subfactor, one deficiency under the information technology systems and approach subfactor, and a total of 16 weaknesses among the three subfactors. Id. at 13-24.

In comparison, the agency assigned acceptable/low risk ratings to the AB proposal under each of the three subfactors, identified no weaknesses or deficiencies, and found that AB's proposal met the agency's requirements. Id. at 77-86.

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<sup>1</sup> The solicitation was set aside for service-disabled veteran-owned small businesses (SDVOSB).

<sup>2</sup> The technical capability factor included three subfactors (human resource management, which was deemed significantly more important than the other two subfactors of organizational and functional management, and information technology approach and management, which each were deemed equal in importance). In addition to the subfactors, the RFP included a number of "aspects" under each subfactor. RFP at 129-132. The RFP provided that, in evaluating proposals, the agency would assign adjectival ratings at the subfactor level only, and that ratings of outstanding, good, acceptable, marginal or unacceptable would be assigned. Id. at 129.

Separately, the RFP advised offerors that the agency also would assign a risk rating to the proposals under each subfactor of low, moderate, high or unacceptable. RFP at 132-133.

The agency's evaluators concluded that, because of the number and severity of deficiencies and weaknesses identified in the ATC proposal (along with a number of price concerns identified by the agency, but not relevant to this decision), ATC's proposal would require a substantial rewrite, and would not be included in any competitive range that might be established. AR, exh. 16, SSEB Report, at 98.

These evaluation results were presented to the agency's source selection authority. After reviewing the evaluation findings, he determined to make award to AB on the basis of initial proposals, finding that the proposal represented the best value to the government, and concluding that, although ATC proposed a total evaluated price that was approximately \$10.3 million less than AB's price,<sup>3</sup> it also proposed materially [deleted] personnel to perform the requirement. AR, exh. 18, SSDD, at 10. After being advised of the agency's selection decision and requesting and receiving a debriefing, ATC filed the instant protest with our Office.

## PROTEST

ATC makes several arguments relating to the agency's decision to award the contract to AB relating principally to the ownership of the company and the nature of the joint agreement between the concerns comprising the AB joint venture. ATC also argues that the agency abused its discretion in failing to hold discussions before awarding the contract. In addition, ATC argues that the agency miscalculated proposals in a number of ways. We have considered all of ATC's allegations and find them to be without merit. We discuss ATC's principal contentions below.

### Ownership of AB

ATC alleges that the agency erred in making award to AB because Avix, Inc., the managing joint venture concern, is owned by an individual that ATC maintains is a federal employee.<sup>4</sup> According to the protester, award to AB is improper because

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<sup>3</sup> ATC's total evaluated price was \$39,487,077, compared to AB's total evaluated price of \$49,795,376. AR, exh. 17, Initial Evaluation Brief, at 342; exh. 18, Source Selection Decision Document (SSDD), at 10.

<sup>4</sup> AB is an all-small-business mentor protégé joint venture comprised of Avix, Inc.--the protégé small business--and BGI, LLC, the small-business mentor concern. As described in the firm's proposal:

The JV [joint venture] is organized under the Small Business Administration's (SBA) Small Business Program as set forth in 13 C.F.R. § 125.8 and § 125.9. The SBA has approved an All Small Mentor Protégé Program (ASMPP) agreement between BGI (as Mentor) and AVIX (as Protégé) effective 13 March 2018.

(continued...)

Federal Acquisition Regulation (FAR) § 3.601 precludes agencies from knowingly awarding a contract to a federal employee or to a business owned by a federal employee.

We find no merit to this aspect of ATC's protest. The record shows that the chief executive officer (president) of Avix, Inc. is a member of the Virginia Air National Guard. In this connection, he submitted an affidavit during the protest stating, among other things, that he retired from the federal Air National Guard on July 1, 2016, and began limited, part-time duty in the Virginia Air National Guard on January 20, 2017. Affidavit of Avix, Inc. Owner, at 1. He further represents that he has not been mobilized or deployed into the federal Air National Guard. Id. The protester has offered no evidence to contradict or draw into question the Avix, Inc. president's affidavit. We therefore conclude that he has accurately characterized his status.

That being the case, there is no basis for our Office to object to the agency's award of the contract to AB for the reason advanced by the protester. Applicable case law clearly establishes that an individual acting as a member of a state national guard is not a federal employee. For example, in Perpich v. Department of Defense, 496 U.S. 334 (1990), the Supreme Court expressly recognized that:

Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army [or in this case, the Air Force], but unless and until ordered to active duty in the Army [or Air Force], they retained their status as members of a separate State Guard unit.

Id. at 345 (emphasis supplied). See also Clark v. United States, 322 F3d. 1358, 1366 (Fed. Cir. 2003) (and cases cited therein), where the Court of Appeals for the Federal Circuit stated:

We understand Perpich [the case quoted above] to stand for the proposition that members of the National Guard only serve the federal military when they are formally called into the military service of the United States. At all other times, National Guard members serve solely as members of the State militia under the command of a state governor.

Accordingly, there is no basis for our Office to conclude that the president of Avix, Inc. is a federal employee as contemplated under FAR § 3.601. It follows that award to the firm was not objectionable for the reasons advanced by the protester.

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(...continued)

AR, exh. 15, AB Technical Proposal, at 9.

In addition to our conclusion above, we point out as well that there is no evidence in the record to show that the president of Avix, Inc. had any affiliation whatsoever with the acquiring activity. There also is no evidence to show that he participated in any way in defining the agency's requirements; preparing the solicitation; evaluating proposals; or participating in the source selection decision. We therefore deny this aspect of ATC's protest.

#### AB's Compliance with Small Business Administration Requirements

ATC argues that AB will be unable to comply with the requirements of the Small Business Administration's (SBA) regulations concerning performance of the contract as between joint venturers. The protester points out that 13 C.F.R. § 125.18(b)(3), requires the managing joint venture partner (in this case Avix, Inc.) to perform at least 40 percent of the requirement. ATC maintains that Avix, Inc. is a small business with only one employee, and that the firm cannot perform at least 40 percent of the requirement.

We view this aspect of ATC's protest to be essentially identical to arguments made in cases where there is a challenge to a small business offeror's compliance with a solicitation's limitation on subcontracting clause in small business set-aside acquisitions where there is a small business prime contractor and a large business subcontractor. In such cases, an agency's judgment as to whether a small business offeror will comply with the limitations on subcontracting clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. Geiler/Schrudde & Zimmerman, B-412219 et al., Jan. 7, 2016, 2016 CPD ¶ 16 at 7. Neither issue is one that our Office generally reviews. 4 C.F.R. §21.5(a), (c). An offeror need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Express Med. Transporters, Inc., B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. Rather, compliance is presumed unless specifically negated by language in the proposal. Id.

Here, ATC has not identified any aspect of the AB proposal that should reasonably have led the agency to question whether AB would comply with the SBA requirements associated with performance of a contract by an SDVOSB joint venture. On the contrary, our review of the record leads us to conclude that the AB proposal gives every indication that, in fact, AB will meet those requirements. In this connection, the AB proposal provides as follows:

Our Team has a long history of very successful contract transition efforts and this Plan is further streamlined by the fact that two of the three ABJV Team companies comprise the incumbent contractor force. The main efforts will center on transitioning some of the existing employees to the ABJV protégé company, AVIX. Since the formal Mentor-Protégé relationship between AVIX and BGI includes assisting AVIX with the required HR [human resources] policies and procedures, this process will

be seamless. We expect to fill all required positions through retention of personnel selected from the current workforce.

AR, exh. 15, AB Technical Proposal, at 34 (emphasis supplied). In light of these considerations, we deny this aspect of ATC's protest.

#### Discussions

ATC also argues that the agency acted unreasonably in making award on the basis of initial proposals and should instead have engaged in discussions.

We have consistently stated that we generally will not review an agency's decision whether or not to engage in discussions because there are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, nor is there any requirement for an agency to, for example, document its decision not to engage in discussions. Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3. As noted, where, as here, a solicitation advises offerors that an agency intends to make award on the basis of initial proposals, the agency is under no obligation to engage in discussions, and properly may make award based on initial proposals. Mare Island Dry Dock, LLC, B-410821, Feb. 26, 2015, 2015 CPD ¶ 100 at 5. We therefore deny this aspect of ATC's protest.

#### Evaluation of Proposals

Finally, ATC challenges the agency's evaluation of proposals. ATC argues that the agency applied unstated evaluation considerations in evaluating its proposal. ATC also argues that, in evaluating its proposal compared to the AB proposal, the agency applied a more rigorous, unequal, standard. In this latter connection, ATC essentially argues that, had the agency applied the same standard in evaluating its proposal that was used to evaluate the AB proposal, many of the weaknesses (and one of the deficiencies) assigned to its proposal would not have been assigned.

In reviewing protests concerning an agency's evaluation of proposals, we do not independently review the proposals; rather, we review the record to ensure that an agency's evaluation is reasonable and consistent with the terms of the solicitation, as well as applicable statutes and regulations. Intelligent Decisions, Inc., et al., B-409686 et al., July 15, 2014, 2014 CPD ¶ 213 at 15–16.

The RFP included a definition for the assignment of an unacceptable rating. That definition provided that the agency would assign an unacceptable rating where the proposal does not meet the requirements of the solicitation and, thus, contains one or more deficiencies and is "unawardable." RFP at 129. As noted above, the agency assigned the ATC proposal four deficiencies, any one of which, pursuant to the terms of the RFP, would provide a basis for rejecting the proposal.

One of the deficiencies identified by the agency in the ATC proposal under the most important subfactor, human resource management, related to the firm's own calculation

of its required full-time equivalent personnel. In particular, the agency found that ATC had materially understated the manning necessary to perform the requirements at Davis-Monthan Air Force Base using ATC's own basis for calculating a full-time equivalent. AR, exh. 16, SSEB Report, at 14.

In its initial protest, ATC claimed that this deficiency arose because of an ambiguity in the solicitation, and argued that it easily could have remedied this deficiency had the agency conducted discussions. In its comments responding to the agency report--which provided a detailed response to ATC's argument--ATC made no further mention of this argument. We therefore take as given that ATC concedes this deficiency was appropriately assigned; we also deem as abandoned ATC's original challenge to the terms of the RFP, as well as its challenge to the assignment of the deficiency. Yang Enterprises, Inc., B-415923, Mar. 12, 2018, 2018 CPD ¶ 109. In any event, ATC has not shown that the agency acted erroneously or unreasonably in assigning the deficiency; ATC's proposal does, in fact, reflect the problem identified by the agency in the firm's calculation of its proposed staffing. The record therefore shows that there was at least one deficiency properly identified in the ATC proposal, and that deficiency rendered its proposal ineligible for award.

With respect to ATC's remaining evaluation challenges, we need not consider them in any detail. None of ATC's evaluation arguments relating to AB allege that the awardee should have been found technically unacceptable; rather, all of its remaining arguments allege that the agency erred in finding ATC's proposal unacceptable.<sup>5</sup> Since the record shows that the ATC proposal was properly and reasonably found technically unacceptable for the reasons discussed above, it follows that, even if ATC were correct with respect to its remaining arguments, it was not competitively prejudiced by any of the remaining alleged evaluation errors. Inasmuch as competitive prejudice is an essential element of any viable protest, even if ATC were correct in its remaining

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<sup>5</sup> With respect to its initial protest relating to the deficiency described above, ATC argued that the AB proposal should also have been found technically unacceptable because of the extent to which Avix, Inc. was relying on its joint venture teaming partner. ATC made no further mention of this aspect of its initial protest in its comments, and thus abandoned it. Yang Enterprises, Inc. supra. In any case, as discussed above, this essentially is no more than an argument that AB will not comply with the requirements of the SBA's regulations relating to performance of the contract as an all-small mentor-protégé joint venture, a matter not for our consideration in these circumstances.

arguments, we still would find no basis to sustain its protest. General Dynamics Information Technology, Inc., B-414387, B-414387.2, May 30, 2017, 2017 CPD ¶ 176 at 8.

The protest is denied.

Thomas H. Armstrong  
General Counsel