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Matter of: ATA Defense Industries, Inc.

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DIGEST

1. Protester's contention that the awardee's proposal for a targetry system was improperly evaluated is sustained where the record shows that the agency could not reasonably conclude that the awardee's proposal merited a rating of excellent under the technical evaluation scheme, which reserved an excellent rating for those systems which locate hits for armor targets to within 60 millimeters of where a round actually penetrates the plane of the target, and the awardee's proposal shows that it does not meet this margin of error.

2. General Accounting Office (GAO) will not review an agency's determination to waive Buy American Act preference requirements as being in the public interest, nor will GAO invalidate an agency's source selection decision merely because the waiver is approved after the award decision.

DECISION

ATA Defense Industries, Inc. protests the award of a contract to Caswell International Corporation under request for proposals (RFP) No. DAAE20-98-R-0215, issued by the Department of the Army, Tank-Automotive and Armaments Command (TACOM), for the Intermediate New Generation Army Targetry System (INGATS). ATA argues that the Army's evaluation was unreasonable in several technical areas, that the source selection decision improperly discounted ATA's strengths and overlooked Caswell's weaknesses, and that the Army improperly failed to apply the Buy American Act price evaluation factor to Caswell's proposal.

We sustain the protest.

BACKGROUND

The INGATS procurement calls for the installation of complete live-fire training ranges, including training in range operations, at various Army facilities throughout the world. RFP at 3. The training ranges purchased under the INGATS contract will be composed of commercially-available targetry equipment, thus the procurement was conducted under the commercial item procedures set forth in the Federal Acquisition Regulation (FAR) Part 12. Question and Answers (posted on the Internet with the solicitation), Jan. 7, 1999, at 1. The major subsystems that are assembled into training ranges include, among other things: stationary infantry targets (SIT), moving infantry targets (MIT), stationary armor targets (SAT), moving armor targets (MAT), moving armor targets-vertical (MAT-V) (used to simulate helicopters, etc.), hit detector devices (HDD), sound effects simulators (SES), battle effects simulators (BES), hand-held controllers (HHC), and central control systems (CCS). Performance Description (PD), Oct. 30, 1998, § 3.1.

The RFP, issued October 8, 1998, anticipated award of a fixed-price indefinite-delivery, indefinite-quantity contract, covering approximately 5 years, to the offeror whose proposal presents the best value to the government. RFP at 3-4, 36. The RFP set forth eight contract line items (CLIN) with each identifying a separate target range.[1] RFP amend. 0001, at 3-9. These eight ranges include one acceptance test installation at Fort A.P. Hill, in Virginia, followed by the installation of seven other ranges in the Republic of Korea. Id. at 2. Listed within each CLIN, but not indicated as separate sub-CLINs, are the components which will make up the range, and the quantity of each component needed. For example, CLIN 0001 requires installation of a sniper range at Camp Casey, composed of 2 HHCs, 70 RFSITs, 12 SESs, and 12 RFMITs.[2]

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[1] The RFP also requests prices for separate "components, parts, systems hardware and software" to allow for installation of future ranges with configurations not yet known. RFP at 3. These prices were to be entered onto separate pricing evaluation sheets appended to the solicitation. RFP at 4. The 15 pricing evaluation sheets requested unit prices by component, over varying quantity ranges, over each of five separate pricing periods.

[2] Since INGATS anticipates the purchase of both hardwired and radio-operated targetry ranges, PD, supra, § 1.2., most of the targetry subsystems can be purchased using either configuration. When, as in CLIN 0001, the RFP anticipates the purchase of radio-operated equipment, the agency adds an RF prefix to the subsystem's acronym--thus, RFSITs and RFMITs.

The RFP identifies four evaluation elements: technical, performance risk, small business utilization, and price. RFP at 36. Of these four elements, technical is significantly more important than performance risk and small business utilization combined, while performance risk is slightly more important than small business utilization. The RFP also states that price is "less important than all other elements combined within the non-price area." Id. In addition, the RFP identifies five technical sub-elements, set forth below, in descending order of importance:

(1) Hit detection
(2) Overall design and stability of the design
(3) Battle effects simulator
(4) Radio frequency bandwidth
(5) Training/manual

Of these technical sub-elements, the first two--hit detection, and overall design and stability of design--are significantly more important than all the others combined.

For each of the non-price evaluation elements, including all five technical sub-elements, the RFP anticipated the use of adjectival ratings. For the technical sub-elements, the RFP anticipated ratings of excellent, good, adequate, or marginal. Id. at 37-38. In addition, each of the technical sub-elements was assigned a technical risk rating of very low, low, medium, or high risk.

The performance risk and small business utilization elements followed the same adjectival scheme as the technical sub-elements with the following modifications: the performance risk scheme included an additional rating of unknown, where no past performance information was available; and, the small business utilization scheme included an additional rating of poor. In addition, the RFP set forth separate definitions for each adjectival rating under each technical sub-element, and under the performance risk and small business utilization elements. RFP at 37-40, as modified by amend. 0004, at 4-6. These separate definitions will be set forth below, as needed, to resolve the protester's contentions.

To calculate the total evaluated contract price, the Army totaled the prices for the eight CLINs identified in the RFP, which formed the minimum guaranteed quantity. To this sum, the Army added a weighted unit price for each of the separate components to be used in future ranges multiplied by the estimated quantities of each component. These weighted component prices were calculated for the base period, and for each of the four option periods. CO's Initial Statement, supra, at 4.

The RFP also incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, which implements the Buy American Act, 41 U.S.C.A. §§ 10a-10d (West Supp. 1999), and provides for the addition of an evaluation differential to offerors proposing to furnish foreign end products when they are in competition with offers of domestic end products. RFP at 20. The

differential to be applied to a nonqualifying country end product is 50 percent of the offered price inclusive of duty. DFARS § 252.225-7001(d).

Five proposals, including those of ATA and Caswell, were received in response to the RFP. Upon receiving proposals, the Army performed an initial evaluation, held discussions with all offerors, requested and received revised proposals--followed by further discussions and submission of final revised proposals. Upon completing its evaluation of final revised proposals, the Army excluded the proposals submitted by the two highest-priced offerors from further consideration given their lower technical ratings and higher technical risk than two of the three lower-priced proposals. Source Selection Decision, Mar. 31, 1999, at 7. The final proposal ratings for the three remaining offerors are set forth below:

EVALUATION ELEMENT	**ATA** (adjective/risk)	**CASWELL** (adjective/risk)	**OFFEROR A** (adjective/risk)
TECHNICAL			
--Hit Detection	Excellent/very low	Excellent/low	**[deleted]**
--Overall Design	Good/low	Good/low	**[deleted]**
--Battle Effects Simulator	Good/very low	Good/very low	**[deleted]**
--Radio Frequency Bandwidth	Good/low	Good/low	**[deleted]**
--Training/Manual	Good/medium	Excellent/very low	**[deleted]**
PERFORMANCE RISK	Good	Good	**[deleted]**
SMALL BUSINESS UTILIZATION	Good	Excellent	**[deleted]**
PRICE	**[deleted]**	$114.2 million	**[deleted]**

Id. at 6.

Given the evaluation results shown above, the Source Selection Authority (SSA) first performed a price/technical tradeoff between ATA's and Caswell's proposals, and the lower-priced, lower-rated proposal submitted by Offeror A, and concluded that the higher-priced, higher-rated proposals submitted by ATA and Caswell represented greater value for the Army. Id. at 26-29. As between ATA and Caswell, the SSA weighed in detail the evaluated merits of these closely-rated proposals, and made the following three types of judgments and observations:

(1) the SSA acknowledged and accepted the evaluated superiority of Caswell in the areas of the training and manuals sub-element, and the small business utilization element (id. at 30-31);

(2) the SSA differentiated between the identical technical ratings given ATA and Caswell under the overall design and battle effects simulator sub-elements, and under the performance risk element, concluding in each case that Caswell's proposal was superior to ATA's despite the identical rating (id. at 29-32); and

(3) the SSA discounted Caswell's slightly higher technical risk under the hit detection sub-element rating (low versus ATA's rating of very low) because the Army did not expect that Caswell would have difficulty integrating its subcontracted hit detection device with the Caswell system (id. at 29).

Based on these judgments, the SSA concluded that Caswell's higher-priced proposal offered a better value to the agency than ATA's proposal. This protest followed.

ANALYSIS

Evaluation of hit detection

ATA's challenge to the Army's evaluation of Caswell's proposal under the most heavily-weighted technical subfactor, hit detection, falls into two categories. First, ATA argues that Caswell's proposed hit detection device (HDD) will not meet the 60 millimeter (mm) accuracy requirement established in the RFP as necessary for a rating of excellent. Second, ATA argues that the Caswell's device is not as mature as ATA's device, has not been demonstrated to the Army, and thus cannot be reasonably considered equal to ATA's device. According to ATA, if the Army had properly evaluated Caswell's device, it would have awarded the proposal a rating of good or adequate.

In reviewing protests of allegedly improper evaluations and source selection decision, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria. Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with an agency's judgment does not render it unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

As a preliminary matter, certain background information regarding hit detection is necessary here. First, two types of hit detection devices are discussed in this decision: one detects the presence of a hit by the vibrations caused when a projectile actually strikes the target, and is called a contact hit detection device; the other is a significantly more sophisticated device that extrapolates the virtual position of a projectile by measuring the acoustic waves (or other types of footprints) the projectile makes as it passes through the plane of the target. This is called a non-contact hit detection device. (For the remainder of this decision we will refer to the device as an HDD, modified by the terms contact, or non-contact, as appropriate.) Greatly simplified, a contact HDD provides information about whether

there was a hit; a non-contact HDD provides information about whether and where the hit occurred.

The technical requirements for hit detection are set forth in the PD document attached to the RFP. The PD requires that some form of HDD be attached to each of the targets, and that the HDD report information about hits or misses to the computerized control equipment that monitors the operation of the range. PD § 3.2.3. The PD also requires that all HDDs be able to identify the time of a hit, the target identifier, and the number of hits required to kill the target. PD § 3.2.3.3. Contact HDDs are used to meet these requirements. For armor-type targets, as opposed to infantry-type targets, the PD imposes more stringent requirements that trigger the use of non-contact HDDs. For these targets--the SAT, MAT, and MAT-V--the HDD must be able to detect and identify several different projectile types (PD § 3.2.3.2), and must meet the following requirements for accuracy:

> The data collected from the SAT, MAT, and MAT-V shall additionally include the location of all supersonic rounds penetrating the target plane, for both hits and near misses. Near misses are defined as within a minimum of 2 feet of the target. The calculated location of the hits for the SAT, MAT, and MAT-V shall be accurate 97% of the time, to within a minimum acceptable parameter of 120 mm of where the round actually penetrated the plane of the target, or to within a preferred acceptable parameter of 60 mm of where the round actually penetrated the plane of the target. This error tolerance shall remain consistent for rounds penetrating the target at angles up to 15 degrees to the left and right of the target centerline and up to three (3) degrees above and below the plane of the target.[3]

PD § 3.2.3.3, as modified by amend. 0007.

As mentioned above, the RFP established separate definitions for the adjectival ratings for each technical sub-element (as well as for the other non-price elements). The following are the ratings definitions applicable to the hit detection sub-element (for ease of reference, the places where the ratings of good and excellent are different are shown in bold):

> Excellent: Item has been produced, or a prototype sample is available, and capabilities have been demonstrated that exceed the requirement listed in Paragraph 3.2.3 of the performance description, including the

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[3]This requirement that HDDs capture information from rounds penetrating the target plane at other than a perpendicular angle is referred to as "off-axis capability" and is considered one of the most technically challenging aspects of this procurement. See Hearing Transcript (Tr.) at 121, 171-2.

> **preferred** acceptable parameter of accurately calculating the location of the hits for the SAT, MAT, and MAT-V to within **60** mm of where the round actually penetrated the plane of the target, 97% of the time.
>
> Good: Item has been produced, or a prototype sample is available, and capabilities have been demonstrated that exceed the requirement listed in Paragraph 3.2.3 of the performance description, including the **minimum** acceptable parameter of accurately calculating the location of the hits for the SAT, MAT, and MAT-V to within **120** mm of where the round actually penetrated the plane of the target, 97% of the time.
>
> Adequate: Meets the minimum acceptable requirements listed in Paragraph 3.2.3. of the performance description, and has produced or a prototype is available that meets, but some redesign is necessary to achieve the specifications listed in the performance description.
>
> Marginal: Meets the minimum acceptable requirements listed in paragraph 3.2.3 of the performance description but considerable redesign is necessary.

RFP amend. 0007, at 3-4.

ATA's argument that the Army has misevaluated the capabilities of Caswell's non-contact HDD focuses on the distinction between the definition of excellent and good in the RFP's rating scheme. As shown above, the RFP reserved the technical rating of excellent for proposals offering an HDD that meets the preferred parameter of calculating the location of hits to within 60 mm of where the round actually penetrated the target plane. The technical rating of good was reserved for proposals offering an HDD that calculates the location of hits between 60 and 120 mm of where the round penetrates the target plane. ATA contends that the non-contact HDD proposed by Caswell will, in some cases, register hit information that calculates the location of hits at greater than 60 mm from where the round penetrated the target plane. Thus, ATA argues that the Army violated the RFP's stated evaluation scheme by awarding a rating of excellent to the Caswell proposal in this area.

Our analysis of ATA's contention starts with the PD document, quoted above, which identifies the requirement that offerors propose a hit detection system to calculate the location of all supersonic rounds penetrating the target plane. The PD limits the location requirement to the area of the target itself, plus at least 2 feet from the edge of the target. A non-contact HDD calculates the virtual location where a round penetrates the target plane, and since the device calculates locations indirectly--as opposed to actually measuring them--the device operates with a margin of error (described in the PD and RFP as its accuracy tolerance). It is this margin of error that drives the distinction between a rating of excellent (60 mm) and a rating of good (120 mm).

Because of the way the technology functions, the task of calculating the location of a projectile's penetration of the target plane is easiest near the center of the target, and grows progressively more difficult for penetrations approaching the edges of the target and beyond. Thus, the risk of error in calculating projectile penetrations increases as the actual penetration moves from the target center outward. See Tr. at 256-57.

This increasing risk of error in locating hits as the actual penetration moves from the target center outward is reflected in Caswell's proposal, which set forth with specificity the tolerances of its proposed device in its final revised proposal (FRP).[4] Of relevance here, the proposal states that: (1) the accuracy tolerance for the target area itself is "**[deleted**[5]**]** radius at projectile impact center," (2) the accuracy tolerance from the edge of the target to 60 mm beyond the edge is "**[deleted]** radius or better at projectile miss impact center," and (3) the accuracy tolerance from 60 mm beyond the edge of the target to 2 feet beyond the edge of the target is "**[deleted]** radius or better at projectile miss impact center." Caswell Proposal, Revised Tab 4, app. A, at 14 of 30.

Focusing on the second of the three tolerances identified above, ATA points out that Caswell's device may score projectiles that miss the target by up to 60 mm as hits, because the **[deleted]** margin of error of Caswell's device in this range easily reaches back into the target area. When this happens, the device generates a false positive hit report. In addition, because of the **[deleted]** margin of error for the device in this area, the false positive hit reported by the system could be more than 60 mm away from the actual point where the projectile penetrated the target plane. Thus, ATA argues that Caswell's proposed device is not eligible for the rating of excellent, which according to the RFP was reserved for devices that located hits no more than 60 mm from where the round actually penetrated the target plane.[6]

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[4]For reasons not relevant to this protest, Caswell elected to abandon the non-contact HDD identified in its initial proposal, and to substitute another manufacturer's non-contact HDD in its FRP. While we need not review in detail the specifics of the initial device, it will be appropriate later in the decision to contrast the evaluation of the final Caswell device with the evaluation of its initial one.

[5]The Caswell proposal sets out its accuracy tolerances in centimeters, while the RFP identifies tolerances in the PD document and the evaluation scheme in millimeters. For ease of reference, we have converted all centimeter tolerances to millimeters.

[6]ATA argues that this situation is even worse when the projectile passes more than 60 mm beyond the edge of the target plane. Under this scenario, the Caswell device has a possible margin of error of **[deleted]**, which could lead to a false positive hit reading where the reported hit is even further from where the round actually penetrated the plane of the target.

ATA's logic regarding the operation of the accuracy tolerances associated with false positive hit reports appeared correct, and was consistent with positions taken by the Army during the course of this procurement. For example, the Army's answers to offeror questions about the solicitation (which were posted on the Internet together with the solicitation) expressly acknowledged that false positive and false negative hit information would be generated for hits near the target edges in accordance with the accuracy of the offeror's non-contact HDD. Questions and Answers, Jan. 7, 1999 (specifically, question 10 at 14, question 37 at 18, question 43 at 19, and question 158b at 45-46). In addition, the Army's evaluation of Caswell's initally-proposed non-contact HDD, which included accuracy tolerances of **[deleted]** at the target edges, raised the issue of whether such tolerances would violate the acceptable minimum tolerance set forth in the PD.[7]

To more fully consider ATA's contention, and to permit the Army and Caswell to explain their disagreement with ATA, our Office convened a hearing, and a subsequent conference call. As discussed in detail below, we find that neither the Army nor Caswell offered a cogent explanation for how Caswell's device's stated accuracy tolerance satisfies the 60 mm tolerance limitation reserved for the technical rating of excellent.

First, Caswell answers ATA's claim by pointing to the narrative portion of its proposal (immediately preceding the accuracy tolerances identified above) to show that its device meets the tolerance required for an excellent rating. In relevant part, the proposal states:

> "The calculated location of any round that passes between the target edge and [60 mm] inside the physical target (Area B) will be accurate to within **[deleted]** of where the round actually penetrates the target plane and scored 100 [percent] of the time as a hit.
>
> The calculated location of any round passing from the edge of target Area "B" to [60 mm] outside the edge of the target is Area "C" and will be counted and scored as a miss 100 [percent] of the time.

Caswell proposal, supra. (Areas A, B, and C, refer to a diagram included in Caswell's proposal to highlight the operation of its device in the target area, and in the areas near and beyond the edge of the target.) However, the quoted narrative in the proposal is internally inconsistent, since it admits to a margin of error of **[deleted]**, while simultaneously claiming a 100 percent success rate (i.e., zero margin of error)

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[7] See Letter from CO to Caswell opening discussions, at 3 (Feb. 18, 1999) ("[Y]ou . . . state that '[t]he accuracy at the target edges is nominally **[deleted]** and is not expected to get better.' Please explain how you intend to meet the stated minimum requirements of the referenced paragraph [PD, § 3.2.3.3].")

in identifying hits and misses. During the course of the proceedings before our Office, Caswell was unable to provide an explanation for this discrepancy.

On this issue, the Army's evaluators also noted the discrepancy between the Caswell proposal's narrative claim that its device would always score actual hits as hits (and actual misses as misses), and the accuracy tolerances in its proposal that would appear to allow a certain number of false positive and false negative hit readings. However, the contracting officer explains that the evaluators concluded that the discrepancy was immaterial because the RFP contains no accuracy requirements for scoring misses, only for scoring hits. Supp. CO's Statement, June 16, 1999, at 62-63.

While the CO's Statement is correct--there is no accuracy requirement for scoring misses--the logic is flawed. Since the non-contact HDD functions by calculating the virtual location of penetrations, and since the possible margin of error for calculating the location of a penetration that misses the target can generate a false positive hit reading, the device necessarily will report that some missed shots were hits. Given the **[deleted]** margin of error for the Caswell device in this area, the distance between the actual penetration of the target plane and the calculated location of the hit, can, in some cases, exceed the "excellent" accuracy tolerance of 60 mm. Thus, the device has violated that tolerance for a hit, not for a miss, as the CO reasons.

Alternatively, both the Army and Caswell explain that Caswell also offered to **[deleted]**. (This response to ATA's challenge appears for the first time in the post-hearing comments filed by both the Army and Caswell.) Specifically, Caswell claims **[deleted]**.

While our review of Caswell's proposal confirms that the company did, in fact, offer to **[deleted]**, the offer was related to an earlier technical requirement (to detect subsonic hits as well as supersonic hits) that was ultimately deleted from the solicitation. Nowhere in Caswell's proposal does the company offer to **[deleted]**, and nowhere in the Army's contemporaneous evaluation materials does it consider whether **[deleted]** might be an appropriate solution for locating hits and misses.[8] See Army Post-Hearing Comments, June 30, 1999, at 7.

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[8]In fact, in the same discussion letter quoted in note 7, supra, the questions asked of Caswell reveal that the Army understood Caswell to be offering **[deleted]**. The Army asked:

[deleted]

Letter from CO to Caswell, supra, at 2. In response, Caswell answered,

[deleted]

Caswell Technical Response to Discussion Questions, Mar. 5, 1999, at 3.

In conclusion, we find that the tolerances identified in the Caswell proposal for its non-contact HDD will result in virtual hit reports at the target edges that will be located more than 60 mm from the point where a round penetrated the target plane. We note that this finding is consistent with positions taken by the Army throughout this procurement, and we note that Caswell has not repudiated the tolerances identified in its proposal. Under these circumstances, we conclude that the Army violated the evaluation scheme by awarding the Caswell proposal a rating of excellent, which was reserved for devices which locate hits for armor targets to within 60 mm of where the round actually penetrated the plane of the target.

With respect to the Army and Caswell's alternative position that Caswell is offering to **[deleted]**, we see no evidence of any such offer in Caswell's proposal. In any event, even if the proposal could be read to support a conclusion that Caswell can meet these requirements, we find that the Army could not reasonably conclude that Caswell's proposal demonstrates its ability to do so--as also required for a rating of excellent or good under the evaluation scheme here. Accordingly, we sustain ATA's challenge to the evaluation of Caswell's hit detection system.[9]

Challenge to the Price/Technical Tradeoff Decision

In addition to challenging the underlying evaluation, as discussed above, ATA's protest also mounts at least 18 separate challenges to the SSA's decision that the Caswell proposal offered the best value to the government. In essence, ATA contends that in looking at the comparatively equal ratings given the proposals submitted by it and Caswell, the SSA improperly found no relative benefit in ATA's offer, and no relative weakness in Caswell's. ATA Post-Hearing Comments, June 30, 1999, at 17. Since we have already concluded that the evaluation upon which this tradeoff was based was unreasonable, we also sustain ATA's overall challenge to the price/technical tradeoff. With respect to the remaining challenges, we will not review in detail each of the arguments raised by ATA, but will instead set forth here a representative sample of two of the areas where ATA challenges the best value decision--i.e., its contentions that the SSA wrongly praised Caswell's BES, and improperly found risk in ATA's remaining effort to develop software for the armor targets. In both cases--and in those not discussed here--we deny ATA's remaining challenges to the tradeoff decision.

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[9]Since we find that the Army could not reasonably conclude that Caswell has demonstrated its ability to meet these requirements, we need not reach ATA's contention that the Caswell device must be rated lower than ATA's device because Caswell did not provide a product demonstration. We note for the record, however, that the RFP's product demonstration clause, on its face, is limited to the evaluation of the overall design and stability of the design technical sub-element.

The SSA's best value analysis, discussed above, undertook a detailed comparison of the similarly-rated ATA and Caswell proposals. Source Selection Decision, supra, at 29-32. In selecting Caswell for award, the SSA: (1) acknowledged and accepted Caswell's evaluated superiority in the training and manuals sub-element, and the small business utilization element; (2) differentiated between the identical technical ratings given ATA and Caswell under the overall design and BES sub-elements, and under the performance risk element; and (3) discounted Caswell's slightly higher risk rating under the hit detection sub-element.

As a preliminary matter, we note that there is nothing improper about an SSA's decision to look behind the adjectival ratings given proposals by evaluators in an attempt to ascertain the true relative strengths and weaknesses of proposals. In fact, the propriety of a tradeoff decision turns not on the difference in technical scores and ratings per se, but on whether the source selection official's judgment regarding the differences in the competing proposals was reasonable and adequately justified in light of the RFP's evaluation scheme. Veda Inc., B-278516.2, Mar. 19, 1998, 98-1 CPD ¶ 112 at 13.

With respect to the BES, evaluated under the third technical sub-element, ATA challenges the SSA's decision that Caswell's device is superior to ATA's--even though both received a rating of good, with very low technical risk. (The arguments raised in this challenge were also raised in a challenge to the Army's technical and risk assessment of Caswell's BES.) According to ATA, the SSA's decision unreasonably overlooked problems arising from the lack of an Army-issued safety certification for Caswell's BES. As a result, ATA argues, only its BES will be available for immediate use, and the Army will be required to spend money on the remaining testing necessary for Caswell's BES to receive the safety certifications needed.

The BES is a device that produces flashes, smoke, and sound effects to simulate the "killing" of a target. Tr. at 19. ATA's arguments in this area spring from a provision in the PD that states the Army's preference is for a BES that does not use pyrotechnics in order "to avoid the lengthy certification procedure and eliminate some of the transporting and handling risk involved with the current pyrotechnics." PD, as amended by amend. 0007, at 2. This preference was incorporated into the separate adjectival definitions for evaluating each offeror's BES. The evaluation scheme reserved the rating of excellent for solutions that did not use pyrotechnics; while the rating of good was reserved for solutions that used pyrotechnics, but for which the offeror had received, or was in the process of receiving "a safety certification through an authorized U.S. Government safety testing agency." RFP at 37-38. Since both ATA and Caswell proposed the less favored pyrotechnic BES, and since both were evaluated to have an authorized safety certification, both received ratings of good.

Despite these equal ratings, the SSA concluded that Caswell's BES was superior to ATA's because it "offers **[deleted]**." Source Selection Decision, supra, at 30. The

SSA also noted that while the ATA device already had certain safety certifications from the Army, the Caswell device's approval by the U.S. Department of Transportaion (DOT) meant there was no signficant difference between the two proposals in the certification area. Id.

ATA contends, however, that Caswell's DOT safety certification will not permit the device to be used on Army installations without further delay and testing expense. Thus, while ATA must concede that the Caswell BES meets the evaluation requirement for a rating of good, it argues that the distinctions made by the SSA in favor of Caswell's device were unreasonable. We disagree.

In response to ATA's assertions, the Army explained that neither ATA's nor Caswell's proposed device (both devices are being purchased from subcontractors) has received sufficeint testing to receive the final approval necessary for the use of such pyrotechnic devices on Army installations. Army Post-Hearing Comments, June 30, 1999, at 6-7. Thus, in the Army's view, both devices will require further testing, and the testing for both devices will be at the Army's expense. ATA has provided no evidence that the Army's characterization of the need for further testing is incorrect. Given the relative equality of the two offerors in this respect, and the fact that the Caswell device offers extra features not available on the ATA device, we see nothing unreasonable in the Army's conclusion that the Caswell device offers the better value, despite the identical ratings given the two offerors in this area.

A second example is ATA's contention that the SSA improperly overemphasized the risk involved in ATA's remaining effort to develop software for its armor targets. In this regard, ATA describes its remaining effort as the conversion of "established, fielded software from DOS to Windows." ATA Comments, May 28, 1999, at 32. In the Army's view, ATA's contention oversimplifies the SSA's concerns, and understates the nature of the remaining software effort.

The SSA decision noted problems with the development of ATA's software for its armor targets under the overall design and stability of design technical sub-element, the second most heavily-weighted sub-element. Specifically, the SSA stated:

> Both offerors received Technical ratings of Good and Technical Risk ratings of Low; however, the reason for the Technical Risk rating is an important trade-off discriminator for this effort. Caswell received the slightly higher risk rating because they lack a mature MIT. ATA received the same risk rating because they lack developed armor software. This is actually a major difference between the two offerors from the view point of concerns in meeting the critical INGATS delivery schedule.
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> Although Caswell lacks a mature MIT, they do have a good SIT and MAT; therefore, the MIT hardware, which combines elements of the

> SIT and MAT, should be reasonably simple to bring to completion in suficient time for initial deliveries. On the other hand, ATA's lack of developed software is considered to be a much more significant risk in meeting the critical INGATS delivery schedule. Caswell's armor software is fully developed, and has been successfully fielded with high marks for realiability, ease of use, and customer satisfaction.
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> . . . . .
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> Finally, a significant discriminator in technical risk is the fact that Caswell's software is fully developed, successfully fielded, and has high marks for quality, reliability and customer satisfaction. Compared to the uncertainty of ATA's undeveloped software and the serious negative impact this could have on the critical INGATS delivery schedule, this more than justifies the premium required for an award to Caswell over ATA . . . .

Source Selection Decision, supra, at 29-30, 32.

In challenging the SSA's finding that ATA's undeveloped software could have a negative impact on the INGATS delivery schedule, ATA argues that the underlying evaluation materials rated ATA's remaining software development a low risk, and described its system as mature and competitive. Thus, ATA argues that the SSA's concerns were unwarranted and unsupported.

Our review of the record here--guided by a substantive response from the Army, which ATA has not rebutted despite several opportunities to do so--leads us to conclude that ATA has focused on a summary paragraph concerning its overall hardware and software capabilities, and not on an assessment of its armor software capabilities. Supp. CO's Statement, June 16, 1999, at 81-2. In addition, the Army explains that this issue is not simply a matter of converting DOS software to Windows, but that ATA has not yet demonstrated its armor software at all. Id. at 82. Further, the Army explains that even if the development issues with ATA's software were limited to converting DOS to Windows, the software conversion is estimated to require several months. Id. In our view, the Army's answer fully addresses the issues raised by ATA in its challenge, and reasonably buttresses the SSA's rationale for relying upon concerns about ATA's unfinished software to support the selection of the Caswell proposal as offering the best value to the government.

Buy American Act

ATA protests that the non-contact HDD proposed by Caswell is a foreign end item, and as such, the Army is required to apply the 50-percent price evaluation factor to this portion of Caswell's offer. The Army denies that Caswell's device is a foreign end item for purposes of applying the Buy American Act price evaluation factor. Nonetheless, during the course of this protest, the agency requested and received a

secretarial-level exemption from the application of the Act, and, as a result, the Army asks that we deny this basis of ATA's protest.

The record shows that Caswell's HDD is manufactured in Switzerland. Acquisitions for products from Switzerland, may, on a purchase-by-purchase basis, be exempted from the application of the Buy American Act as inconsistent with the public interest. DFARS § 225.872-1(b). The record also shows that on July 16, 1999, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) made such a determination.

Our Office will not review a decision by the appropriate agency officials to waive the Buy American Act provisions in a particular procurement, as such a decision "involves balancing competing Buy American and foreign policies to determine what is in the public interest." Canadian Commercial Corp./Liftking Indus., Inc., B-282334 et al., June 30, 1999, 99-__ CPD ¶ ___ at 14 (citing and quoting SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 at 5). We also have no basis to disturb the agency's procurement merely because the waiver of the Act's requirements took place after award. Canadian Commercial Corp./Liftking Indus., Inc., supra. Accordingly, ATA's assertion that the Caswell non-contact HDD should be considered a foreign end item has been rendered academic, and we will not consider the question further.

RECOMMENDATION

We recommend that the Army reopen the procurement and reevaluate proposals in accordance with the stated evaluation scheme. If, after reevaluation, Caswell's proposal does not represent the best value to the government, we recommend that the agency terminate the award to Caswell, and award to the offeror whose proposal presents the best value under the evaluation scheme.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). In accordance with 4 C.F.R. § 21.8(f)(1), ATA's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States