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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Able Business Technologies, Inc.

File: B-299383

Date: April 19, 2007

Daniel R. Gilliam for the protester.

Scott W. Barber, Esq., and Michael D. Harbart, Esq., National Aeronautics and Space Administration, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where record demonstrates reasonable basis for agency findings pertaining to weaknesses in protester's proposal.

2. Agency was not required to equalize the competition to compensate for competitive advantage that one offeror enjoyed as a result of (1) its greater knowledge regarding government facility's infrastructure, and (2) its own existing facilities.

DECISION

Able Business Technologies, Inc. protests the award of a contract to Bell South Telecommunications, Inc. under request for proposals (RFP) No. NNS060162866R, issued by the John C. Stennis Space Center (SSC), National Aeronautics and Space Administration (NASA), for telecommunications service to the SCC via a route from the north. Able argues that the evaluation of its technical proposal and the evaluation of Bell South's past performance were unreasonable. The protester also asserts that Bell South had an unfair advantage over other firms in the competition.

We deny the protest.

BACKGROUND

The agency explains that at present, the SSC's telecommunication pathway runs along the Gulf Coast, where it is vulnerable to hurricane damage. Most notably, in 2005, the SSC suffered a total loss of communications services as a result of

Hurricane Katrina. NASA has determined that the best way to lower the risk of future communications pathway failures is to provide an alternate fiber pathway leading north from the SSC to a metropolitan service area where multiple inter-exchange carrier points of presence (POP) are available, such as Jackson, Mississippi.

NASA personnel originally believed Bell South to be the only source capable of satisfying the agency's requirement and thus did not intend to conduct a competitive acquisition. After receiving statements of interest from additional firms in response to a notice posted on the Federal Business Opportunities website, the contracting officer determined that a basis for competition did in fact exist, however. On September 11, 2006, the agency issued the subject solicitation.

The RFP contemplated the award of a 5-year, fixed-price, indefinite-quantity contract for the installation and servicing of an OC-192 circuit and various channels. The solicitation explained that NASA required an OC-192 access service to a northern POP from the demarcation point in Building 1201 at the SCC, and that this access service was to include channelization at each end to allow the provisioning of multiple T1/DS1, DS3, OC3, OC12, and OC48 circuits in various combinations. RFP at 25. Offerors were instructed that their technical proposals should depict the routing of their communications pathway and describe the method of routing for each segment (e.g., aerial, direct bury, microwave, or other); describe inherent redundancies in the route; describe any approvals needed; identify the address of the POP and identify all carriers available at the POP; describe emergency facility support; specify a timeline for completion of the OC-192 and each circuit; describe the procedures for handling trouble calls; and describe the offeror's experience with similar projects.

The RFP provided for award to the offeror whose proposal represented the best value to the government. In the determination of best value, price was to be worth 50 percent, technical merit 35 percent, and past performance 15 percent. Factors to be considered in the evaluation of technical merit were the extent to which the offeror's approach exhibited understanding of the requirement, was acceptable within industry standards, was likely to fulfill the objective, would be timely delivered, and reduced the risk of communication disruption.

Three offerors submitted proposals prior to the October 2, 2006 closing date. After evaluation, the contracting officer selected for award the proposal of Bell South, which had been assigned a normalized technical rating of 35 percent and a past performance rating of 15 percent by the evaluators, and which had an evaluated price of \$3,331,228. (The "normalization" of technical scores involved assigning the maximum possible score to the highest-rated proposal (which was Bell South's); other proposals were then assigned ratings based on a comparison of their point scores to Bell South's score.) Able's proposal received a normalized technical rating

of 21 percent and a past performance rating of 15 percent, and its evaluated price was \$3,575,500.¹

DISCUSSION

At Able's debriefing, the agency identified four strengths, five weaknesses, and one performance risk in the protester's technical proposal. Able argues that the agency's findings of weakness and performance risk were unjustified.

At the outset, we note that several of Able's objections to the technical evaluation of its proposal were not raised in a timely manner. In this connection, Able supplemented its January 17, 2007 protest, which was timely filed, with a January 23 submission, which was filed more than 10 days after the protester's January 10 debriefing and thus was not timely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2006). Except in limited circumstances not present here, we consider only timely protests.² 4 C.F.R. § 21.5(e). Accordingly, while we will consider the arguments raised in Able's January 23 submission to the extent that they are encompassed within the arguments raised in its January 17 filing, see L-3 Communications Corp., Ocean Sys. Div., B-281784.3, B-281784.4, Apr. 26, 1999, 99-1 CPD ¶ 81 at 9 n.12, we will not consider the arguments raised in the January 23 submission that are unrelated to the initially advanced grounds of protest.³

Able argues that NASA unreasonably identified the following as a weakness in its technical proposal:

Although [Able] identified a number of field crews to support network outages, these crews appeared to be spread from Baton Rouge to Panama City with no priority given to the NBR [northbound route] for repairs. This could be an issue for NASA where [Defense Information

¹ Because they are not relevant to the protest issues raised, the third offeror's ratings are not discussed.

² Our regulations do permit us to consider an untimely protest "for good cause shown" or where we determine that a protest raises issues significant to the protest system. 4 C.F.R. § 21.2(c). Neither circumstance applies here.

³ Arguments raised by the protester in its January 23 submission that we dismiss as untimely are as follows: (1) the agency unreasonably identified as a weakness in the protester's proposal Able's failure to describe its entire route and method of routing; (2) the agency unreasonably identified as a weakness in Able's proposal the protester's failure to identify redundancies or emergency back-up facilities; (3) the agency unreasonably identified as a weakness in Able's proposal the protester's failure to describe any preventive maintenance in support of the circuit; and (4) the agency incorrectly interpreted Able's proposed timeline for implementation.

Systems Agency] and critical [Department of Defense] customers take precedence in needed repairs.

Able Debriefing at 5. The protester contends that the agency evaluators unfairly assumed that because it is a small business (with correspondingly fewer field crews), it will be less capable of supporting its proposed solution. Able maintains that the assumption that it will be incapable of performing is inconsistent with its historical performance. The protester notes in this regard that unlike Bell South, it was able to keep its network operational in the aftermath of Hurricanes Katrina and Rita. Able also points out that while Bell South may have more crews, it also has more customers entitled to the highest priority in the restoration of service after an outage.

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. We will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement laws and regulations. AHNTECH, Inc., B-295973, May 11, 2005, 2005 CPD ¶ 89 at 3.

We think that Able's contentions miss the main thrust of the agency argument, which is not that the protester offered too few crews in support of its proposed solution, but rather that the protester failed to furnish assurances in its proposal that repair of the NBR would be a priority for these crews in the event of a widespread outage. That is, while Able's proposal established that the protester's subcontractor, Southern Light, had a number of support technicians available in the general vicinity of the SSC, the proposal did not indicate that in the event of a disruptive natural disaster (such as a hurricane), restoration of service along the NBR would be a top priority for these technicians, who would also be addressing the needs of other customers.⁴ Since the solicitation instructed offerors that one of the factors that would be considered in the evaluation of proposals' technical merit was the extent to which an offeror's approach reduced the risk of communication disruption, and the availability of an offeror's support crews to perform immediate repairs in the event of an outage clearly has a bearing on the extent of communication disruption, we think that it was both reasonable and consistent with the RFP's evaluation criteria for the evaluators to find Able's failure to provide for priority repair of the NBR to be a weakness in its technical approach.

⁴ While the protester points out that Federal Communications Commission regulations require that certain categories of customer receive priority in the restoration of service, it is unclear from its comments whether service to NASA along the NBR falls within the highest priority category. In addition, it is unclear how many other Southern Light customers fall within the highest priority category.

Able also takes issue with the agency's identification of the following performance risk in its proposal:

[Able's] subcontractor, Southern Light, has all the expertise and capabilities to be used in providing the NBR. If the affiliation between [Able] and SL dissolves, there would be a risk that any follow on contractor support to [Able] for the NBR would not have the same expertise, arrangements, tariffs, etc. Also [Able] appears to have one employee and if anything would happen to that one employee, then disposition of the contract would be questionable.

Able Debriefing at 5. The protester argues that it is discriminatory toward small businesses for the agency to view reliance upon subcontractors as a performance risk given that small businesses are more likely to rely upon the services of subcontractors than large businesses. Able further argues that it does not have only one employee. The protester contends that NASA "gleaned this assumption" from an outdated Dun & Bradstreet report that it furnished as part of its proposal. Protester's Submission, Jan. 23, 2007, at 9. Able asserts that it has expanded its operation since the report was created in late 2005, and that it now has "more than one" employee on its payroll. Id.

First, regarding the protester's complaint that the evaluators incorrectly concluded that it had only one employee, the agency relied upon information submitted by Able in its proposal in reaching this conclusion. An agency may reasonably rely as accurate upon information provided by an offeror in its proposal in performing its evaluation, especially where it has no reason to question that information. See Apex Marine Ship Mgmt. Co., LLC; American V-Ships Marine, Ltd., B-278276.25 et al., Sept. 25, 2000, 2000 CPD ¶ 164 at 12-13.

Turning then to the protester's argument concerning reliance upon its subcontractor, we think that the evaluators could reasonably regard Able's reliance upon Southern Light as a performance risk for precisely the reasons identified in the above excerpt, i.e., that in the event of a breakdown in the relationship between Able and Southern Light, there was no assurance that Able would be able to locate an equally capable subcontractor to perform the services performed by Southern Light. We note in this connection that it was not the mere existence of a contractor/subcontractor relationship that resulted in the finding of performance risk here; it was the fact that Able was almost totally reliant upon its sole proposed subcontractor for performance, which magnified the risk to performance in the event of a breakdown of the relationship, and the fact that Southern Light possessed qualifications and capabilities that could not easily be duplicated.

Next, Able argues that Bell South received an unreasonably high rating for past performance. The protester requests that "an unbiased individual/organization" (presumably our Office) evaluate and rate Bell South's performance. Protester's Comments, Feb. 17, 2007, at 2.

It is not the function of our Office to perform de novo evaluations of offerors' past performance. Our role is confined to reviewing the evaluation performed by the contracting agency to ensure that it was reasonable and consistent with the solicitation and applicable statutes and regulations. See Kathpal Tech., Inc., B-291637.2, Apr. 10, 2003, 2003 CPD ¶ 69 at 5. Here, the agency relied on favorable responses that it received from Bell South's references in assigning the awardee the maximum possible score for past performance. While information pertaining to the evaluation of Bell South's past performance was not furnished to the protester because it is source selection sensitive, we have examined it in camera and find that it provides a reasonable basis for the rating assigned.⁵

Finally, Able argues that Bell South enjoyed an unfair advantage over its competitors in responding to the RFP here in that (1) Bell South had greater knowledge of the SSC's existing conduit/duct infrastructure due to its prior work at the facility, and (2) Bell South already had a fiber pathway in place that it could use in its solution, which enabled Bell South to propose a less extensive, and thus less costly, approach than its competitors.

First, regarding the protester's complaint that Bell South possessed greater knowledge than its competitors regarding the SSC's existing infrastructure due to its prior work there, a particular offeror may possess unique advantages and capabilities due to its prior experience under a government contract or otherwise, and the government is not required to attempt to equalize competition to compensate for it, unless (unlike in this case) there is evidence of preferential treatment or other improper action. Holiday Inn-Laurel, B-290364, June 10, 2002, 2002 CPD ¶ 96 at 5. The existence of this advantage, by itself, does not constitute preferential treatment by the agency, nor does it otherwise represent an unfair competitive advantage. Id.

Moreover, the agency did in fact take steps to mitigate any advantage that Bell South might have had by virtue of its greater knowledge of the existing infrastructure. Specifically, the agency permitted the protester to view a map of the infrastructure located in the contract specialist's office. (The agency explains that Able was not permitted to take the map with it due to security issues.) In addition, the agency maintains that at the site visit, it informed prospective offerors that they could

⁵ The protester proceeded with its protest pro se and therefore did not have an attorney representing it who could obtain access, pursuant to the terms of a protective order, to nonpublic information submitted by the agency in response to the protest. Accordingly, our discussion of the agency's evaluation of the awardee's proposal is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including the nonpublic information.

perform physical inspections of the existing conduit, but that Able never took advantage of the opportunity.

With regard to the protester's complaint that Bell South was able to offer a less extensive, less costly solution than other offerors because it could use a fiber pathway that it already had in place, again the rule is that the government is not required to equalize the competition to compensate for a competitive advantage that one particular offeror may enjoy unless that advantage resulted from preferential treatment of that offeror or other unfair action by the government. Halifax Eng'g, Inc., B-219178.2, Sept. 30, 1985, 85-2 CPD ¶ 559 at 3; Universal Alarm Servs., B-214022, Mar. 5, 1984, 84-1 CPD ¶ 267 at 2. Here, any advantage that Bell South may have enjoyed due to its existing fiber network was not the result of preference or unfair action by the government.

The protest is denied.

Gary L. Kepplinger
General Counsel