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## Decision

**Matter of:** Millennium Space Systems, Inc.

**File:** B-406771

**Date:** August 17, 2012

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Maj. Troy D. Hammon, Department of the Air Force, for the agency.  
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. A debriefing provided in a procurement conducted as a Broad Agency Announcement pursuant to Federal Acquisition Regulation (FAR) § 6.102(d)(2) and FAR § 35.016 does not fall within the exception to our general timeliness rules at 4 C.F.R. § 21.2(a)(2) (2012), because such a procurement is not a procurement conducted on the basis of competitive proposals, under which a debriefing is requested and, when requested, is required.
  2. Protest that agency applied unstated criteria in its evaluation of protester's proposal is denied where the record reflects that the agency's evaluation was consistent with terms of solicitation.
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### DECISION

Millennium Space Systems, Inc., of Torrance, California, protests the award of a contract to Orbital Sciences Corp., of Dulles, Virginia, by the Department of the Air Force under Broad Agency Announcement (BAA) No. BAA-RV-12-4, seeking proposals to advance the state-of-the-art and scientific knowledge in space technology, with the primary objective of developing and delivering an "ESPA Augmented Geostationary Laboratory Experiment (EAGLE) Platform" spacecraft bus. Agency Report at 1.

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

## BACKGROUND

The Air Force issued the BAA on October 24, 2011, under the provisions of Federal Acquisition Regulation (FAR) § 6.102(d)(2) and FAR § 35.016, relating to the competitive selection of research proposals. The BAA provided direction to potential offerors concerning the required content of their proposals, including direction that the following be included in their technical proposals:

**Executive Summary:** Describe the proposed program, objectives, and approach. A description of the innovation and benefits of the proposed approach and relationship to previous efforts should be discussed. It should summarize the technical issues addressed by the offeror's proposal without repeating the requirements. This should provide a vision of what will ultimately be achieved and what solution this effort will produce.

**Program Description:** Describe the techniques, methods, materials, or ideas that will be addressed in this proposal, their innovation, and to what degree they advance the state-of-the-art.

**Program Plan:** Describe in detail the planned approach and how the plan will be executed. This section should include all technical aspects of the approach. Provide technical detail and analysis necessary to support the technical approach proposed. Clearly identify the core of the intended approach. The "new and creative" solution to the problem(s) should be developed and analyzed in this section. Include a risk assessment of key technical, schedule or cost areas and their potential impact on the program. Identify why proposed subcontractors were selected and what tasks they are to perform.

BAA at 8-9.

The BAA also established a proposal evaluation process consisting of a peer or scientific review under three factors, listed in descending order of importance: technical, cost/price, and proposal risk. Id. at 10. The technical factor had three subfactors: overall scientific and technical merits of the proposal, importance to the agency's programs, and affordability. Id.

The BAA provided that based on the evaluation factors, proposals would be categorized as category I, category II, or category III. Id. Category I was the highest rating for proposals, and such proposals were recommended for acceptance. Category II described proposals that were "scientifically or technically

sound,” but required further development. Id. Category II proposals were also recommended for acceptance, but at a lower priority than category I proposals. Category III described proposals that were not technically sound or did not meet the agency’s needs. The BAA advised that the agency anticipated awarding one cost-plus fixed-fee contract, with a total period of performance, including options, of 60 months. Id. at 1, 2, 5.

Millennium submitted a timely proposal in response to the BAA on January 3, 2012. On April 17, the agency notified Millennium that its proposal had not been selected for the award. The notification letter explained that while it was not selected, Millennium “provided a strong proposal” that was rated category II, because “it is scientifically and technically sound and could be recommended for acceptance with minor developmental and moderate programmatic changes.” April 17 notice at 1. The notification letter also explained the developmental and programmatic changes that the agency determined were required, and outlined the technical and cost/price evaluation results for Millennium’s proposal. Millennium requested a debriefing from the agency on April 18, and a debriefing was held on May 9. During the debriefing the agency provided a presentation that further set forth the reasons for Millennium’s non-selection.

Millennium filed this protest on May 18. In the protest, Millennium argues that the agency’s evaluation improperly considered an option price in evaluating the baseline cost of Millennium’s proposal, improperly increased Millennium’s labor hours and upwardly adjusted its cost proposal, failed to consider the full content of the proposal, and improperly considered an unstated evaluation criteria related to “innovativeness.”

## TIMELINESS

Subsequent to the filing of the protest, Orbital Sciences filed a notice of intervention and submitted a request for the dismissal of the protest, later joined by the agency, arguing that the protest was untimely. As relevant here, our Bid Protest Regulations require that protests not based upon alleged improprieties in a solicitation:

shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier) with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest ground basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed no later than 10 days after the date on which the debriefing is held.

4 C.F.R. § 21.2(a)(2) (2010). Orbital Sciences argues that the protest is untimely because Millennium knew or should have known the basis for the majority of its protest grounds at the time it received its notice of non-selection on April 17, and because the debriefing exception to our timeliness rules does not apply to BAA procurements, which are not procurements “conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.”<sup>1</sup> In support of the latter argument, Orbital Sciences cites McKissack-URS Partners, JV, B-406489.2, May 22, 2012, 2012 CPD ¶ 162, in which our Office concluded that the debriefing exception to our rules does not apply in architect-engineer (A/E) procurements conducted pursuant to the Brooks Act because those procurements are not “conducted on the basis of competitive proposals.”

In its response to the request for dismissal, Millennium does not argue for the application of the debriefing exception to our timeliness rules in this procurement. Rather, Millennium argues that its protest was timely filed because it could not have known the specific basis of its protest allegations until the time of its May 9 debriefing, and properly filed its protest within 10 calendar days of that time. We disagree, and conclude that with the exception of its challenge to the agency’s consideration of “innovativeness,” Millennium knew the basis of its protest grounds prior to its debriefing, and did not file its protest within the required time.

First, although Millennium’s response does not rely on the debriefing exception to our timeliness rules, we nonetheless analyze whether the exception properly applies. The answer to this question turns on whether the procurement at issue was conducted on the basis of “competitive proposals.”

Our Office has previously considered this question in various contexts. Most recently, in McKissack-URS Partners, JV, supra, our Office concluded that the debriefing exception to our rules does not apply in architect-engineer (A/E) procurements conducted pursuant to the Brooks Act because those procurements are not “conducted on the basis of competitive proposals.” In this regard, we noted that the use of negotiated procedures in accordance with FAR Part 15--as evidenced by the issuance of a request for proposals--is the hallmark of a procurement conducted on the basis of competitive proposals,<sup>2</sup> McKissack-URS

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<sup>1</sup> Orbital Sciences did not argue that Millennium’s challenge to the agency’s consideration of innovativeness was untimely, but that it failed to state a valid basis of protest. We disagreed, and we discuss the merits of that protest challenge in this decision.

<sup>2</sup> Consistent with our understanding in this regard, we have noted that FAR § 6.401(b), “Competitive Proposals” begins with a reference, “See Part 15 for procedures.” See The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6 n.4.

Partners, JV, supra, at 5, and that Brooks Act procurements are not conducted under FAR Part 15, but under FAR Subpart 36.6. We have also previously addressed this question in The MIL Corp., supra, where we held that a procurement conducted pursuant to FAR Subpart 8.4, rather than FAR Part 15, was not conducted on the basis of competitive proposals, and that the debriefing exception to our timeliness rules does not apply to such procurements. See The MIL Corp., supra, at 6.

In McKissack, we also found FAR § 6.102 instructive in its separation of Brooks Act's procedures from "competitive proposals." In this regard, FAR § 6.102 describes various types of competitive procedures available to fulfill the requirement for full and open competition mandated by the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (2006). FAR § 6.102(b) is entitled "[c]ompetitive proposals," while FAR § 6.102(d) is entitled "[o]ther competitive procedures." Read together, these sections expressly carve out procurements conducted pursuant to the Brooks Act under FAR Subpart 36.6 from the category of competitions based on "competitive proposals" by listing them under the category of "other competitive procedures."<sup>3</sup> See § 6.102(d)(1). Similarly, and consistent with our holding in The MIL Corp., supra, FAR § 6.102(d)(3) defines procurements conducted pursuant to FAR Subpart 8.4, as "other competitive procedures," as opposed to procurements conducted using competitive proposals.

With regard to the present protest we conclude that, as with Brooks Act procurements conducted under FAR Subpart 36.6 discussed in McKissack, and procurements conducted under FAR Subpart 8.4 discussed in The MIL Corp., procurements conducted using BAAs are not procurements "conducted on the basis of competitive proposals." Like Subpart 36.6 and Subpart 8.4 procurements, FAR § 6.102(d) carves out BAA procurements from those conducted using "competitive proposals" and defines them as "other competitive procedures." See § 6.102(d)(2)(ii). Moreover, like A/E procurements and Subpart 8.4 procurements, BAA procurements are not conducted under FAR Part 15; rather, they are

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<sup>3</sup> FAR Part 15 also draws a distinction between the procedures to be used for "competitive proposals" versus the procedures to be used for "other competitive procedures." Specifically, FAR § 15.502 states in full:

This subpart applies to competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). The procedures in 15.504, 15.506, 15.507, 15.508, and 15.509, with reasonable modification, should be followed for sole source acquisitions and acquisitions described in 6.102(d)(1) and (2).

conducted using procedures established by FAR § 35.016.<sup>4</sup> Therefore, we conclude that the debriefing exception to our timeliness rules does not apply, and Millennium was required to file its protest within 10 days of when it knew, or should have known, the basis for its protest.

Next, concerning Millennium's argument that its protest was timely filed because it could not have known the basis for its protest challenges prior to the time of its debriefing on May 9, the record here reflects that Millennium's April 17 notice of non-selection was sufficiently detailed to inform Millennium of three of its four protest grounds. Specifically, the April 17 notification demonstrated that the agency considered an option price in evaluating the baseline cost of Millennium's proposal and conducted a price realism analysis that increased Millennium's labor hours and upwardly adjusted its cost proposal. With regard to Millennium's third protest ground--that the agency failed to consider the entirety of the proposal--Millennium specifically argues that if the agency had reviewed the entire proposal it would not have assessed Millennium a weakness for failure to simultaneously support certain spacecraft payloads. However, this weakness was clearly set forth in the April 17 notice. Finally, that Millennium had sufficient knowledge to formulate these protest grounds on April 17 is confirmed by the fact that each challenge is presented in Millennium's April 18 request for a debriefing, in which Millennium asked detailed questions about the weaknesses assessed against its proposal and argued that they were unreasonable. Accordingly, Millennium had knowledge of, and was required to raise these grounds of protest within 10 days of April 17. Where the protest was not filed until May 18, these protest grounds are untimely and are dismissed.

## DISCUSSION

Concerning its timely protest ground, Millennium states that while its April 17 notice of non-selection did not mention "innovativeness" or provide any indication that innovation was considered, the agency announced during the debriefing that innovativeness was evaluated. According to declarations provided by Millennium personnel, the agency stated during the debriefing that the government utilized a BAA because it was "looking for someone to come up with an innovative solution," that Millennium's "[b]aseline design was good, but [there was] more innovation in another proposal," and that "[i]nnovation was the highest priority." M.M. Declaration

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<sup>4</sup> We note that under FAR § 35.016 is materially different from a FAR Part 15 procurement. When an agency uses the BAA process proposals need not be evaluated against each other since they are not submitted in accordance with a common statement of work. See FAR § 35.016(d). This is distinct from a FAR Part 15 procurement where the evaluation and selection process is premised on making meaningful comparisons between and among competing proposals submitted in response to a common set of requirements.

at 4. Based on these statements in the debriefing, Millennium alleges that the agency's consideration of innovation constituted an improper unstated evaluation criteria.

We disagree. While procuring agencies are required to identify significant evaluation factors and subfactors in a solicitation, they are not required to identify every aspect of each factor that might be taken into account; rather, agencies reasonably may take into account considerations, even if unstated, that are reasonably related to or encompassed by the stated evaluation criteria. Client Network Servs., Inc., B-297994, Apr. 28, 2006, 2006 CPD ¶ 79 at 6. Further, an element considered in an evaluation need not be stated in a solicitation where it is intrinsic to the criteria that are stated in the RFP. See Sturm, Ruger & Co., Inc., B-250193, Jan. 14, 1993, 93-1 CPD ¶ 42 at 5-6 n.7

In this case, the agency issued the procurement as a BAA, indicating that the agency had a requirement for "scientific study and experimentation directed toward advancing the state-of-the-art." FAR § 35.016(a). The BAA also explicitly instructed that responses should discuss "the innovation and benefits of the proposed approach," the degree to which the contents of the proposal "advance the state-of-the-art," and development of "new and creative" solutions. BAA at 8-9. In the context of such a BAA, we conclude that consideration of the level of innovativeness in a proposal was intrinsic to the agency's technical evaluation of the "overall scientific and technical merits of the proposal," and was not improper.<sup>5</sup> Accordingly, we see no error in the agency's evaluation.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>5</sup> The agency also points out that Millennium apparently understood the importance of innovation under the BAA, as demonstrated by its proposal's inclusion of a section titled "Innovation," in which Millennium describes 12 "key innovations" in its approach. Technical Proposal at 6. Moreover, the debriefing demonstrates that innovation was considered within the context of the "overall scientific and technical merits of the proposal." For example the agency awarded Millennium's proposal with a strength for its "almost 200% margin on propulsion requirement for 600 kg/4 slot payloads" because "this innovative approach provides the EAGLE Platform with additional momentum management and orbit maneuvering capabilities." Debriefing at 20.