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## Decision

**Matter of:** Kvichak Marine Industries, Inc.

**File:** B-409301

**Date:** March 6, 2014

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William A. Shook, Esq., Law Offices of William A. Shook PLLC, for the protester.  
W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., and Ethan E. Marsh, Esq., Jenner & Block LLP, for Birdon America, Inc., the intervenor.  
Michael J. Kraycinovich, Esq., and Laura K. Anderson, Esq., Department of the Army, Army Materiel Command, for the agency.  
Paul N. Wengert, Esq., 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**

Protest that agency misevaluated protester's proposal and made an unreasonable source selection decision is denied where contemporaneous record shows that evaluators and source selection authority based award on solicitation criteria, weighed competing advantages proposed by offerors, and made a reasonable source selection decision that was consistent with the terms of the solicitation.

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### **DECISION**

Kvichak Marine Industries, Inc., of Seattle, Washington, protests the award of a contract to Birdon America, Inc., of New Orleans, Louisiana, by the Department of the Army, Army Materiel Command, under request for proposals (RFP) No. W56HZV-12-R-0445, for bridge erection boats (BEB). Kvichak argues that the Army misevaluated its proposal and made an unreasonable source selection decision.

We deny the protest.

### **BACKGROUND**

Under earlier contracts awarded in March 2010, three firms were employed to engineer, manufacture, and begin development (EMD) of designs for new BEBs. One of the contracts was awarded to Kvichak's corporate antecedent, and Birdon acted as a subcontractor to a second of the three EMD contractors. During the

testing of BEB designs, both Birdon’s and Kvichak’s designs experienced failures. As is relevant to the protest, Kvichak’s design experienced failures relating to steering deflector bushings of its proposed hydro-jet engine. Agency Report (AR), Tab 5, Source Selection Advisory Committee (SSAC) Report, at 16.

The current RFP sought proposals to provide an initial quantity of 11 BEBs for production testing and qualification, and also to provide up to 388 more BEBs under several optional line items. The RFP provided for a two-phase evaluation procedure. During phase one, an initial pass/fail evaluation of the proposals was conducted. RFP at 183. Proposals that passed the initial evaluation were then evaluated under four different factors: technical, price, data rights, and small business participation (in descending order of significance). Under the technical factor, there were three subfactors: reliability, conventional rafting speed, and forward top speed (in descending order of significance). Id. at 184.

In response to the solicitation, the Army received five proposals, all of which were determined initially acceptable.<sup>1</sup> After evaluation under the remaining criteria, the Army formed a competitive range that included all offerors and held discussions. Following discussions the Army solicited and obtained final proposal revisions from all offerors. AR at 3. The final evaluation resulted in the following ratings being assigned to the Kvichak and Birdon proposals:

	<b>Kvichak</b>	<b>Birdon</b>
<b>Technical</b>	<b>Good</b>	<b>Outstanding</b>
Reliability	Good	Outstanding
Conventional Rafting Speed	Good	Outstanding
Forward Top Speed	Outstanding	Good
<b>Data Rights</b>	<b>6 of 6</b>	<b>6 of 6</b>
<b>Small Business Participation</b>	<b>Outstanding</b>	<b>Outstanding</b>
<b>Evaluated Price</b>	<b>\$210 million</b>	<b>\$261 million</b>

AR, Tab 5, SSAC Report, at 3. On the basis of these evaluation results, the agency’s source selection authority (SSA) made award to Birdon, finding that its proposal was technically superior to the Kvichak proposal and merited payment of the price premium associated with the Birdon proposal. AR, Tab 4, Source Selection Decision Document (SSDD), at 3-5. In particular, the SSA concluded that the Birdon proposal offered advantages under the reliability and conventional rafting speed subfactors of the technical factor and, while he recognized that the Kvichak proposal had been rated superior under the forward top speed subfactor, he

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<sup>1</sup> Kvichak submitted two proposals. This protest relates only to the evaluation of one of Kvichak’s proposals; Kvichak does not challenge the evaluation of its second proposal.

concluded that Birdon's superiority under the first two subfactors outweighed Kvichak's superiority under the third subfactor. After being advised of the agency's selection decision and requesting and receiving a debriefing, Kvichak filed the instant protest.

## ANALYSIS

Kvichak argues that the Army misevaluated the firm's proposal, and also argues that the agency gave consideration to unstated evaluation factors in arriving at its source selection decision. We have considered all of Kvichak's contentions and conclude that none has merit. We discuss Kvichak's principal assertions below. We note at the outset that, in considering protests relating to an agency's evaluation, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's disagreement with the agency's evaluation conclusions does not provide a basis for our Office to object to the evaluation. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6. As described below, our review of the record supports the reasonableness of the Army's evaluation and source selection decision.

### Reliability Subfactor

To assess the technical performance of the proposed BEB designs, the RFP provided that the Army would consider the validity and source of test data presented by the offerors in their proposals. RFP at 185. Test data that was generated as a result of testing performed on a BEB configuration that was identical to the design being proposed would be considered the most valid, while test data generated as a result of testing a configuration that differed from the configuration being proposed would be considered less valid. Id. The RFP provided that the agency could assess a risk to a proposal that offered a configuration that varied from the configuration that was used in generating the test data presented, and also provided that any design changes that were either untested or partially tested also could be assessed as riskier. Id. Finally, the RFP also provided that the agency would consider the origin of any offered test data, specifically, whether test data was government-generated, developed by an independent third party, or developed by the offeror. Id.

Kvichak argues that the Army unreasonably downgraded its proposal under the reliability subfactor based on the performance of its hydro-jet's steering capabilities. Kvichak argues that, although there were problems associated with the steering performance of its proposed hydro-jet during testing under the predecessor EMD contract, its hydro-jet manufacturer made modifications to its proposed hydro-jet that addressed these concerns. Kvichak argues that the Army unreasonably discounted test data generated by its hydro-jet manufacturer and submitted by Kvichak with its proposal, which showed successful testing of the changes to its hydro-jet. Kvichak

also argues that the Army exaggerated the significance of the steering problems experienced by Kvichak's boat during the EMD contract.<sup>2</sup>

We have no basis to object to the agency's evaluation of the Kvichak proposal for the reasons advanced by the protester. The record shows that, in evaluating the Kvichak proposal, the agency downgraded it under the reliability subfactor based on the steering performance of its proposed hydro-jet. In this connection, the record shows that the agency criticized the Kvichak proposal during the evaluation because, during the predecessor EMD contract, the Kvichak-proposed hydro-jet had experienced a large number of reliability failures relating to the hydro-jet steering deflector bushings. AR, Tab 11, Source Selection Evaluation Board (SSEB) Report, at 9; Tab 5, SSAC Report, at 16.

The record further shows that the manufacturer of the hydro-jet made modifications to address the problems that had been encountered during the EMD contract. AR, Tab 7, Kvichak Proposal, at 20. However, the modified hydro-jet had only been tested by the manufacturer of the hydro-jets in a laboratory. Id.

The record shows that the agency discounted the significance of the test data from the manufacturer of the hydro-jet, principally because it had been generated in a laboratory rather than as part of a test of the hydro-jet as integrated on a BEB and then tested in the environment used under the predecessor contract. For example, the SSAC found as follows:

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<sup>2</sup> Kvichak maintains that the final report generated during the predecessor EMD contract incorrectly characterized a significant number of the problems with its hydro-jet steering system as essential function failures rather than less severe non-essential function failures. According to the protester, this led the agency during the current acquisition to consider those problems as more significant than they actually were.

To the extent that the protester takes issue with accuracy of the test report generated during the EMD contract, this is a matter of contract administration under the EMD contract, and we have no jurisdiction to consider these allegations in the context of the current bid protest relating to a different acquisition. Ashland Sales & Serv. Co., B-408969, Nov. 1, 2013, 2013 CPD ¶ 256 at 2-3. In any event, the record shows that Kvichak included the report from the EMD contract in its proposal, AR, Tab 7, Kvichak Proposal, Attach. T, and also independently reported the results of the testing under that contract in a separate portion of its proposal. Id. at 31-35; see also, Protester's Comments, Attach. 6. Kvichak's proposal does not take issue with the accuracy of the test results from the EMD contract, or suggest in any way that the steering failures during performance of the EMD contract were other than--as reported--essential function failures.

[T]he KMI [Kvichak] BEB tested during PPQT [the EMD contract] experienced 33 reliability failures, 28 of them related to the water jet steering deflector bushings. KVA proposed new materials and inspection procedures to address this issue and provided results from component testing performed by the water jet manufacturer, but this is not sufficient to mitigate the risk associated with this high failure rate component. The contractor testing performed consisted of a limited number of components tested in a tub of water with additives in an attempt to replicate the turbid conditions at Aberdeen Proving Grounds, which are representative of the BEB's operational environment. Although the testing demonstrated a decrease in component wear, the testing was not performed in an operational environment on a fully integrated system; therefore the applicability of the testing in mitigating the risk of the jet not meeting reliability requirements is low. KVA proposed a Fix Effectiveness Factor (FEF) of 0.95 for this fix. The SSAC believes that, considering the lack of system-level testing in an operationally representative environment to prove the proposed fix, there is a substantial risk the FEF will not be achieved.

AR, Tab 5, SSAC Report, at 16.

We conclude that the agency's evaluation findings are reasonable and consistent with the terms of the RFP, which allowed the Army to discount test data that had not been generated by the government, and also permitted the agency to assign a risk to a proposed design that varied from a previously tested design. Additionally, the agency's actions were consistent with the terms of the RFP because it permitted the agency to assign a risk to a proposal that offered a design feature that was only partially tested. Simply stated, the hydro-jet proposed by Kvichak was different from the hydro-jet that had been tested by the government under the EMD contract, and the proposed hydro-jet was unproven on an integrated BEB system that had been subject to testing in an operationally-representative environment. We therefore deny this aspect of Kvichak's protest.

#### Source Selection Decision

As noted above, the record shows that the agency selected the Birdon proposal, despite its price premium, because of its technical superiority under the reliability subfactor, and also under the conventional rafting speed (CRS) subfactor. With respect to the CRS subfactor, the RFP's purchase description specified a threshold speed of 6 feet per second, and an objective speed of 8 feet per second. AR, Tab 3-1, Performance Description, at 10. The record shows that Birdon offered a BEB that attained a CRS of 7.7 feet per second, while the Kvichak BEB had a CRS of 7.2 feet per second. AR, Tab 5, SSAC Report, at 17. The agency found this

difference significant, and it was identified as the second most important factor favoring award to Birdon, notwithstanding its higher price. AR, Tab 4, SSDD, at 4-5.

Kvichak argues that the source selection decision was unreasonable because, in discussing the advantages of Birdon's higher CRS, the decision used the terms "thrust," "throughput of the crossing force," and "control," which the protester maintains amounted to the application of unstated evaluation criteria. Protest at 6-7; Protester's Comments at 8-12.

We find no merit to this aspect of Kvichak's protest. The record here shows that, in discussing the superior CRS of the Birdon design, the SSA made reference to several elements relating to CRS. In particular, the SSDD states as follows:

Under Conventional Rafting Speed, the second most important Subfactor under the Technical Factor, there were meaningful distinctions between the Birdon proposal and the remaining proposals. Simply stated, the Birdon proposal offers significantly more thrust which results in favorable operational implications when compared to [the other proposed BEBs]. The difference between Birdon's 7.7fps and . . . KVA's 7.2fps . . . is substantial. The substantially higher thrust of Birdon's proposal results in not only additional rafting speed, but also better control of bays during rafting, faster throughput of the crossing force, rafting in higher speed currents, and sustained operations when water flow conditions vary due to seasonal impacts as demonstrated in recent operations in theatre.

AR, Tab 4, SSDD, at 4. While the protester takes issue with the SSA's use of the terms "thrust" "throughput of the crossing force" and "control," the protester has not demonstrated that these concepts are anything other than performance aspects or measurements of CRS. For example, as the agency points out, greater thrust will (typically) result in a higher CRS. Similarly, a BEB with a faster CRS will be able to achieve a more efficient, or rapid, 'throughput' of the crossing force (the 'crossing force' refers to the fleet of BEBs that are used to construct a bridge), all other things being equal. See Protester's Comments at 14 (comparing implications of faster rafting speed but slower forward top speed). In the final analysis, the protester has not challenged the agency's underlying substantive finding that the Birdon-proposed design offers superior CRS; rather, the protester's challenge is a semantic one relating to the words the agency used to describe that superiority. While the protester is correct that agencies are not permitted to use unstated evaluation factors, an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria. MINACT, Inc., B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 3. That is precisely what occurred here.

Kvichak also argues that Birdon's advantage under the CRS subfactor was insignificant and did not merit paying a price premium of 22 percent for Birdon's proposed BEB. However, as noted, Birdon's superiority under the CRS subfactor was only the second most important consideration in the agency's source selection decision. Consistent with the terms of the RFP, the Birdon proposal's superiority under the most important subfactor--reliability--was paramount in the SSA's decision, although Birdon's superiority under the CRS subfactor also was considered by the SSA in reaching his decision. AR, Tab 4, SSDD, at 3-5.<sup>3</sup>

In the final analysis, agencies are afforded broad discretion to make price/technical tradeoffs in best value acquisitions, and those choices are governed only by the test of rationality and consistency with the solicitation's evaluation and award criteria. HP Enter. Servs., LLC, B-408825, Dec. 23, 2013, 2014 CPD ¶ 13 at 6-7. Here, while Kvichak challenges the reasonableness of the agency's source selection decision based on what it perceives as the inadequate superiority of the Birdon-designed BEB under the CRS subfactor, its protest allegation ignores the agency's other significant finding, namely, that the Birdon BEB also was superior under the reliability subfactor. Under these circumstances, we have no basis to object to the agency's source selection decision for the reasons advanced by the protester.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>3</sup> As noted, the record also shows that the SSA acknowledged the superiority of the Kvichak BEB under the third most important subfactor, forward top speed, but he concluded that Birdon's superiority under the other two--more important--evaluation subfactors outweighed this advantage. AR, Tab 4, SSDD, at 4-5.