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

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Decision

Matter of: Aeronautical Instrument & Radio Company

File: B-298582.2; B-298582.3

Date: January 10, 2007

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Lars E. Anderson, Esq., Peter A. Riesen, Esq., and Keir X. Bancroft, Esq., Venable LLP, for Tel Instrument Electronics Corporation, an intervenor.
Timothy Lasko, Esq., Naval Air Systems Command, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly ignored solicitation preference for commercial off-the-shelf (COTS) products in evaluating its and awardee's proposals as comparable is denied where record supports agency's determination that proposals reflect a comparable use of COTS products.
2. Protest that agency's evaluation of awardee's proposal under management subfactor was unreasonably favorable because awardee allegedly did not propose program manager currently working for the firm is denied where record shows that awardee proposed one of its principal current employees as program manager.
3. Protest that agency improperly refused to allow protester to correct alleged mistake in its price is denied where alleged mistake related to use of one set of indirect rates versus another, and protester provided no documentation to support its claimed mistake.

DECISION

Aeronautical Instrument & Radio Company (AIRCO) protests the award of a contract to Tel Instrument Electronics Corporation under request for proposals (RFP) No. N68335-05-R-0128, issued by the Department of the Navy to acquire a quantity of aircraft navigation test sets. AIRCO maintains that the agency miscalculated proposals, improperly relaxed a solicitation requirement for the awardee, and improperly failed to allow it to correct a mistake in its price proposal. We deny the protest.

The RFP contemplated the award of an indefinite-delivery, indefinite-quantity, fixed-price contract for the manufacture of intermediate level (I-level) tactical aircraft navigation (TACAN) test sets (ITATS). Offerors were advised that the agency would evaluate proposals on the basis of price and several non-price considerations and make award on a “best value” basis. Specifically, the RFP advised that proposals would be evaluated under three non-price factors—technical, past performance and experience; that the technical factor was the most important consideration; that the past performance and experience factors combined were slightly less important than the technical factor; that the past performance factor was more important than the experience factor; and that the experience factor was slightly more important than price. Firms were further advised that each non-price evaluation factor included numerous subfactors. As relevant here, the subfactors under the technical factor were technical approach (most important), logistics, and management (equal in weight and slightly less important than technical approach). Offerors were advised that the agency would assign adjectival ratings and risk assessments for each technical factor/subfactor, and that past performance and experience would be assigned risk assessment ratings.¹

The agency received numerous proposals. It evaluated AIRCO’s and Tel’s proposals (the only proposals relevant here) as follows:

	AIRCO	Tel
Technical	Highly Satisfactory/Low Risk	Highly Satisfactory/Low Risk
Technical Approach	Highly Satisfactory/Low Risk	Highly Satisfactory/Low Risk
Logistics	Satisfactory/Low Risk	Satisfactory/Low Risk
Management	Satisfactory/Low Risk	Satisfactory/Low Risk
Past Performance	Very Low Risk	Very Low Risk
Past Experience	Very Low Risk	Very Low Risk
Price	\$(deleted)	\$12,724,750

AR, exh. 6 at 2. On the basis of these evaluation results, the agency found that Tel’s and AIRCO’s proposals were essentially technically equal and, accordingly, made award to Tel based on its lower price.

¹ The agency’s source selection plan specified adjectival ratings of outstanding, highly satisfactory, satisfactory, marginal or unsatisfactory for the technical factor and subfactors, and risk ratings of low, medium or high. Agency Report (AR), exh. 1, at 15.

After learning of the award decision, AIRCO filed a protest with our Office. In response to that protest, the agency advised our Office that it intended to take corrective action by establishing a competitive range, advising the competitive range offerors of the agency's revised delivery schedule requirements for contract performance, engaging in discussions with the competitive range offerors, obtaining and evaluating revised proposals and making a new source selection decision. In light of this proposed corrective action, we dismissed AIRCO's protest as academic (B-298582, Aug. 25, 2006).

Thereafter, the agency established a competitive range comprised of AIRCO's and Tel's proposals, amended the RFP to establish delivery requirements, and held limited discussions, primarily to permit the two firms to respond to the revised delivery requirements. In requesting final proposal revisions (FPR), the agency advised both firms that price changes were permitted only to the extent that they were related to compliance with the revised delivery schedule and that, accordingly, price changes had to be accompanied by supporting documentation.

In its FPR, Tel affirmed its compliance with the agency's delivery requirements, and stated that its price remained the same as its original price. AIRCO, on the other hand, submitted a revised price of \$[deleted], stating that its original proposal included a mistake in the calculation of overhead and general and administrative (G&A) expenses, and that its new lower price reflected a lower cost per production unit because [deleted].²

In considering AIRCO's claimed mistake, the contracting officer contacted the Defense Contract Audit Agency (DCAA) to inquire as to AIRCO's current recommended rates. The information from DCAA showed that AIRCO's recommended indirect rates were more consistent with its earlier, higher price, so the agency refused to allow AIRCO to revise its price based on its alleged mistake and used AIRCO's earlier price (\$[deleted]) in making its source selection decision. The agency concluded that any proposal changes resulting from the revised delivery requirements did not affect the firms' original technical ratings. Accordingly, as before, the agency made award to Tel on the basis of its lower price. AIRCO again challenges the source selection.

COMMERCIAL OFF-THE-SHELF (COTS) PREFERENCE

² AIRCO's FPR also offered an "alternate" price of \$[deleted], stating that, [deleted]. However, the proposal did not include a revised technical proposal detailing these changes to its product. The record shows that the Navy did not evaluate AIRCO's alternate proposal because AIRCO had not submitted a revised technical proposal. AIRCO does not argue that this was improper, and we have no basis to question the agency's decision here.

AIRCO bases several protest arguments on an RFP preference--evaluated under the technical approach subfactor--for a COTS solution to the agency's requirements. In this regard, the RFP provided as follows in section M (Evaluation Factors for Award):

The use of NDI [non-developmental items] and COTS hardware and software shall be the first choice for development of ITATS. Development of new or special purpose hardware or software may only be considered if NDI or COTS is not available or is not capable of meeting the Performance Specification Requirements with minor modification. The preference for the use of COTS and commercial standards does not relieve the Contractor from meeting any of the ITATS Performance Specification requirements.

RFP at 96. Further, section L (Instructions, Conditions and Notices to Offerors), repeated the above-quoted language, and went on to provide: "For the ITATS program, COTS Hardware will be defined along a gradient. At the low end (Level X) is minimum COTS insertion defined at the piece part level, at the high end (Level I) is maximum COTS, defined as fully commercial off the shelf items." RFP at 89.

In reviewing protests concerning an agency's evaluation of proposals, our Office does not reevaluate proposals; rather, we will examine the evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. Pickering Firm Inc., B-277396, Oct. 9, 1997, 97-2 CPD ¶ 99 at 4. The agency's evaluation here was reasonable.

Based on its understanding that Tel intended to create an I-level tester from another piece of equipment manufactured by the firm, an O-level tester,³ AIRCO asserted in its initial protest that Tel's proposed ITATS is not a COTS item but, rather, a device custom developed in response to the solicitation. AIRCO cited nine aspects of the performance specification and asserted that Tel's O-level tester would need to be substantially reengineered to meet those requirements. In its comments on the agency report, AIRCO made no further mention of the nine performance requirements, and focused instead on one ITATS component, the TACAN beacon simulator (which AIRCO also referenced in its initial protest).⁴ AIRCO maintains

³ An O-level tester performs pass/fail tests to determine whether a piece of equipment is functioning properly, while an I-level tester, more sophisticated than an O-level tester, isolates a fault that has been detected at the line replaceable or shop replaceable unit level.

⁴ AIRCO's comments did include an annotated table reproduced from Tel's proposal which, without elaboration, offers conclusory comments on the COTS status of various components of Tel's ITATS. For example, in reference to Tel's RF-I/O

(continued...)

that Tel's TACAN beacon simulator will be manufactured by combining two existing Tel products, and thus is a developmental, rather than a COTS, item. AIRCO concludes that it was unreasonable for the agency to assign Tel's proposal a low risk rating under the technical factor because this developmental effort introduces significant risk into Tel's performance of the contract.

This argument is without merit. As noted above, the agency advised offerors that it intended to evaluate the degree to which firms offered COTS solutions using a gradient from high (an entirely COTS solution) to low (use of COTS piece parts). The record shows that Tel's proposed TACAN beacon simulator in particular, and its ITATS in general, are comprised substantially of COTS components or assemblies that the firm already was manufacturing. With respect to the TACAN beacon simulator, Tel combined two previously manufactured items in its inventory, its [deleted] and [deleted] test sets. AR, exh. 4, at 32-33. Tel's engineer explained the combination of these two units in an affidavit as follows:

In responding to the ITATS Solicitation, Tel proposed the [deleted], which is a variant of Tel's field-proven [deleted] [test set]. The key change will be the substitution of the existing RF board in the [deleted] with the state-of-the-art Tel-designed [deleted] RF board. Specifically, the [deleted] will include [deleted] enabled RF board design (employed in the fielded [deleted]) and TACAN [deleted] firmware taken from Tel's [deleted] test unit. Utilizing this [deleted] TACAN technology in the [deleted] will not entail any hardware changes to the Tel RF circuit board, although some relatively minor software and firmware modification will be required to achieve the specified ITATS tolerances and additional user test functions. The [deleted] would also incorporate fully automated TACAN test routines leveraging a hardware and software architecture based on an existing [deleted] design developed and deployed with Contact Test Set Generation II (CTS II). This automation hardware and software is 100 % COTS.

Tel Comments, Nov. 13, 2006, exh. 1, at 2. In effect, therefore, Tel proposed to insert a circuit board from one preexisting COTS product into another preexisting COTS

(...continued)

assembly, which Tel's proposal described as a modified COTS item, AIRCO concludes, without explanation, that the item is "not produced; developmental item." AIRCO Comments, Nov. 13, 2006, at 7. These annotations are not related to AIRCO's earlier arguments relating to the nine enumerated specification requirements and, in the absence of further elaboration, do not constitute an independent basis of protest. In any case, we address the broad comparability of the offerors' proposed products below.

product with no modifications to the hardware, and only minor modifications to its firmware and software.

The record shows that AIRCO proposed to modify its [deleted] in a similar manner. Specifically, AIRCO proposed to perform [deleted] in order to meet the RFP requirements, [deleted]. AR, exh. 3, at 24-25. AIRCO's proposal also similarly contemplates changes to its product's firmware and software. Id. at 24-25.

Regarding the offerors' proposed ITATS units more generally, the record shows that both firms proposed, largely, to incorporate COTS technology, but to modify it somewhat to meet the RFP requirements. Tel's proposal shows that, of the 19 major subassemblies that comprise its offered product, 15 are COTS subassemblies, 2 are modified COTS subassemblies, and 2 are developmental items. AR, exh. 4, at 40-41. In comparison, AIRCO proposed a total of [deleted] to its existing product in order to comply with the specifications and, as noted above, proposed to use its [deleted], to meet the RFP requirements. (AIRCO's proposal contains an item-by-item table detailing each component of the specifications and a representation concerning whether its product is COTS or must be modified in order to meet the specifications.) AR, exh. 3, at 8-23, 25-26. We conclude that the agency reasonably viewed the two firms' solutions to the COTS preference as comparable (in terms of the degree to which each firm would have to modify its COTS products to meet the specifications), and therefore reasonably assigned the proposals comparable risk ratings under the technical approach subfactor.

AIRCO argues alternatively that, to the extent the Tel product may be considered a COTS item, the agency improperly relaxed the COTS requirement without advising AIRCO. In a similar vein, AIRCO argues that the RFP contained a latent ambiguity as to the need to offer a "true" COTS product rather than a product that only incorporates COTS assemblies into a "new" product.

This argument is without merit. First, as is implicit in the above discussion, we do not agree that the agency relaxed the COTS preference for either offeror. Rather, the firms were treated equally in that both offered modified COTS products to meet the agency's requirements, and both proposals were evaluated as offering this modified COTS approach. Correspondingly, we find nothing ambiguous in the RFP as it relates to the COTS preference; the RFP advised offerors that the COTS preference would be evaluated using a gradient that took into consideration the spectrum of possibilities—from using only COTS piece parts to offering an entirely unmodified COTS product—and the agency's evaluation was consistent with this scheme.

TEL'S PROGRAM MANAGER

AIRCO asserts that it was unreasonable for the agency to rate Tel's proposal low risk under the management subfactor because the firm offered a program manager who it had not yet hired. This argument is without merit. While Tel's proposal stated that it

was interviewing candidates to replace Tel's current program manager, the proposal specifically designated TEL's vice president of operations as program manager, and in an affidavit submitted in connection with the protest, this individual states that he currently is serving as Tel's program manager. Tel Comments, Nov. 13, 2006, exh. 1. The mere possibility that the program manager could be replaced did not require the agency to downgrade the proposal.

AIRCO'S ALLEGED MISTAKE

AIRCO asserts that the agency improperly disallowed correction of its claimed pricing mistake (discussed above) relating to the calculation of its indirect rates. The protester states that it contacted the contracting officer immediately after discovering its mistake and was advised that it should submit its corrected price, along with documentation supporting its claimed mistake. AIRCO maintains that the agency thereafter determined that it had not submitted sufficient documentation to substantiate its correction, but never gave it an additional opportunity to submit supporting documentation.

This argument is without merit. AIRCO submitted absolutely no documentation to support its alleged mistake claim at the time it submitted its FPR, beyond its revised pricing sheets. The Federal Acquisition Regulation (FAR) calls for the production of clear and convincing evidence establishing the mistake and the offer actually intended. FAR §§15.306(b)(3)(i), 14.407-3. The record shows that the firm did not even provide the contracting officer with a price breakdown showing its allegedly revised overhead and G&A rates, and this in turn led the contracting officer to contact DCAA to obtain information that would allow the contracting officer to attempt to essentially reverse engineer AIRCO's original and revised prices. Even in the course of its protest, AIRCO has supplied no documentation of any sort to support its claimed mistake. Absent such documentation, there was no basis for the agency to permit correction.

The protest is denied.

Gary L. Kepplinger
General Counsel