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**Comptroller General
of the United States**

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

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Decision

Matter of: Northrop Grumman Information Technology, Inc.

File: B-400134.10

Date: August 18, 2009

William W. Thompson, Jr., Esq., Lori Ann Lange, Esq., and Michael A. Branca, Esq., Peckar & Abramson, P.C., for the protester.

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W. Michael Rose, Esq., MAJ Jonathan P. Widmann, and B. Eric Beckstrom, Esq., Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Air Force failed to properly evaluate the awardee's proposal and assess its proposal risk is sustained where, contrary to the evaluation scheme announced in the solicitation, the agency failed to evaluate staffing under all of the Mission Capability subfactors.
 2. Protest that agency improperly evaluated proposals is sustained where the solicitation stated that they would be evaluated on "the extent to which" they exceeded a requirement, and proposals that were substantially different were nevertheless rated the same.
 3. Protest of agency's decision not to consider revised proposals in the reevaluation following corrective action is untimely when filed after the issuance of the new award decision, where protester knew or should have known prior to that award decision of the agency's intent not to consider proposal revisions.
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DECISION

Northrop Grumman Information Technology, Inc. (NGIT), of McLean, Virginia, protests the award of a contract to General Dynamics Information Technology, Inc. (GDIT), of Fairfax, Virginia, by the Department of the Air Force (AF), Air Force Space Command (AFSPC or Command) under request for proposals (RFP)

No. FA2550-06-R-8000, to provide enterprise operations, maintenance, and management of data, voice, land mobile radio, and video conferencing facilities. The protester argues that the agency failed to properly evaluate GDIT's proposal and assess its proposal risk, improperly evaluated all proposals under the Mission Capability/Small Business Subcontracting subfactor, and improperly assessed NGIT's proposal risk under the Mission Capability/Core Communications and Information Technology (IT) Services Management subfactor.

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

BACKGROUND

This acquisition, referred to as Uni-Comm, seeks to consolidate the Command's operations and maintenance requirements for government-owned networks at seven of AFSPC's main operating bases. Core communication and information technology services are currently performed under 24 contracts. The RFP called for a fixed-price incentive (firm target) contract, with certain cost-reimbursement items, for a 9-month base period and five 1-year option periods.¹

The RFP contained the following four equally weighted evaluation factors: Mission Capability, Proposal Risk, Past Performance, and Cost/Price. Although, when combined, the three non-cost/price factors were significantly more important than Cost/Price, the RFP stated that "Cost/Price will contribute substantially to the selection decision," RFP § M.3.2, and that the total cost/price would be evaluated for reasonableness and realism, using one or more of the techniques set out in FAR § 15.404. The realism analysis would include the development of a probable cost for each offeror.

The five Mission Capability subfactors, in descending order of importance, were Proposed Enterprise End State, Core Communications and IT Services Management, Transition Plan, Enterprise Program Management, and Small Business

¹ A fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. The price ceiling is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses. When the contractor completes performance, the parties negotiate the final cost, and the final price is established by applying the formula. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. Federal Acquisition Regulation (FAR) § 16.403-1.

Subcontracting. The Mission Capability factor was to be assessed at the subfactor level only, using the color codes defined below.

Color	Rating	Description
Blue	Exceptional	Exceeds specified minimum performance or capability requirements in a way beneficial to the government; proposal must have one or more strengths ² and no deficiencies to receive a blue.
Green	Acceptable	Meets specified minimum performance or capability requirements delineated in the Request for Proposal; proposal rated green must have no deficiencies but may have one or more strengths.
Yellow	Marginal	Does not clearly meet some specified minimum performance or capability requirements delineated in the Request for Proposal, but any such uncertainty is correctable.
Red	Unacceptable	Fails to meet specified minimum performance or capability requirements; proposal has one or more deficiencies. Proposals with an unacceptable rating are not awardable.

RFP § M.4.3. With respect to the most important Mission Capability subfactor, Proposed Enterprise End State (PEES), the RFP stated, in part:

M.4.4. Proposed Enterprise End State³ Subfactor. This subfactor evaluates the proposed enterprise end state for AFSPC core communications and IT services. The proposed enterprise end state demonstrates an advantage in at least two of the following: performance, [information assurance (IA)] posture, interoperability or reduction of required resources.

* * * * *

M.4.4.4. Proposed enterprise end state demonstrates a reduction in required resources such as time, personnel, facilities, or cost.

² The RFP defined “strength” as “a significant, outstanding or exceptional aspect of an offeror’s proposal that has merit and exceeds specified performance or capability requirements in a way that is advantageous to the Government, and either will be included in the contract or is inherent in the offeror’s process.” RFP § M.3.3.

³ The Proposed Enterprise End State subfactor required a description of the entire communication system at the completion of the consolidation that is central to the procurement.

Id. § M.4.4. The RFP also stated that “[s]taffing will not be assigned a separate Mission Capability Subfactor rating or associated color and will also not be assigned a separate risk rating. Information from the Staffing Tab of Volume II will be used to evaluate all Mission Capability Subfactors.” Id. § L.6.2.2.

With respect to the least important Mission Capability subfactor, Small Business Subcontracting, the RFP stated that “[f]avorable assessments under this subfactor will be based on the extent to which the offeror’s proposed approach will exceed the small business subcontracting requirements,” id. § M.4.8, which were that 40 percent of the total annual contract dollars, exclusive of dollars under cost-reimbursement/no-fees contract line items, would be subcontracted at the first tier to small businesses. Id. at § H.3.a.

The RFP provided that the Proposal Risk factor would assess the risk of a proposal’s approach under each of the five Mission Capability subfactors. Under the first subfactor, Proposed Enterprise End State, risk would be assessed for the four categories of performance: performance, IA posture, interoperability, and reduction in required resources. Under the risk factor, the agency considered the potential for disruption of schedule, increased cost, degradation of performance and the need for government oversight, and the likelihood of unsuccessful contract performance. Risk would be assigned one of three adjectival ratings, “high,” “moderate,” or “low.” Id. § M.5. The Air Force was to select “the best overall offer,” id. § M.2.2, based on an integrated assessment of the four evaluation factors. The RFP further defined the best value tradeoff this way:

The Government seeks to award to the offeror who gives the Air Force the greatest confidence that it will best meet, or exceed, the requirements. This may result in an award to a higher-rated, higher-priced offeror, where the decision is consistent with the evaluation factors and the Source Selection Authority (SSA) reasonably determines that the technical superiority and/or overall business approach and/or superior past performance of the higher-priced offeror outweighs the cost difference.

Id.

The RFP was issued on October 29, 2007, and nine offerors submitted proposals. Four proposals—from the protester, the awardee, L-3 Services, Inc., and Lockheed Martin Information Services, Inc. (LMIS)—were included in the competitive range. Based on its evaluation, the agency selected GDIT’s proposal for award.

After the Air Force awarded the contract to GDIT, the other three offerors whose proposals were in the competitive range filed protests with our Office. NGIT submitted information with its protest seeking to correct what it deemed an inadvertent error that led to a risk rating of “moderate” under the Mission

Capability/Core Communications and IT Services Management subfactor. The agency decided to take corrective action, indicating that it would reevaluate the existing proposals and issue a new source selection decision. We then dismissed the protests as academic. See L-3 Servs., Inc. et al., B-400134.5 et al., Dec. 11, 2008.

The reevaluation ratings, including price, are summarized below.

FACTOR/Subfactor	NGIT	GDIT	L-3	LMIS
MISSION CAPABILITY				
Proposed Enterprise End State	Blue	Green	Green	Green
RISK	Low	Low	Low	Low
Core Comm. & IT	Green	Green	Green	Green
RISK	Moderate	Low	Low	Low
Transition Plan	Green	Green	Green	Green
RISK	Low	Low	Low	Low
Enterprise Program Mgmt.	Green	Green	Green	Green
RISK	Low	Low	Low	Low
Small Bus. Subcontracting	Blue	Blue	Blue	Blue
RISK	Low	Low	Low	Low
PAST PERFORMANCE ⁴	High	High	Significant	High
PRICE	\$333 M	\$271 M	\$244 M	\$279 M

After the reevaluation, the agency again selected GDIT for contract award. The Air Force did not consider the higher technical rating of NGIT’s proposal to be worth the cost/price premium. The agency determined that GDIT’s proposal, with its superior past performance rating, was worth the premium over L-3’s. After receiving a debriefing, NGIT filed this protest with our Office.

ANALYSIS

The protester alleges that the agency improperly evaluated the proposals. The evaluation of an offeror’s proposal is a matter within the agency’s discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. Agencies are required to identify the bases upon which offerors’ proposals will be evaluated and to evaluate offers in accordance with the stated evaluation criteria. See Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(2)(A), (b)(1) (2006); FAR §§ 15.304(d), 15.305(a); Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-

⁴ “High confidence” was defined as follows: “Based on the offeror’s performance record, the government has high confidence the offeror will successfully perform the required effort,” and “significant confidence” was defined as follows: “Based on the offeror’s performance record, the government has significant confidence the offeror will successfully perform the required effort.” RFP § M.6.4.

Owego, B-299145 et al., Feb. 26, 2007, 2007 CPD ¶ 45 at 4. In reviewing a protest against an agency's evaluation of proposals, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. Here, as explained below, we conclude that the agency failed to properly evaluate the offerors' proposed staffing under the Mission Capability/Proposed Enterprise End State subfactor, and improperly evaluated the proposals under the Mission Capability/Small Business Subcontracting subfactor.

Agency's Evaluation of GDIT's Proposal and Proposal Risk Under the Mission Capability/Proposed Enterprise End State Subfactor

NGIT argues that the agency's risk analysis of GDIT's proposal was flawed because the agency failed to properly consider the comments made by the team evaluating the awardee's proposal under the Proposed Enterprise End State subfactor. The comments at issue were made primarily by one evaluator and concerned, in part, the validity of GDIT's claims that it would realize staffing efficiencies. See, e.g., Agency Report (AR), Tab 204, Comment Report at 17 ("This issue [of GDIT's enhanced performance] is uncertain because I [the evaluator] have no description, however minimalist, of how they will achieve the [DELETED] reduction in incident resolution time, the [DELETED] reduction in open ticket time, the [DELETED] improvement in availability and a [DELETED] reduction in incidents."). As explained below, the record is clear that the agency failed to properly evaluate staffing under the PEES subfactor as required by the RFP.

In responding to the protest, the contracting officer asserted, not that the evaluator's comments in question were in fact considered, but that the agency properly decided to disregard the comments because the "Air Force did not evaluate offerors' staffing under [the PEES] subfactor." Contracting Officer's Supplemental Statement, June 28, 2009, at 18. The contracting officer explained that

almost all of the individual evaluator comments cited by NGIT under the Proposed Enterprise End State subfactor were discarded by the [source selection evaluation team (SSET)] during consensus. In particular, individual evaluator comments that cited a lack of substantiating information in the Proposed Enterprise End State subfactor portion of GDIT's proposal were discarded during the consensus process as being not relevant since they addressed evaluation of proposal elements outside of the Proposed Enterprise End State subfactor.

Id. To support its contention that the Air Force was not required to evaluate staffing under the Proposed Enterprise End State subfactor, the agency cites various portions of the RFP that indicate staffing would be considered under other Mission

Capability subfactors. See Agency Response to Protester's Comments on AR, July 10, 2009, at 5-7.

The agency's argument ignores the provisions of the RFP noted above indicating that staffing is an inherent part of the PEES subfactor, RFP § M.4.4.4 ("Proposed enterprise end state demonstrates a reduction in required resources such as time, personnel, facilities, or cost."), and that staffing information "will be used to evaluate all Mission Capability Subfactors." Id. § L.6.2.2. Moreover, the record simply does not support the agency's claim that staffing was not assessed for any offeror under the Mission Capability/Proposed Enterprise End State subfactor. The Air Force's Advantages Report for that subfactor, for example, states the following advantage for GDIT:

- (2) Advantage. M.4.4.4 vs. Vol. II, Pg. 10, Para 2.3.4, "Our model reduces overall staffing by over [DELETED] from current counts during the contract period of performance. . . ."
Concur; this is an advantage for the Government. A [DELETED] reduction in overall staffing is an advantage to the Government since it significantly reduces the personnel required.

AR, Tab 195, Advantages Report at 6. Here, the agency made direct reference to the staffing information in volume two of the awardee's proposal to substantiate an advantage it found under the PEES subfactor. The Advantages Report is consistent with the RFP requirement that staffing be evaluated across all Mission Capability subfactors; the conclusions in the report undermine the agency's claim that PEES evaluator comments were properly excluded from consideration because they addressed the issue of staffing. The record reveals that the agency in fact evaluated staffing under Mission Capability/Proposed Enterprise End State, but did so inconsistently.

GDIT asserts that the earlier evaluator comments were superseded by the consensus evaluation which concluded that GDIT's proposed reduced staffing level--which was separately evaluated under other Mission Capability subfactors--was an advantage to the government. While GDIT seems to suggest that any possible deviation from the stated evaluation scheme did not materially change the final consensus evaluation, we have no basis on this record to draw such a conclusion. Accepting the statement of the agency at face value, that certain comments related to staffing were "discarded" as "not relevant" during the evaluation of GDIT's proposal under the PEES subfactor, we have no basis on which to find that the agency's evaluation of GDIT's proposal under this subfactor was reasonable. Because the agency concedes it did not look at the evaluator's negative comments, we have no basis to conclude that, had this information been properly evaluated, it would not have materially affected GDIT's rating. Accordingly, we sustain the challenge to the agency's evaluation under the Mission Capability/Proposed Enterprise End State subfactor.

Mission Capability/Small Business Subcontracting Subfactor Evaluation

NGIT challenges the agency’s proposal evaluation under the Mission Capability/ Small Business Subcontracting subfactor. As noted above, the RFP stated that the proposals would be evaluated on “the extent to which” the proposed level of subcontracting exceeded the 40 percent base requirement. RFP § M.4.8. During the first evaluations—prior to the protests, corrective action, and reevaluation—the agency stated that GDIT’s proposal had “minimally exceed[ed]” the requirement and rated that proposal “green” under the subfactor. AR, Tab 55A, Initial Evaluation Briefing at 201. The chart below summarizes the percentage by which the proposed subcontracting level exceeded the 40 percent requirement, the agency’s color rating, and the description included in the evaluation briefing, for each of the proposals.

Offeror	Percent Over Requirement	Color Rating	Narrative Description
NGIT	[DELETED]	Blue	“exceeding”
GDIT	[DELETED]	Green	“minimally exceeding”
Offeror A	[DELETED]	Blue	“exceeding”
Offeror B	[DELETED]	Green	“minimally exceeding”

Id. at 118-19, 167-68, 201-02, and 217-18. The agency’s Proposal Analysis Report (PAR) concluded that “NGIT and [Offeror A] both significantly exceeded the small business subcontracting standard of 40% that resulted in a BLUE. GDIT and [Offeror B] both exceeded the 40% standard, but not significantly enough to be considered a Blue.” AR, Tab 161, PAR at 96-97.

In the reevaluation, the PAR concluded that all of the proposals “significantly exceeded” the subcontracting requirement and improved small business opportunities, and therefore all of the proposals were rated “blue” under this subfactor. AR, Tab 223, PAR at 153. The AR states simply that

[the Air Force] determined that each of the offerors provided a benefit to the Government by committing to exceed the 40% small business subcontracting threshold specified in the RFP. Based on the evaluators’ assessment that each offeror provided a benefit, each offeror was rated blue or excellent for the subfactor.

AR, Memorandum of Law at 27.

As discussed above, agencies are required to identify the bases upon which offerors’ proposals will be evaluated and to evaluate proposals in accordance with the stated evaluation criteria. Where an RFP states that it will evaluate “the degree” to which a proposal exceeds a requirement, a comparative evaluation is required. Ratings that do not distinguish between proposals that make different commitments are inconsistent with that evaluation scheme. ASRC Research & Tech. Solutions, LLC, B-400217; B-400217.2, Aug. 21, 2008, 2008 CPD ¶ 202 at 14 (sustaining protest where

the solicitation stated that the agency would consider “the degree” to which a proposal’s past performance references exceeded the requirement, and the agency failed “to consider the relative size of offerors’ past performance references”); Systems Research & Applications, Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 22 (sustaining protest where solicitation required agency to assess “the degree” to which the offerors’ proposed approaches would satisfy the contract objectives and the agency determined that all of the proposals would satisfy the government’s minimum requirements).

NGIT’s proposed level of small business subcontracting, over and above the required 40 percent minimum, exceeded that of GDIT--[DELETED] compared to [DELETED]-- a difference the contracting officer termed “slight.” Contracting Officer’s Statement of Facts, June 16, 2009 at 48. In fact, as evaluated by the agency, the dollar value of the offerors’ proposed small business subcontracting above the 40 percent minimum was [DELETED] for NGIT, compared to [DELETED] for GDIT, AR, Tab 222, Final Decision Briefing at 77, 208, a difference of [DELETED]. Given the wide range of proposed subcontracting levels in excess of the required minimum, the agency’s reevaluation determination that all of the proposals “significantly” exceeded the requirement is not consistent with the stated evaluation criterion, namely, that a favorable assessment under this subfactor would be based on “the extent to which” an offeror’s proposed approach exceeded the small business subcontracting requirement. While the agency had the discretion to create an evaluation scheme that would rate “blue” all proposals that simply exceeded the requirement for this subfactor, that is not the evaluation method that was announced in the RFP. Because the agency failed to follow the stated evaluation criterion, we sustain the protest on this ground as well.

NGIT’s Moderate Risk Assessment Under the Mission Capability/Core Communications and IT Services Management Subfactor

The protester argues that the agency improperly evaluated its proposal risk as “moderate” under Mission Capability/Core Communications and IT Services Management. At issue is whether the agency was required to consider information submitted by NGIT as part of its protest of the first award decision. NGIT argues that the Air Force should have considered the information regarding [DELETED] that NGIT submitted to the agency in its November 2008 protest or otherwise requested clarification of its proposal from the protester. We disagree.

On December 17, 2008, after the Air Force announced its intent to take corrective action, the protester sent the contracting officer an email stating that “[u]nder the circumstances, we hope that the Government will allow us the opportunity to address the weakness which resulted in a Moderate Risk assessment in Mission Capability/Proposal Risk Core Communications and IT Services Management.” AR, Tab 5E, Agency Correspondence with NGIT at 1 (E-mail from NGIT to Contracting

Officer, Dec. 17, 2008). The Air Force's prompt response explicitly denied the request, stating:

2. The purpose of this memorandum is to ensure that your firm's Final Proposal Revision (FPR) submitted in Sep 2008 remains valid as an offer that may be accepted by the Air Force. . . .

* * * * *

4. This memorandum is not a request for a revised proposal in any form. Your e-mail of 17 Dec 2008 noted a hope for having the opportunity to address a proposal item; however, no revised proposals will be considered by the Air Force unless submitted in response to a separate written request.

Id. at 2-3 (E-mail from CO to NGIT, Dec. 19, 2008).

In general, a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2009); see also K9 Operations, Inc., B-299923, Aug. 6, 2007, 2007 CPD ¶ 146 at 3. This protest issue, which challenges the ground rules that the agency announced for the corrective action and recompetition, is analogous to a challenge to the terms of a solicitation. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7.

In our view, the protester knew or should have known that the agency did not intend to hold discussions or permit clarifications with NGIT when it received the December 19, 2008 e-mail from the contracting officer. It was therefore unreasonable for NGIT to await the agency's second award decision without raising any challenge. Domain Name Alliance Registry, supra, at 8. This protest allegation is therefore untimely.⁵

⁵ NGIT argues that, regardless of whether the agency is required to consider the explanatory information submitted with its earlier protest, the agency's rating of its proposal risk as "moderate" was unreasonable. Based on our review of the record, we find this argument without merit. NGIT also argues that the agency employed an unstated evaluation factor when it rated the protester's proposal lower for risk under this subfactor than for the subfactor itself. Because the announced evaluation scheme stated that proposal risk would be evaluated separately, we find this argument without merit as well. In any event, the record shows that the agency evaluated all of the proposals as green under the subfactor in question; the agency states that the protester's proposal was rated "green" under the assumption that it would, during the required time frame, [DELETED], and that it was rated "moderate" for risk to account for the possibility that it would not. We see nothing unreasonable in the agency's evaluation.

CONCLUSION AND RECOMMENDATION

Competitive prejudice is an essential element of any viable protest, and we will sustain a protest only if there is a reasonable possibility that the protester was prejudiced by the agency's action. McDonald--Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. The record here shows that this was a close competition, with similar technical ratings for all of the offerors' proposals. Accordingly, while we sustain the protest only with regard to the challenge to the evaluation of proposals under two Mission Capability subfactors, Proposed Enterprise End State⁶ and Small Business Subcontracting, it is clear that these elements of the evaluation could have affected the outcome of the competition by lowering GDIT's proposal ratings under the Mission Capability subfactors and proposal risk, and therefore reasonably may be regarded as prejudicial to NGIT, notwithstanding NGIT's higher price.

We recommend that the Air Force reevaluate the proposals under the Mission Capability/Proposed Enterprise End State and Small Business Subcontracting subfactors, consistent with this decision.⁷ After the reevaluation, we recommend that the Air Force prepare a new selection decision; if that decision results in the selection of an offeror other than GDIT, we recommend that the Air Force terminate the contract with GDIT. We also recommend that NGIT be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, limited to the costs relating to the grounds on which we sustain the protest. 4 C.F.R. § 21.8(d)(1). NGIT should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. Id. § 21.8(f)(1).

The protest is sustained in part and denied in part.⁸

Daniel I. Gordon
Acting General Counsel

⁶ Although NGIT's protest concerned only the agency's evaluation of GDIT's proposal, the record makes clear that the agency failed generally to evaluate offerors' proposed staffing under Mission Capability/Proposed Enterprise End State.

⁷ Another unsuccessful offeror under the RFP here, L-3 Services, Inc., also filed a protest challenging the award to GDIT and its own evaluation. We intend to issue a decision in that case no later than the due date, September 3.

⁸ NGIT raised a number of other allegations, including that the agency improperly evaluated its proposal risk under one Mission Capability subfactor and that the agency's cost/price analysis was flawed. Having reviewed these other challenges and finding them without merit, we deny the protest on these grounds.