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## Decision

**Matter of:** Infrastructure Defense Technologies

**File:** B-401860.2; B-401860.3

**Date:** July 27, 2010

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Terrence M. O'Connor, Esq., and Stephanie D. Wilson, Esq., Albo & Oblon LLP, for the protester.

Douglas C. Proxmire, Esq., and Elizabeth M. Gill, Esq., Patton Boggs LLP, for Hesco Bastion, Ltd., an intervenor.

Linda G. Sandoli, Esq., Defense Logistics Agency, for the agency.

Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Corrective action taken in response to a prior protest is not objectionable where the agency took this action to address legitimate concerns raised by the protester concerning the propriety of the prior award.
  2. Agency's evaluation of the protester's and the awardee's technical proposals was reasonable and supports the agency's conclusion that the protester's slight technical advantage was not worth its higher proposed price.
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### DECISION

Infrastructure Defense Technologies (IDT), of Belvidere, Illinois, protests the award of a contract to Hesco Bastion, Ltd., of Leeds, United Kingdom, under request for proposals (RFP) No. SPM8E6-08-R-0061, issued by the Defense Logistics Agency (DLA), Defense Supply Center Philadelphia (DSCP), for expeditionary earth-filled protective barriers. IDT challenges the agency's corrective action in response to an earlier protest, and the agency's evaluation of the offerors' proposals and past performance.

We deny the protest.

## BACKGROUND

The RFP was issued on February 27, 2008, and sought proposals for expeditionary earth-filled protective barriers, also known as revetments. The barriers are comprised of a containment system that can be filled with locally-available fill material to meet the user's force protection requirements with regard to barrier thickness, height, and configuration. RFP at 9. Hesco previously provided these barriers to DLA under sole-source contracts.

The RFP, as amended, anticipated award of an indefinite delivery/indefinite quantity (ID/IQ), fixed-price with economic price adjustments (EPA) delivery order contract, with a 2-year base period and two 1-year options. The maximum value of the contract is \$1 billion, with a minimum guarantee of \$10 million for the 2-year base period, and a minimum guarantee of \$5 million for each of the options.

The RFP required offerors to submit product demonstration models (PDMs), which were to be evaluated based on a combination of testing and contractor performance certifications. RFP amend. 2, at 33. The RFP identified six technical evaluation factors, which were listed in descending order of importance: (1) protection requirements, which had subfactors for small arms protection, indirect fire protection, and large explosive charge breaching; (2) expeditionary characteristics, which had subfactors for deployment of unit, transportability, permeability, and structural load; (3) past performance, which had subfactors for delivery and quality, business relations/customer satisfaction, and compliance with contractual socioeconomic goals; (4) production capability/surge; (5) socioeconomic program support; and (6) Javits Wagner O'Day Act (JWOD) entity support.<sup>1</sup> RFP amend. 5, at 8. The RFP stated that factors one through six were of decreasing importance, with the exception that factors five and six were of equal importance. Id.

The RFP stated that price would be evaluated based on the proposed pricing for three types of PDMs: (1) indirect fire; (2) large explosive charge breaching; and (3) class II structure load. For purposes of award, the non-price evaluation factors were "significantly more important" than price. Id.

Seven offerors, including IDT and Hesco, submitted proposals by the July 1, 2008, closing date. The Army Corps of Engineers Engineer Research and Development Center, tested the offerors' PDMs, and DLA reviewed each offeror's lab certifications for acceptability. Based on the evaluations, the agency limited the competitive range to IDT and Hesco, and conducted discussions with these offerors. On August 19, 2009, DLA made award to Hesco, concluding that its slightly lower rated technical

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<sup>1</sup> Under the protection requirements and past performance factors, the subfactors were listed in descending order of importance. RFP amend. 5, at 9. For the expeditionary characteristics factor, the subfactors were of equal importance. Id.

proposal, but lower-priced proposal, provided the best value to the government. See Agency Report (AR) at 5.

On September 2, IDT filed a protest with our Office challenging the award to Hesco. IDT argued that the agency unreasonably evaluated its proposal regarding its surge and sustainment plan<sup>2</sup>; the agency failed to adequately document its trade-off decision; the agency unreasonably determined that Hesco's product met the RFP requirement for providing a minimum serviceable field life of 24 months; and Hesco's proposal did not provide a required small business subcontracting plan. Protest, Sept. 2, 2009, at 7-11. On September 25, DLA advised our Office that it would take corrective action by amending the solicitation, conducting discussions with IDT and Hesco, soliciting and evaluating revised proposals, and making a new award decision. The agency stated that discussions would address the offerors' proposals regarding requirements for their surge and sustainment plans, subcontracting plans, product serviceable field life, and other matters as required. Based on the agency's corrective action, we dismissed the protest on October 1.

DLA issued RFP amendment No. 10, which advised offerors that their surge and sustainment plans should not assume or incorporate any material inventories that utilize funding under the DLA Warstopper program.<sup>3</sup> DLA also conducted discussions with IDT and Hesco regarding the issues identified in the agency's notice of corrective action. As relevant here, DLA requested that Hesco provide a revised surge and sustainment plan, a business subcontracting plan—which was not provided in Hesco's initial proposal, and additional information to demonstrate that its proposed barriers met the two-year serviceable life requirement. AR, Tab D, Price Negotiation Memorandum, at 14.

The agency received final proposal revisions from the offerors on April 1, 2010. For the protection requirements, expeditionary characteristics, socioeconomic program support, and JWOD entity support factors and subfactors, the agency ranked offerors in order of their relative merit, *i.e.*, first or second.<sup>4</sup> RFP amend. 5, at 9. For production capability/surge, the agency used an evaluation scheme of outstanding,

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<sup>2</sup> As discussed below, this plan addresses the RFP requirement to meet unanticipated demands for accelerated delivery of supplies above and beyond the contract schedule requirements during wartime and peacetime emergencies.

<sup>3</sup> Under the Warstopper program, DLA provides funding to contractors to maintain industrial capacity to support a surge in production capabilities during wartime and national emergencies. AR at 11 n.3. As relevant here, contractors may store inventories of items purchased by DLA at the contractor's facilities.

<sup>4</sup> The permeability subfactor of the expeditionary characteristics factor, was rated based on a pass/fail test. RFP amend. 5, at 9.

good, fair, and poor. Id. For past performance, the agency used an evaluation scheme of outstanding, good, fair, poor, and neutral. Id. The agency reviewed the offerors' revised technical proposals as follows:

	<b>IDT</b>	<b>HESCO</b>
<b>PROTECTION REQUIREMENTS</b>	<b>FIRST</b>	<b>SECOND</b>
Small arms protection	First	Second
Indirect fire protection	First	Second
Large explosive charge breaching	First	Second
<b>EXPEDITIONARY CHARACTERISTICS</b>	<b>SECOND</b>	<b>FIRST</b>
Deployment of Unit	Second	First
Transportability	Second	First
Permeability	Pass	Pass
Class II structural load	Second	First
<b>PAST PERFORMANCE</b>	<b>OUTSTANDING</b>	<b>OUTSTANDING</b>
Delivery and Quality	Outstanding	Outstanding
Business relations/customer satisfaction	Outstanding	Outstanding
Socioeconomic Goals	Neutral	Neutral
<b>PRODUCTION CAPABILITY/SURGE</b>	<b>GOOD</b>	<b>OUTSTANDING</b>
<b>SOCIOECONOMIC PROGRAM SUPPORT</b>	<b>FIRST</b>	<b>SECOND</b>
<b>JOWD ENTITY SUPPORT</b>	<b>FIRST</b>	<b>SECOND</b>
<b>OVERALL TECHNICAL RANKING</b>	<b>FIRST</b>	<b>SECOND</b>

AR, Tab E, Source Selection Decision Document (SSDD), at 27. The offerors' evaluated prices were as follows:

	<b>IDT</b>	<b>HESCO</b>
Indirect Fire PDM	[DELETED]	[DELETED]
Large Explosive PDM	[DELETED]	[DELETED]
Class II PDM	[DELETED]	[DELETED]
<b>TOTAL</b>	\$9,491.51	\$7,875.80

Id. at 34.

The source selection authority (SSA) found that IDT's and Hesco's technical proposals were "largely equivalent, with IDT providing only a slight technical advantage to the Government." Id. at 43. The SSA concluded that the slight benefits provided by IDT's proposal did not warrant a payment of a price premium of [DELETED], [DELETED] percent, and [DELETED] percent, respectively, for the three PDMs. Id. In view of these considerations, and the price/technical trade off analysis, DLA awarded Hesco the contract on April 8. The agency provided IDT a debriefing on April 15, and this protest followed.

## DISCUSSION

IDT challenges the reasonableness of DLA's evaluation of the offerors' technical proposals and past performance. The protester also argues that the agency's corrective action in response to its earlier protest was improper, because it was undertaken with the intent to avoid awarding the contract to IDT. Finally, the protester argues that the award of a single contract to Hesco was contrary to the statutory and regulatory requirement to make multiple awards for ID/IQ contracts over \$100 million. For the reasons discussed below, we find that none of these arguments provides a basis to sustain the protest.<sup>5</sup>

The evaluation of an offeror's technical proposal, and its past performance, is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead 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. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's evaluations or its judgments concerning the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

### Corrective Action

As an initial matter, IDT argues that DLA's corrective action in response to the September 2009 protest was improper because it was designed with the specific intent to allow Hesco to correct a noncompliant offer. The protester contends that the agency improperly allowed the awardee to revise areas of its proposal that would

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<sup>5</sup> IDT raised additional arguments that were addressed by the agency in its reports on the initial and supplemental protests, but not addressed further by the protester in its comments. For example, the protester argues that the award was improper because of an incorrect date referenced in the contract award, that the agency awarded a contract for component parts instead of a complete barrier system, as required by the RFP, and that Hesco's proposal did not establish that its product met the certification requirements. Because the agency addressed these issues in its reports, and the protester did not rebut or otherwise address the agency's responses, we find that the protester abandoned these arguments. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 4 n.4. In addition to these issues, IDT raises several other collateral arguments that we do not address. We have reviewed all of the arguments that were raised by the protester and not otherwise abandoned, and find that none has merit.

have precluded it from award, and that these actions indicate that the agency sought to avoid awarding a contract to IDT.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. An agency may amend a solicitation, and request and evaluate revised proposals where the record shows that the agency made the decision to take this action in good faith, without specific intent of changing a particular offeror's technical ranking, or avoiding award to a particular offeror. Id. We will not object to an agency's proposed corrective action where the agency concluded that the award, because of perceived flaws in the procurement process was not necessarily made on a basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Re-Engineered Business Solutions, Inc., B-310301.5, Apr. 4, 2008, 2008 CPD ¶ 72 at 4-5.

IDT argues that DLA's corrective action allowed Hesco to submit an acceptable subcontracting plan, to clarify whether its barrier met the requirement for a minimum 24-month serviceable field life, and to revise its surge and sustainment plan. The protester contends that the agency allowed the protester to do so with the intent to avoid awarding the contract to IDT.

DLA explains that the agency reviewed the contract file based on the allegations raised in IDT's September protest, which led the agency to address the areas of concern involving surge, subcontracting plan, and field service life. AR at 25. As discussed above, the agency also concluded that certain elements of the surge plan requirements in the solicitation were ambiguous and therefore should be clarified with the offerors. Id. Further, the agency states it found that in not addressing with Hesco the acceptability of its subcontracting plan, the agency may have improperly neglected an element of responsibility or may have failed to conduct meaningful discussions.<sup>6</sup> Id. Finally, the agency states that regarding the allegation that IDT made regarding the serviceable field life, including life cycle costs, the agency needed to research IDT's claims further before proceeding with the award. Id.

We find that the agency's decision to address the concerns raised in IDT's protest through corrective action was reasonable, and that the agency was within its discretion to conduct discussions with the offerors. To the extent the protester

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<sup>6</sup> The agency also notes that while the agency conducted discussions with Hesco that permitted this offeror to submit an acceptable subcontracting plan, the agency also conducted discussions with IDT that allowed the protester to correct its failure to submit a JWOD plan in its initial proposal. Supp. AR at 16.

alleges that the agency acted in bad faith, we do not think that the record supports this conclusion.

## Warranty

Next, IDT argues that DLA Hesco did not propose a warranty that complied with the solicitation requirements. Specifically, the protester contends that the awardee's proposal improperly limited the terms of the warranty required under the RFP. The agency acknowledges that both offerors took exception to the terms of the RFP, but contends that both proposed acceptable warranties.

As discussed above, the RFP required the proposed barriers to have "a minimum serviceable field life of 24 months." RFP at 9. The RFP also required offerors to provide a warranty that met the following requirement: "The contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in the contract." RFP at 18.

The protester contends that Hesco improperly limited the terms of the required warranty. In this regard, IDT contends that the warranty was defective because it stated that the product must be assembled and used under the guidance of the agency's experts, based on the following underlined provisions:

The Products are guaranteed against defects in materials or workmanship for 24 months from the date of the purchase provided that the Products are assembled and used under the guidance of the Buyer's own experts in accordance with best practice. The seller hereby warrants that all items delivered pursuant to this contract are merchantable and fit for the purpose as described in [the RFP] . . . The containment system is warranted as being applicable to, and deployable in, the military expeditionary environment such that the competent user may tailor thickness, height and configuration with the aim of meeting force protection and revetment requirements. The Seller is not responsible for the configuration and assembly of the Products so that the Buyer is advised to rely on its own expertise when assessing the suitability and effectiveness of the Products in any given configuration for any given installation.

AR, Hesco Revised Proposal, Tab K, at 42 (emphasis added).

DLA contends that Hesco's warranty was acceptable because it included the material requirements of a 2-year warranty and stated that the products would be merchantable and fit for a particular purpose. Supp. AR at 3. The agency states that it considered the qualifying language to reflect only the awardee's requirement that the product be used for its intended purpose. *Id.* In this regard, the agency points to similar language in IDT's proposal, which the agency contends placed a similar qualification on the protester's warranty, as follows:

IDT warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this proposal, when installed in accordance with IDT's installation manual.

AR, IDT Revised Proposal, Tab J, at 87.

We think that the agency reasonably concluded that Hesco's warranty met the requirements of the RFP. While the awardee's warranty included a number of qualifying conditions, it expressly stated that it was warranted for purposes described in the RFP. In our view, the agency reasonably found that both offerors complied with the warranty requirement, despite the fact that both qualified their warranties to emphasize that the barriers must be used for their intended purposes.

### Surge Plan

Next, IDT argues that DLA did not reasonably evaluate Hesco's surge and sustainment plan. Specifically, the protester contends that the awardee's proposal relied on a source of funding that was expressly prohibited under the solicitation. The agency notes that the awardee's proposal specifically states that it did not rely on such funding.

As relevant here, the RFP required offerors to submit a surge and sustainment plan for meeting possible surge demands required by the RFP, in accordance with the clause at FAR § 52.217-9I16 (DSCP alternative, July 2004). RFP amend. 0010, at 4-5.

Hesco's initial proposal provided three options for a surge plan, two that relied in part on use of an inventory of materials that were funded by Warstopper program funding, and one that did not involve such funding. AR, Tab R, Hesco Initial Proposal, at 48-49. During DLA's review of the procurement in connection with IDT's September 2009 protest, the agency concluded that the solicitation was ambiguous as to the use of Warstopper funds. AR at 11. As part of its corrective action, the agency issued RFP amendment No. 10, which expressly prohibited offerors from using Warstopper funds. During discussions, the agency asked Hesco to clarify its surge and sustainment plan in light of the new requirement. *Id.* In its revised proposal, Hesco stated that it would meet the surge and sustainment plan requirements without use of any materials funded through the Warstopper program. AR, Tab K, Hesco Revised Proposal, at 103-104.

IDT argues that the agency should have concluded that Hesco's proposal would--despite its representations to the contrary--rely on Warstopper program funding. The protester notes that Hesco's initial proposal stated that, under one of the surge and containment plan options, it would make approximately 4.7 million cubic yards of materials available for surge requirements relying, in part on existing inventories of materials which were funded under the Warstopper program. AR, Tab R, Hesco



Initial Proposal, at 48-49. In its revised proposal, Hesco stated that it would make approximately 4.7 million cubic yards of materials available, without relying on any inventories funded through the Warstopper program. AR, Tab K, Hesco Revised Proposal, at 103-104. IDT argues that it is not credible that Hesco could initially propose to meet a certain surge level through reliance on Warstopper program funds, but then subsequently propose to meet the same level without relying on such funds.

The protester's arguments consist of mere speculation that the awardee has misrepresented its surge and sustainment plan; such speculation is not a valid basis of protest. See Kellogg Brown & Root Servs., Inc., B-298694.7, June 22, 2007, 2007 CPD ¶ 124 at 8 n.6. In light of the awardee's express representations that it would comply with the requirements of RFP amendment No. 10, and would not rely on Warstopper program funds to meet the surge and sustainment requirements, we find no basis to question the agency's conclusion that Hesco's proposal was acceptable.

#### Unequal Treatment

Next, IDT argues that DLA treated the offerors unequally in its evaluation of the offerors' technical proposals and past performance. We have reviewed all of the numerous arguments raised by the protester, and find that none has merit. For example, the protester argues that DLA should not have rated both proposals neutral under the compliance with socioeconomic goals subfactor of the past performance factor because Hesco failed to provide a required subcontracting plan under its prior sole-source contract.

IDT received a neutral rating under the compliance with socioeconomic goals subfactor because it is a small business, and therefore did not require a subcontracting plan. AR, Tab E, SSDD, at 22. Hesco received a neutral rating because it had not provided a subcontracting plan under any of its prior contracts with DLA. Id. DLA explains that under Hesco's prior sole-source contracts, the contracting officer for those contracts did not require the company to provide a socioeconomic subcontracting plan based on the belief that such a plan was not required for a contract performed in the United Kingdom. AR at 13. The contracting officer subsequently concluded that a plan should have been required under the terms of the contract due to the applicability of the Berry Amendment, 10 U.S.C. § 2533a. Id.

For purposes of the competition here, DLA concluded that because the agency had not required Hesco to provide a socioeconomic subcontracting plan, and because the offeror had no other past performance that required such a plan, it was appropriate to rate the awardee as neutral under the compliance with socioeconomic goals subfactor. Id.; AR, Tab E, SSDD, at 22. Under these circumstances, we think that the agency reasonably viewed the awardee as having no relevant past performance--which was consistent under the terms of the RFP with a neutral rating.

## Propriety of a Single Award

Finally, IDT alleges that DLA's award of a single contract under this solicitation did not comply with the statutory and regulatory requirements concerning multiple awards of ID/IQ contracts valued in excess of \$100 million. As discussed below, however, we conclude that this argument was not timely raised.

For ID/IQ contracts valued in excess of \$100 million, including all options, agencies are required to award multiple contracts, unless the head of the agency contracting activity makes a determination and finding (D&F) in writing that award of a single contract is appropriate. 10 U.S.C. § 2304a(c)(3)(A) (2006); Federal Acquisition Regulation (FAR) § 16.504(c)(1)(ii)(D)(1). The RFP advised offerors that the "Government intends to make one award . . . [but] reserves the right to make multiple awards if it is determined to be in the best interest of the Government." RFP at 9.

IDT's initial protest did not challenge the agency's decision to make a single award. Instead, the protester first challenged the agency's decision in a supplemental protest, which was filed after receipt of the agency report. This supplemental protest argued that the agency report did not address whether the agency had complied with the requirements of FAR § 16.504 in making a single award. Supp. Protest at 6. In its supplemental report, the agency provided a copy of the D&F, which explained the basis for the single award. In its comments on the supplemental report, IDT argued that the agency's basis for making a single award was not consistent with the D&F requirements of FAR § 16.504.

DLA argues that the supplemental protest alleging that the agency report did not address the justification for a single award was untimely. We agree. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2010).

Here, IDT knew at the time of award that the agency had made a single award of an ID/IQ contract valued at more than \$100 million. The protester, however, did not challenge the award of a single contract in its initial protest, and instead waited 47 days from its debriefing to first raise the issue of whether the award was proper. While IDT's supplemental protest argued that the agency's report on the protest had not disclosed its basis for making a single award, there was no reason for the agency to address this issue in its protest in light of the protester's failure to raise this issue in its initial protest. Moreover, the supplemental protest argument merely questioned whether the agency had made a proper determination under FAR § 16.504--there was no reason why the protester could not have raised the same concern in its initial protest. In this regard, the protester knew at the time of the award to Hesco that the agency had made a single award, rather than multiple

awards, and could have raised the exact same challenge raised in its supplemental protest. On this record, we find the protest untimely.<sup>7</sup>

In sum, here the record shows that the evaluators reasonably evaluated the offerors' proposals, and that the SSA reasonably found that the slight technical benefits in IDT's proposal did not merit award as compared to Hesco's lower-priced proposal.

The protest is denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>7</sup> For the same reason, we consider the protester's more specific argument that the D&F did not comply with FAR § 16.504, which was first raised in its comments on the agency's supplemental report, is also untimely because the protester did not raise the issue of the single award in a diligent manner. See HG Properties A, LP, B-290416, B-290416.2, July 25, 2002, 2002 CPD ¶ 128 at 5 n.1.