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Decision

Matter of: DynaLantic Corporation

File: B-402326

Date: March 15, 2010

Jason A. Carey, Esq., and Matthew T. Crosby, Esq., McKenna Long & Aldridge LLP, for the protester.

Hilary S. Cairnie, Esq., Baker Hostetler, for Fidelity Technologies Corporation, an intervenor.

Debra J. Talley, Esq., and Harlan Gottlieb, Esq., Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Small Business Administration (SBA) decision finding that awardee is a small business concern and a manufacturer for purposes of its status as a small business under the protested procurement is binding on GAO because the SBA has conclusive authority to determine small business size status for federal procurements.
2. Protest that awardee's proposal would not comply with the solicitation's limitation on subcontracting is denied where the proposal did not show that the awardee took exception to the requirement.
3. Agency's evaluation of the protester's and the awardee's technical proposals was reasonable and supported the conclusion that the awardee's proposal was technically superior to the protester's.

DECISION

DynaLantic Corporation of Sayville, New York protests the award of a contract to Fidelity Technologies Corporation of Reading, Pennsylvania, under request for proposals (RFP) No. W900KK-09-R-0042, issued by the United States Army, Program Executive Office for Simulation, Training, and Instrumentation, for an MI-17 CT (counter terrorism) flight training device (FTD) simulator.

We deny the protest.

The MI-17 CT FTD is a virtual simulator of the aircraft cockpit in a MI-171 CT helicopter that simulates the flight of this aircraft and is designed to teach flying and maneuvering skills to Iraqi pilots. The MI-171 CT helicopter is a Russian manufactured medium lift aircraft that has been configured with North Atlantic Treaty Organization (not Russian) avionics unique to the Iraq and Afghanistan missions.¹ Modification of the MI-171 aircraft is being performed under contract by ARINC Incorporated, which is responsible for the “newly designed features, instruments, communication and navigation systems, defensive systems, and other changes to the cockpit configuration.”² RFP at 29. The FTD is to be delivered to Taji, Iraq as part of the suite of trainers for the Iraq Flight Simulator Program in support of the Iraqi Air Force Flight Training Program.

The RFP, issued on May 7, 2009 as a total small business set-aside, sought to procure the manufacture, assembly, integration, installation, check out, and delivery of one commercial off-the-shelf (COTS) MI-17 CT FTD simulator under a fixed-price contract that at a minimum meets the requirements for a Federal Aviation Administration (FAA) Level 5 FTD, with options to purchase two additional FTDs. Contractor logistics support, spare parts, operator and maintenance training courses and corresponding training manuals, MI-17 CT FTD technical data, and a geo-specific visual terrain data base were also required to be provided under the contract.

The RFP indicated that the American Industrial Classification System (NAICS) code for this procurement was for manufacturing. It incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-6, “Notice of Total Small Business Set-Aside” and FAR § 52.219-14, “Limitations on Subcontracting.” These clauses put the offerors on notice that the procurement was set aside exclusively for small business concerns and, with respect to the limitations on subcontracting, that “[t]he concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the materials.” FAR § 52.219-14(b)(2).

¹ The MI-17 helicopter, manufactured by Ulan Ude Helicopter, is utilized throughout the world for diverse missions, such as emergency airlift, civilian transport, military transport, and flying hospital.

² The RFP statement of work placed the responsibility on the contractor to obtain data for the basic MI-171 aircraft necessary to produce the MI-17 CT FTD and advised that ARINC would provide the successful contractor with final detailed configuration design data concerning modification of the basic MI-171 aircraft. RFP at 10.

Award was to be made on a best-value basis considering the following evaluation factors listed in descending order of importance: (1) technical, (2) management, (3) past performance, and (4) price. The technical factor listed six standards to be considered in the evaluation of that factor. Of relevance here were “(1) [t]he government will evaluate the offeror’s technical approach for integration of ARINC newly designed features, instruments, communication and navigation systems, defensive systems, and other changes to the cockpit configuration”; “(2) [t]he government will evaluate the offeror’s proposed compliance with the basic requirements to meet FAA level 5 [FTD] standards”; and “(5) [t]he government will evaluate the offeror’s plans for, and ability to obtain all necessary MI-17 and MI-17 CT aircraft technical data to insure the accuracy of the simulation design for the production of the MI-17 CT [FTD].” RFP at 29.

Seven proposals, including DynaLantic’s and Fidelity’s, were received by the June 12 closing date. The technical and management factors were evaluated using an adjectival rating scale with identified deficiencies, strengths, significant strengths, weaknesses, and significant weaknesses.³ The past performance evaluation resulted in a risk assessment of no risk, low risk, moderate risk, high risk, or unknown risk.

Fidelity’s proposal was based on “acquiring a [DELETED] MI-17 [FTD] and modifying the [DELETED] trainer to be compliant with the MI-17 [CT] configuration.” It proposed to team with [DELETED], a [DELETED] manufacturer of the MI-17 FTD, and [DELETED], which would be responsible for the center pedestal of the cockpit CT configuration. Agency Report (AR), Tab 11, Fidelity Proposal, at 1. On the other hand, DynaLantic proposed to obtain a license from [DELETED], a [DELETED] manufacturer of the MI-17 FTD simulator, to allow DynaLantic to

³ The RFP defined the ratings relevant here as follows:

Outstanding – A proposal that satisfies all of the Government’s requirements with extensive detail to indicate feasibility of the approach and shows a thorough understanding of the problems and offers numerous significant strengths, which are not offset by weaknesses, with an overall low degree of risk in meeting the Government’s requirements.

Good – A proposal that satisfies all the Government’s requirements with adequate detail to indicate feasibility of the approach and shows an understanding of the problems and offers some significant strengths or numerous minor weaknesses, which are not offset by weaknesses, with an overall low to moderate degree of risk in meeting the Government’s requirements.

RFP at 28.

manufacture the simulator at its own facility in the United States based on [DELETED] commercial product design and software, and to modify the design to incorporate the ARINC-designed CT modification to the MI-17 aircraft. AR, Tab 14, DynaLantic Proposal, at 1.

The evaluation of DynaLantic’s and Fidelity’s proposals was as follows:

	DynaLantic	Fidelity
Technical	Good	Outstanding
Management	Very Low	Very Low
Past Performance	Good	Outstanding
Price	\$10,455,000	\$10,360,426

AR, Tab 21, Source Selection Decision, at 2. DynaLantic’s proposal had four noted strengths and two weaknesses under the technical factor, while Fidelity’s proposal had nine noted strengths and no weaknesses under this factor. *Id.* at 6-7, 11-12.

The SSA in a trade-off analysis found that Fidelity’s proposal represented the best value as between Fidelity and DynaLantic, given that DynaLantic’s proposal showed more risk of technical performance, as was indicated by its lower technical rating, and given that DynaLantic’s proposal had a lower management rating and a slightly higher price than Fidelity’s proposal. *Id.* at 16. The Army awarded the contract to Fidelity on November 20.

On November 24, DynaLantic filed a timely size protest with the Small Business Administration (SBA), challenging the small business size status of Fidelity. Under FAR §§ 19.001 and 19.102(f)(1), to be considered a small business concern under a small business set-aside procurement, an offeror must either manufacture its own product and have no more than 500 employees, or if it does not manufacture the item being purchased, the offeror must comply with the “nonmanufacturer rule”: (1) have no more than 500 employees, (2) furnish the end item of a small business manufacturer, and (3) furnish an end item that is manufactured in the United States. DynaLantic challenged Fidelity’s small business status, asserting that Fidelity had more than 500 employees and that its proposal did not comply with the nonmanufacturer rule. DynaLantic argued that Fidelity was not the manufacturer under its proposal because the changes it proposed to make to the FTD unit were minor and its proposal indicated that the FTD was being manufactured in [DELETED], not the United States. DynaLantic thus argued that Fidelity was not a small business concern for purposes of this procurement.

DynaLantic concurrently filed this protest with our Office challenging the award to Fidelity. Besides challenging the evaluation of the proposals, DynaLantic raised the same issue that was before the SBA, *i.e.*, that Fidelity’s proposal was unacceptable for failure to comply with the nonmanufacturer rule. In addition,

DynaLantic argued that Fidelity's proposal was unacceptable because it demonstrated, on its face, that Fidelity would not comply with the solicitation's limitation on subcontracting.

On February 26, 2010, the SBA regional office found that Fidelity qualified as a small business. In so doing, the SBA found that Fidelity was the manufacturer of the MI-17 CT FTD it was furnishing under the contract because Fidelity was using its plant in Pennsylvania to transform the COTS simulator into the CT simulator sought by the Army. See SBA Size Determination (Feb. 26, 2010) at 1-2. In its protest and its comments on the SBA size determination, DynaLantic nevertheless argues to our Office that Fidelity's proposal still should be considered unacceptable because it clearly indicated that Fidelity was not the manufacturer of this item. However, the SBA, not our Office, has conclusive authority to determine the size status of an offeror for federal procurement purposes, including whether the offeror is a manufacturer under the small business size standards. See 15 U.S.C. § 632(a)(2) (2006); Unholtz-Dickie Corp., B-235561, August 30, 1989, 89-2 CPD ¶ 194 at 3.

With respect to DynaLantic's contention that Fidelity's proposal should have been rejected as unacceptable with regard to the subcontracting limitation, the protester argues that Fidelity's proposal indicated, on its face, that it would not manufacture the end item in the United States and identified two team members who would provide more than 50 percent of the cost of manufacturing.

We have recognized that, as a general rule, an agency's judgment as to whether a small business offeror is able to comply with a subcontracting limitation presents a question of responsibility, which would be subject to review by the SBA under its certificate of competency procedures in the event that a small business is found to be not responsible. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51, at 5. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of proposal acceptability and a proposal that fails to clearly conform to the requirement is unacceptable and may not form the basis for an award. Id.

As noted above, the SBA found that Fidelity was manufacturing the MI-17 CT FTD at its facility in Pennsylvania. In addition, our review of Fidelity's proposal provides no basis to conclude that the proposal on its face should have led the agency to conclude that Fidelity could not or would not comply with the requirement that the contractor perform work for at least 50 percent of the cost of manufacturing the supplies, not including the materials. See Chant Engineering Co., Inc., B-402054, Dec. 29, 2009, 2010 CPD ¶ 16 at 3.

Turning to the protester's remaining contentions, DynaLantic challenges the evaluation of its and Fidelity's proposals under the most important technical factor. The evaluation of technical proposals is a matter within the discretion of

the contracting agency. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. In reviewing an agency's evaluation, we will not reevaluate technical proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. Decision Sys. Techs., Inc.; NCI Info. Sys., Inc., B-257186 at al., Sept. 7, 1994, 94-2 CPD ¶ 167 at 7. An offeror's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. McDonnell Douglas Corp., B-259694.2, B-259643.3, June 16, 1995, 95-2 CPD ¶ 51 at 18.

DynaLantic argues that the Army rated its proposal unequally and unfairly when compared to Fidelity's proposal because the evaluation team assigned a weakness for the proposal's plan to manufacture the FTD in the United States. DynaLantic claims that the Army applied a double standard because, in the protester's view, Fidelity's proposal did not agree to manufacture the FTD in the United States. However, as noted, the SBA found that Fidelity's proposal indicated that it was manufacturing the FTD in the United States. As to DynaLantic's proposal, the agency expressed concern that DynaLantic had no previous experience manufacturing this particular FTD. AR, Tab 21, Source Selection Decision, at 7. In this regard, the evaluation team found:

[DynaLantic] plans to manufacture (under license in the US) a device designed and built by a [DELETED] company. [DynaLantic's] ability to build someone else's Mi-17 FTD significantly increases the risk to contract performance. [DynaLantic] plans to take a [DELETED] design and have that tech data shipped to the US and built by a US firm who has not previously manufactured a Mi-17 FTD. Utilizing a data package from a foreign company has potentially high risk. Translations, processes and techniques from one culture to another could result in performance issues and schedule delays for the government contract.

AR, Tab 17, Proposal Evaluation Report, at 20. Both the evaluation team and the SSA regarded this as a weakness. Id.; AR, Tab 21, Source Selection Decision, at 7. While DynaLantic argues that this assessment was unreasonable because its proposal explained that the company has an ongoing relationship with [DELETED] and had incorporated [DELETED] software into a similar DynaLantic simulator, we believe the agency reasonably assigned a weakness for this aspect of the proposal.

DynaLantic also argues that the proposals were evaluated unequally under the technical factor standards 1, 2, and 5, as set forth above. As evidence of unequal treatment, DynaLantic notes that its [DELETED] ARINC, and license with [DELETED] (whose Mi-17 simulators have been certified by the Russian Mil Design Bureau), was assessed as a significant strength in its proposal. In contrast, DynaLantic argues that Fidelity's proposal did not have a [DELETED] ARINC, or evidence that it had access to Mil Design Bureau certification and Russian aircraft

data. Therefore, DynaLantic contends that Fidelity should not have received an outstanding rating under the technical factor.

The record here shows that the evaluation team assigned a significant strength to Fidelity's proposal because the proposal advised that the company had initiated discussions with ARINC and formulated the outline for an agreement which would be executed after the contract is awarded. The record also shows that each party had reviewed the agreement, and both were prepared to execute the agreement after award was made.

Given this information, the evaluation team found that Fidelity had established a process to monitor and meet the delivery schedule, and that Fidelity's close relationship with ARINC—[DELETED]—increased the likelihood that the company would provide accurate simulation of the MI-17 CT aircraft. While Fidelity's proposal may, in fact, have a less desirable approach in this one area than DynaLantic's proposal, the record shows that Fidelity's proposal had numerous other strengths that contributed to its outstanding rating. Among these evaluated strengths were a highly detailed geographic-specific data base, computer generated forces capability and vibration seats "that are consistent with the characteristics of the MI-17." AR, Tab 17, Proposal Evaluation Report, at 25-28. DynaLantic has not shown that the strengths in these areas were not warranted.

In sum, the record shows that the SSA reasonably determined that Fidelity's technical proposal, with nine strengths and no weaknesses, should be rated outstanding, and that DynaLantic's technical proposal with fewer strengths and an approach that presented more risk than Fidelity's technical proposal, should be rated good.⁴

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁴ While the protester has also questioned the validity of a weakness assigned to its proposal for not committing to furnish two technicians for CLS, the record shows that its proposal would still be rated lower than Fidelity's under the technical factor even if this weakness had not been assigned. Fidelity's proposal had more strengths than DynaLantic's and no weaknesses; DynaLantic's proposal had a weakness that posed risk to the government.