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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Americom Government Services, Inc.

File: B-292242

Date: August 1, 2003

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Stephanie A. Kreis, Esq., Defense Information Systems Agency, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably eliminated from competitive range proposal that failed to comply with material technical requirements in solicitation; contrary to protester's contention, agency was not required to augment the proposal by considering information contained in competitors' proposals, or to conduct discussions to enable offeror to cure evaluated deficiencies.

DECISION

Americom Government Services, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. DCA500-03-R-0001, issued by the Defense Information Technology Contracting Organization (DITCO) for the acquisition of a space segment for the Alaskan National Airspace System Interfacility Communications System (ANICS), a Federal Aviation Administration (FAA) backbone communications system consisting of satellite earth stations, transmission channels, and services for communications in Alaska and Seattle, Washington.¹ Americom contends that one of the proposal alternatives that it offered easily could

¹ The agency explains that the ANICS network, the FAA's primary communications network in these areas, is used for almost all of FAA's operational capabilities including those associated with air traffic control, and that its reliability is critical to air traffic safety throughout the area. The FAA owns, operates and maintains the ANICS network and only the space segment portion of the network that is the subject of this procurement is commercially leased. Agency Report (AR) at 2.

have been made fully compliant, and was improperly excluded from the competitive range on the basis of technical noncompliance.

We deny the protest.

BACKGROUND

The RFP, issued on February 14, 2003, as a commercial acquisition under Federal Acquisition Regulation (FAR) part 12, sought fixed-priced proposals for a requirements contract for a base period of 2 years with 8 1-year options to supply the satellite space segment portion of the ANICS network. The RFP provided that award would be made to the responsible, technically acceptable offeror with an acceptable/neutral record of past performance whose proposal represented the lowest discounted life cycle cost to the government, with technical capability rated on a pass/fail basis. The solicitation included the clause at FAR § 52.212-1(e) stating that the government intended to evaluate offers and award a contract without discussions.

The solicitation specified a number of mandatory technical requirements, including, among others, that: the contractor provide two satellites that are at least 4 degrees apart in orbit in order to mitigate the effects of sun outages and radio frequency interference; satellites have sufficient signal strength to serve Seattle, Washington and all of the state of Alaska; all satellite transponders be non-preemptible; and the contractor provide satellite transponder space during the life of the contract, including a restoral plan for failure of any transponder that describes restoral for any outages that may occur. The RFP also required a satellite space segment plan which includes, for leased space segments for resale to the government, a detailed description of the lease plan between the contractor and satellite vendor. The RFP directed offerors to submit a technical response sufficiently detailed to evaluate compliance with the solicitation requirements, specifically including a satellite space segment plan and a restoral plan. The extended closing date for proposal submission was March 26, 2003.

The agency received 19 proposals submitted by 12 offerors by the closing date, including Americom's proposal, which contained two alternatives. As a result of the initial evaluation, 14 proposals from seven offerors, including the two alternatives submitted by Americom, were determined to be technically unacceptable for failure to comply with mandatory solicitation requirements and were eliminated from the competitive range because correction would require substantial revision and essentially the submission of new proposals. AR at 5.² A telephonic debriefing was

² In making the competitive range determination, the agency concluded that the proposed prices were sufficiently close to each other that the relative pricing did not have an impact. AR, Tab 8, Competitive Range Determination, at 4. Americom does
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provided to Americom on April 21. Thereafter, Americom filed this protest with our Office on April 29, alleging that one of its two proposal alternatives was improperly evaluated as technically unacceptable and unreasonably eliminated from the competitive range; in Americom's view the proposal could "easily" have been rendered technically compliant if the agency had considered relevant information in competitors' proposals for a similar solution, and had provided Americom an opportunity to cure other evaluated deficiencies through either communications or discussions. Protester's Comments at 23.

AMERICOM'S PROPOSAL

Americom proposed to provide space segment capacity on the AMC-8 satellite, and eventually to provide capacity on AMC-13 as the required second satellite. Because AMC-13 has not been launched and Americom estimated that it would not be available for approximately 12 months, Americom's proposal called for a transition period during which it offered two proposal alternatives, one of which was to provide capacity on Telstar-7 (as a leased segment), and the other was to provide capacity on AMC-7. Protest at 3. While the parties have argued at length over which of those two technical transition approaches constituted Americom's primary proposal, and which was intended as an alternate proposal, the answer to this question does not affect the resolution of the protest. Americom concedes that its proposal to use AMC-7 during transition is noncompliant with the material solicitation requirement for 4 degrees of separation between the two proposed satellites, and explicitly states that it does not challenge the agency's determination to exclude this proposal from the competitive range as technically unacceptable. Protester's Comments at 1, n.1. The relevant question is whether the agency reasonably evaluated Americom's proposal of Telstar-7 as a transition as technically noncompliant, and reasonably excluded the proposal from the competitive range on that basis, irrespective of whether this proposal was intended by Americom as primary or as an alternate.

EXCLUSION FROM THE COMPETITIVE RANGE

Contracting agencies are not required to retain a proposal in a competitive range where the proposal is not among the most highly rated or where the agency otherwise reasonably concludes that the proposal has no realistic prospect of award. FAR § 15.306(c)(1); SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD

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not question this assessment. Subsequently, on April 18, following evaluation of responses to discussion questions, a second competitive range determination was made, as a result of which one other proposal was eliminated from the competitive range. AR at 6. The remaining four offerors were asked to submit final proposal revisions by April 23, 2003. Id.

¶ 59 at 5-6. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, exclusion from the competitive range is generally permissible. CMC & Maint., Inc., B-290152, June 24, 2002, 2002 CPD ¶ 107 at 2. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors. American Med. Depot, B-285060 *et al.*, July 12, 2000, 2002 CPD ¶ 7 at 6-7. In reviewing an agency's decision to eliminate a proposal from the competitive range, we will not evaluate the proposal anew, but rather, will examine the agency's evaluation to ensure it was reasonable and in accord with the provisions of the solicitation, and in this regard, a protester's mere disagreement with an agency's evaluation does not establish that the evaluation was unreasonable. CMC & Maint., Inc., *supra*.

Here, as discussed below, we have reviewed the record and find no basis to question the reasonableness of the agency's determination to exclude Americom's Telstar-7 proposal from the competitive range.

Americom's protest initially characterized its proposal as one which consisted of a fully compliant primary proposal, along with a supplemental alternative proposal which "did not meet one of the specifications for the project, but offered other benefits to the government that [Americom] believed warranted DITCO's evaluation." Protest at 1. The agency found both alternatives technically unacceptable and in need of major revision and excluded both from the competitive range on that basis, as documented in a finding that summarizes the evaluated areas of technical noncompliance for both proposals. The listed bases for concluding that Americom's proposals failed to satisfy the technical requirements are: failure to meet the requirement for 4 degrees of separation; insufficient signal strength; proposal of a preemptible transponder; conflicting data about satellites proposed; restoral plan based on unlaunched satellite; pricing subject to availability; and unlaunched satellite to replace a primary or alternate satellite. AR, Tab 8, Competitive Range Determination, at 1.

As noted above, the finding that the proposed satellites failed to meet the requirement for 4 degrees of separation provides the uncontested basis for excluding Americom's AMC-8 alternative as technically unacceptable. With respect to the Telstar-7 alternative, the applicable areas of technical noncompliance included that: a proposed transponder was preemptible; conflicting and insufficient satellite data was provided; Americom had failed to provide the required space segment plan; there was insufficient satellite signal strength; the proposal was based on an unlaunched satellite; and pricing was subject to availability.

While Americom asserts that the Telstar-7 alternative is fully compliant, it also actually concedes that the proposal contains certain of the enumerated deficiencies. Thus, for example, Americom states that it "proposed a fixed price, but included in the proposal standard language regarding capacity being subject to availability [and]

is prepared to remove this language from the proposal, and would have done so if DITCO had inquired.” Protest at 9. With respect to the agency’s concern about Americom’s proposal of an unlaunched satellite, Americom simply asserts that “[t]he [agency’s] conjecture that AMC-13 might never launch is far-fetched, and one to which [Americom] could have responded in discussions with DITCO. Surely a replacement capacity on an existing or new satellite would be established in the several years remaining before the retirement of Telstar-7.” Protester’s Comments at 7. Similarly, Americom’s response to the agency’s conclusion that Telstar-7 provided insufficient signal strength essentially concedes that Americom’s proposal fails to address this issue. In this regard, Americom notes that “in certain instances [Americom’s] proposal devoted more words and detail to its second [technically unacceptable AMC-8] alternative, which it mistakenly believed would be the most attractive to DITCO.” Protester’s Supplemental Comments, July 1, 2003, at 3. Americom argues that information regarding Telstar-7 signal strength was available in other proposals, some of which also proposed Telstar-7. Protester’s Comments at 12. With respect to the agency’s determination that Americom had failed to provide the required space segment plan for Telstar-7, Americom’s response is that “[t]o the extent that DITCO requires additional information regarding Telstar-7—e.g. [Americom’s] lease with Loral Skynet, the monitoring procedures, and the restoral plan—it is information that would easily be provided during discussions.” Protester’s Comments at 9. In our view, each of these conceded technical deficiencies is material, and any one is sufficient to warrant a determination that Americom’s Telstar-7 proposal is technically unacceptable, and provides a reasonable basis to eliminate the proposal from the competitive range.

The real thrust of Americom’s protest is that the agency was required to either permit Americom to provide additional information through clarifications during communications, or was required to conduct discussions to permit Americom to cure the deficiencies, and that missing required information was readily available from the other proposals, and therefore should have been considered in conjunction with the evaluation of Americom’s proposal. We disagree.

By placing language in its proposal which stated that providing the required capacity was subject to availability, Americom made both its technical offer and its fixed pricing contingent, in response to a solicitation which required fixed prices for the specific proposed technical solution. This is an impermissible deviation from a material RFP term that renders the proposal unacceptable and ineligible to form the basis for award. SWR, Inc., B-284075, B-284075.2, Feb. 16, 2000, 2000 CPD ¶ 43 at 6-7; Beckman Coulter, B-281030, B-281030.2, Dec. 21, 1998, 99-1 CPD ¶ 9 at 6. Americom’s protest characterization of this contingency as standard language that it was willing to remove from its proposal is without consequence or legal effect. This impermissible contingency rendered Americom’s proposal technically unacceptable and properly subject to elimination from the competitive range; an agency is under no obligation to conduct discussions with an offer to permit it to cure the

noncompliance which provided the basis for the proposal's exclusion. SOS Interpreting, Ltd., B-287505, June 12, 2001, 2001 CPD ¶ 104 at 12.

As noted above, Americom explains that its failure to provide material information about Telstar-7 that the RFP explicitly required in order to establish technical acceptability resulted in part from its focus on its alternative offer of AMC-8. In addition to asserting that these deficiencies could have been resolved through discussions which, as explained above, the agency is not required to conduct in these circumstances, Americom provides two rationales for how these perceived deficiencies should have been addressed by the agency. Americom's first argument is that FAR § 15.306(b) requires the contracting officer to communicate with offerors being considered for the competitive range with respect to these kinds of matters before eliminating the proposal. Protest at 8. In fact, the only requirement for the conduct of such communications pertains to offerors whose past performance information is the determining factor preventing their proposals from being placed within the competitive range. FAR § 15.306(b)(1)(i). The only other offerors with whom such communications "[m]ay . . . be held [are offerors] whose exclusion from, or inclusion in, the competitive range is uncertain." FAR § 15.306(b)(1)(ii). First, this language clearly places the decision to hold such communications in the discretion of the contracting officer, and is not a requirement. More important, "[s]uch communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal." FAR § 15.306(b)(2). The agency could not properly have conducted communications here to permit Americom to cure its proposal deficiencies, all of which fall within the proscribed areas.

Americom's alternative argument is that other offerors proposed Telstar-7, and because the relevant necessary information was contained in those proposals, the agency was required to apply that information to Americom's proposal. Protester's Comments at 8-9. In fact, the case cited by Americom as authority for this proposition requires only that a contracting officer not simply ignore "personally known information about an offeror's prior experience merely because it was not mentioned in the proposal." Safeguard Maint. Corp., B-260983.3, Oct. 13, 1995, 96-2 CPD ¶ 116 at 12. This holding with respect to an offeror's past performance does not provide any basis to require an agency to transfuse material information contained in one proposal into the evaluation of a competitor's proposal.

Americom also asserts that the exclusion of its proposal is improper because DITCO included other proposals for the same technical solution, and then held disparate discussions with those offerors regarding the deficiencies. Protester's Comments at 7. This argument mischaracterizes proposals as the same as Americom's because they included Telstar-7. While other offerors proposed Telstar-7 in conjunction with AMC-13, the record establishes that their proposals contained substantial required information that Americom's proposal omitted, including the identification of restoral satellites for Telstar-7, and that those proposals did not include the same

extent of other evaluated deficiencies contained in Americom's proposal. Thus, they were not identical, nor even broadly comparable, and there is no reason to conclude that disparate discussions were conducted.

On this record, there is simply no basis to conclude that the agency was legally required to find that Americom's proposal was among the most highly rated or that the proposal had any realistic chance of being selected for award. Americom's Telstar-7 proposal contained numerous informational deficiencies and other instances of material technical noncompliance which provided a reasonable basis for the agency to exclude the proposal from the competitive range, and the agency was not obligated to permit Americom to cure these deficiencies through communications or discussions, or by transfusing information from other competing proposals.

The protest is denied.

Anthony H. Gamboa
General Counsel