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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: TyeCom, Inc.

File: B-287321.3; B-287321.4

Date: April 29, 2002

Howard Stanislawski, Esq., and Richard L. Larach, Esq., Sidley Austin Brown & Wood, for the protester.

Moses Harvin, for American Services Technology, Inc., an intervenor.

Joseph A. Lenhard, Esq., and Timothy Fischer, Esq., Department of Energy, 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

Protest against proposal reevaluation is denied where the reevaluation was performed by the agency in response to, and consistent with, corrective action suggested during alternate dispute resolution conducted in conjunction with a predecessor protest of the same procurement to the General Accounting Office, and the protester has not provided any persuasive evidence that the reevaluation was improper or unreasonable.

DECISION

TyeCom, Inc. protests the award of a contract to American Services Technology, Inc. (ASTI), under request for proposals (RFP) No. DE-RP09-00SR22183, issued by the Department of Energy (DOE) as an 8(a) small disadvantaged business (SDB) set-aside for administrative facility support services at DOE's Savannah River Operations Office. TyeCom contends that the agency's most recent technical and cost evaluation is "fatally flawed." Protest at 1.

We deny the protest.

BACKGROUND

This procurement has had a protracted history, commencing with DOE's issuance of the solicitation on March 18, 2000. On February 15, 2001, the agency initially selected [deleted] proposal for award from amongst a final competitive range consisting of three proposals, the others of which were the TyeCom and ASTI

proposals. TyeCom protested the award determination to our Office on February 26, whereupon the agency determined to reopen discussions and, on March 6, TyeCom withdrew this protest.¹ After conducting additional discussions and providing the offerors an opportunity to submit final proposal revisions (FPR), the DOE source evaluation panel (SEP) evaluated TyeCom's proposal as "acceptable" with a proposed cost-plus-fee of \$8,003,798. ASTI's proposal was evaluated as "exceptional" with a proposed cost-plus-fee of \$8,921,239. Agency Report, B-287321.2, Aug. 10, 2001 (AR.2), Tab 4, Source Selection Decision, at 1-2. The two offerors had proposed virtually the identical existing workforce, with the exception of three managers. The SSO reasoned that since TyeCom's proposal had been evaluated as "acceptable" by the SEP, "from a technical standpoint, TyeCom should be successful in performance," and also believed that "[since] TyeCom has accepted indirect rate ceiling rates, which protect the Government against increased indirect costs (an eventuality I consider likely), cost risk is reduced to an acceptable level." Id. at 2. In these circumstances, the SSO decided that "[i]n terms of the evaluation criteria of the RFP, TyeCom would be in line to receive the award." Id.

However, the SSO questioned TyeCom's responsibility based on other available information, including that TyeCom had done very little business during the [deleted] years that it had been in the 8(a) program, had been, [deleted], essentially dormant for the past [deleted], had no [deleted] for the year [deleted], and had [deleted] current business and only [deleted] employee, [deleted]. Id. at 2-3. As a result, the SSO requested the Small Business Administration (SBA) to review TyeCom's responsibility under SBA's certificate of competency (COC) procedures. SBA issued a COC for TyeCom on July 2, 2001, after which DOE determined to make award to TyeCom. In particular, the SSO determined that TyeCom's lower technically rated, lower cost proposal was in line for award on the basis that: "the overall advantage the 'Exceptional' rated proposal of ASTI represents over the 'Acceptable' rated proposal of TyeCom is one of degree. . . . [T]he incremental increase in overall performance potential represented by the ASTI offer does not warrant the increased cost of \$917,441." AR.2, Tab 8, Source Selection Decision Addendum, July 17, 2001, at 4. On July 27, after receiving a debriefing, ASTI protested this award determination to our Office.

¹ Performance under each of the contract award decisions from February 15, 2001, until the present has been stayed by DOE because of the protests. As a result, performance of the work at issue has continued by the incumbent, Madison Research Group (MRG), a non-SDB, with Systems Support Alternatives, Inc. (SSA), another non-SDB, performing as MRG's subcontractor for certain of the operations. In the current SDB set-aside competition, TyeCom has proposed SSA as its subcontractor, and ASTI has proposed MRG as its subcontractor.

Alternative Dispute Resolution Disposition of ASTI's Protest

As a result of ASTI's protest, our Office conducted an "outcome prediction" alternative dispute resolution (ADR) conference with the parties.² During this conference, the GAO attorney handling the protest explained to the parties that ASTI's protest was likely to be sustained because the agency had awarded to TyeCom, which had submitted a substantially lower-rated technical proposal, on the basis of TyeCom's low proposed cost under a cost-reimbursement contract, without performing any meaningful cost realism analysis on TyeCom's proposed costs, which the record established were subject to serious question. As a result of the ADR conference, the agency determined to take corrective action in the form of conducting probable cost analysis of all proposals and making a new award determination based on consideration of the resulting cost and technical evaluations, along with a documented cost/technical tradeoff, if appropriate. Thereupon, on September 4, our Office dismissed ASTI's protest as academic.

ADR Rationale

During the ADR conference, the GAO attorney pointed out that the solicitation provided that technical was more important than cost, which was being proposed on a cost-reimbursement-plus-fee basis. The solicitation further provided that the agency would evaluate offerors' cost data to assess the accuracy and reasonableness of the proposed cost and the probable cost to the government. RFP § M.3(2). ASTI's proposal had received an overall technical rating of "exceptional" while TyeCom's overall technical rating was "acceptable"; TyeCom's proposed cost (including fee) was \$8,003,798, while ASTI's proposed cost was \$8,921,239. The offerors were proposing substantially the same labor force, and the most significant cause for the cost difference was that TyeCom had applied a flat 2.5 percent per year direct wage escalation rate over the life of the contract, including options, while ASTI had applied a significantly higher wage escalation rate which substantially reflected the rates contained in an independent survey conducted by Data Resource Inc. (DRI) of labor escalation rates for the industry. The Defense Contract Audit Agency (DCAA), which reviewed the proposed costs for DOE, had used DRI data as a measure of

² In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief, including the form of corrective action that our Office would likely recommend where the protest is likely to be sustained. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case.

likely direct labor cost escalation, and during discussions DOE had asked TyeCom about its flat, low proposed direct labor escalation rate, requesting supporting documentation. Agency Report, B-287321.3, B-287321.4, Mar. 8, 2002 (AR.3), Tab 12, TyeCom Discussion Questions, encl. 1, at 1. In response, TyeCom acknowledged that its proposed escalation rate was below the DRI estimates used by DCAA; noted that it had used a “conservative” 2.5 escalation rate “in the interest of being price competitive”; stated that it desired to “retain the current work force in place,” and had “proposed to pay current prevailing wages, an excellent fringe benefits package and will offer competitive annual adjustments”; and indicated its willingness to discuss a higher rate during contract negotiations. AR.3, Tab 14, TyeCom Discussion Response, Aug. 28, 2000, at 5-6.

The agency eventually accepted TyeCom’s flat 2.5 percent escalation rate, without making a probable cost adjustment, despite the fact that nothing in the record provided any basis to conclude that TyeCom would be able to achieve this low wage escalation rate, beyond the fact that its initial wages exceeded the Service Contract Act wage determination rates for the local area. During the ADR conference, TyeCom was provided an opportunity to point to anything in the record which supported the artificially low escalation rate. TyeCom’s only response was that the proposals should be individually evaluated and that TyeCom’s low escalation rate was supported by the fact that its initial wage rates exceeded the wage determination rates. However, this was also true, and, indeed, to a greater extent for ASTI, which proposed the identical workforce at initial wage rates which exceeded the wage determination rates, in some cases by more than TyeCom; thus, TyeCom’s initial rates did not provide a reasonable basis to distinguish between the respective proposed direct wage escalation rates.

Nonetheless, DOE had not made any adjustments to TyeCom’s proposed cost, noting only that “[i]n as much as TyeCom has accepted indirect rate ceiling rates, which protect the Government against increased indirect costs (an eventuality I consider likely), cost risk is reduced to an acceptable level.” AR.2, Tab 4, Source Selection Decision, at 2. However, the indirect rate ceilings are completely unrelated to the direct wage rates and thus cannot reduce the government’s risk with respect to the direct wage escalation rate. In addition, the indirect rate ceiling rates that TyeCom had proposed to accept were below the indirect ceiling rates it had actually proposed in its cost proposal. That is, TyeCom could escalate its indirect rates by amounts that would result in a cost increase that DOE conceded was in excess of \$200,000 before the ceilings were reached. Accordingly, the ceilings provided limited protection even with respect to the indirect rates.

The GAO attorney noted during the ADR session that DOE had improperly accepted TyeCom’s apparently unrealistic proposed cost, without performing an adequate cost realism analysis, and without making the required probable cost adjustment. Accordingly, the GAO attorney suggested that, since TyeCom’s low cost had been determinative, and the record showed that there was no basis to conclude that this

cost was realistic, the agency reevaluate proposed cost and make a new award determination taking into consideration this reevaluation.

Reevaluation and New Award Determination

DOE subsequently decided to take this corrective action, and in so notifying TyeCom, DOE advised that “[w]ith respect to labor escalation rates, DOE intends to apply the appropriate Data Resource, Inc. (DRI) labor escalation rates as the realistic measure of labor escalation to each of the offerors’ cost proposals.” Protester’s Comments, Mar. 18, 2002, attach. 1, SSO Letter to TyeCom, Aug. 30, 2001. TyeCom, after having fully participated in the ADR conference, and having received this specific explanation of the specific method of cost reevaluation that the agency would be implementing, did not protest either the agency’s decision to conduct the reevaluation, or the specified methodology for conducting the reevaluation.

As a result of the agency’s revised cost evaluation, in large measure because of the imposition of DRI wage escalation rates to both proposals, TyeCom’s final evaluated cost-plus-negotiated-fee was increased to \$8,889,202, and ASTI’s evaluated cost was increased to \$9,154,834. TyeCom’s “acceptable” technical proposal evaluation remained unchanged, as did ASTI’s “exceptional” evaluation. Based on the results of this reevaluation, the agency determined that the relatively small, \$265,632, total cost advantage (less than 3 percent of the cost total) associated with TyeCom’s proposal was outweighed by ASTI’s substantial technical superiority under the most important technical areas. In particular, the SSO noted that there was a major technical difference in the strengths between the offerors under the three most heavily weighted technical criteria and subcriteria, under each of which ASTI’s proposal was substantially higher rated. AR.3, Tab 33, Source Selection Decision, at 6-7. Accordingly, DOE awarded ASTI the contract on January 10, 2002. After receiving a debriefing from the agency, TyeCom filed this protest with our Office on January 18, 2002, and later filed a supplemental protest after receiving documents from the agency.

While TyeCom styles its protest as an objection to a wide array of technical and cost evaluation, the real core of the protest is TyeCom’s objection to the agency’s implementation of the corrective action suggested during the ADR conducted in conjunction with the predecessor ASTI protest. In our view, TyeCom has not provided any persuasive evidence that the reevaluation and award are unreasonable or improper, and the protest is entirely without merit.

PROBABLE COST EVALUATION

During ADR, the GAO attorney advised the agency that it appeared to have failed to perform an appropriate and required cost evaluation, and suggested that in the circumstances presented here, a normative application of the DRI wage escalation percentages would be a reasonable step, at least as a starting point. Because a GAO

attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome, the willingness to do so is a sufficiently clear indication that the protest is meritorious such that, absent persuasive evidence to the contrary, such a prediction satisfies the requirement that we conclude that a protest was “clearly meritorious” for purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55, at 3. Similarly, an agency may reasonably rely on such a prediction in implementing corrective action.

Here, DOE implemented corrective action that was precisely consistent with GAO’s ADR analysis, including the specific nature of the suggested corrective action, after notifying TyeCom of its specific proposed evaluation methodology. The cost realism analysis and the resulting upward adjustments applied by DOE were reasonable and consistent with both applicable regulatory guidance under Federal Acquisition Regulation (FAR) § 15.404-1(d)(2), and with the GAO attorney’s suggestion during ADR. TyeCom’s protest does not provide any basis to question the agency’s action since TyeCom has merely recapitulated essentially the same argument it presented during ADR, and has not provided any persuasive evidence that the reevaluation was unreasonable. Similarly, the new cost/technical tradeoff determination resulting in selection of ASTI’s proposal is reasonably based on the corrected cost evaluations, and TyeCom has not provided any meaningful basis to question the propriety of the determination.

TECHNICAL EVALUATION

TyeCom has also raised a broad array of objections regarding various aspects of the agency’s evaluation of its own and of ASTI’s technical proposals, which is unchanged from the initial evaluation, all of which we have considered and find without merit. We will limit our discussion in this decision to a representative example of these arguments.

Experience of TyeCom’s President

In evaluating TyeCom’s proposal as neutral for past performance, and “acceptable” overall under the most important technical criterion of Experience of Organization--Past Performance, the agency concluded that TyeCom did not have demonstrated past performance related to the statement of work. TyeCom asserts that it was entitled to an exceptional rating under this evaluation factor based on the past performance of its company president, and that DOE improperly failed to credit this experience. TyeCom cites FAR 15.305(a)(2)(iii) as requiring that “the evaluation take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.” Protest at 6. While, in fact, the FAR language cited by the protester is precatory rather than mandatory, the simple and undisputed answer is

that for purposes of evaluation as key persons under section L-14 of the RFP, the solicitation designated only the program manager and assistant program manager. AR.3 at 6. TyeCom's company president was not proposed to fill either position and therefore does not fall within the purview of the key person requirement.

The agency also correctly points out that while, in appropriate circumstances, an agency properly may consider the experience of supervisory personnel in evaluating the experience of a new business, there is no legal requirement for an agency to attribute employee experience to the contractor as an entity. Hard Bodies, Inc., B-279543, June 23, 1998, 98-1 CPD ¶ 172 at 4. Accordingly, the agency was under no obligation to credit TyeCom as a corporate entity with the individual experience or past performance of the company's president; TyeCom's protest allegation is misplaced as to both fact and law.

COST EVALUATION VERSUS COC

Finally, TyeCom asserts that because the agency's cost reevaluation included an adjustment of TyeCom's proposed indirect rates, it constituted a "de facto nonresponsibility determination," thus, the agency "usurp[ed] SBA's legal authority to make responsibility determinations for small businesses." Protest at 10. This argument patently misconstrues the nature and effect of both the COC determination and the probable cost evaluation. Under FAR 15.305(a)(1), when contracting on a cost-reimbursement basis, an agency is required to perform a cost realism analysis to determine what the government should realistically expect to pay for the proposed effort when contracting. SBA's issuance of a COC constitutes an affirmative determination of responsibility with respect to responsibility elements such as capability, competency, credit, integrity, perseverance, tenacity and limitations on subcontracting. FAR 19.601. An affirmative determination with regard to these kinds of responsibility considerations is separate from and unrelated to a probable cost adjustment, as required by the FAR and specifically called for here under the RFP, in conjunction with performing a cost realism analysis. Accordingly, this allegation provides no basis to question the agency's probable cost adjustment or reevaluation.

The protest is denied.

Anthony H. Gamboa
General Counsel