Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

# Decision

**Matter of:** Department of Commerce--Request for Modification of Recommendation

**File:** B-283137.7

**Date:** February 14, 2000

Robert M. Nutt, Esq., for Kathpal Technologies, Inc., and Edward J. Tolchin, Esq., Fettman, Tolchin & Majors, for Computer & Hi-Tech Management, Inc., the protesters.
Terry Hart Lee, Esq., Department of Commerce, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Solicitation's evaluation scheme may not be materially changed after receipt of proposals without providing offerors an opportunity to submit revised proposals based on the revised scheme.

## DECISION

The Department of Commerce requests that we modify the recommendation in Kathpal Techs., Inc.; Computer & Hi-Tech Management, Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ __. In that decision, we concluded that Commerce improperly rejected the protesters' proposals under request for proposals (RFP) No. 52-SAAA-9-00010, issued by the Department of Commerce for the award of government-wide acquisition contracts, referred to as the Commerce Information Technology Solutions (COMMITS) program.

In our decision, we found that Commerce improperly excluded the protesters' proposals from consideration for award based upon the ratings of a single technical subfactor without consideration of the offerors' proposed prices or the other technical factors and subfactors. This, we found, violated statutory requirements for meaningful consideration of price in all negotiated procurements and for evaluation of proposals under the factors stated in the solicitation. 41 U.S.C. §§ 253a(c)(1)(B), 253b(a) (1994). We also agreed with the protesters that, contrary to the express language of the RFP, the agency improperly deprived the protesters of the opportunity to make oral presentations as a part of their technical proposals.

We recommended that Commerce either afford all technically acceptable offerors, including the protesters, an opportunity to make oral presentations or amend the solicitation to properly inform offerors that oral presentations would not be considered as part of offerors' proposals and obtain revised proposals. We further stated that in either event Commerce should reevaluate proposals against the solicitation criteria, adequately document the relative strengths and weaknesses of the proposals, and select awardees through written source selection decisions that meaningfully consider all of the evaluation criteria, including price.

Commerce does not assert that our decision contains errors of law or fact, or information not previously considered, that warrants reversal or modification. Commerce does not challenge the merits of our decision, but requests that we modify our protest recommendation in favor of an "approach [that] is more practical and workable for the agency and in no way prejudices the protesters or other offerors." Agency Request at 2.

Specifically, Commerce proposes to amend the RFP to inform offerors that the previously submitted proposals will be evaluated against all technical factors and price to determine which offerors will be allowed to make oral presentations, and that only those offerors that make oral presentations will be considered for award. The agency's source selection decisions would then be based upon a documented evaluation of proposals under all the evaluation criteria, including price. As before, the agency intends to make award without conducting discussions.[1] Agency Request at 1-2.

Despite its plan to revise the RFP to inform offerors that it will reevaluate written proposals in accordance with the evaluation criteria to determine which offerors will be permitted to make oral presentations, Commerce states that it will not obtain revised proposals from offerors but will, instead, evaluate proposals as originally submitted. Agency Request at 3. Commerce argues that it would be "prejudicial to the government's interests and those of the awardees" to obtain revised proposals because unsuccessful offerors, such as Kathpal and CHM, which learned in debriefings the areas of their proposals that were deemed weak or deficient, would have a competitive advantage. Id. "Moreover, [Commerce argues] to allow revised proposals has the potential for a major reshuffling of awardees in all functional areas, some of whom have already begun task order performance." Id. On the other

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[1] Commerce has labeled this process of determining which offerors will make oral presentations as establishing a "competitive range." Labeling this process as the establishment of a competitive range is not appropriate, given Commerce's decision not to conduct discussions. The Federal Acquisition Regulation (FAR) provides that "if discussions are to be conducted, [agencies shall] establish the competitive range." FAR § 15.306(c)(1).

hand, Commerce anticipates that merely re-evaluating the proposals as submitted to determine which offerors will receive the opportunity for oral presentations would not result in a "significant difference in source selections." Id.

We recognized in our prior decision the difficulties faced by Commerce in needing to evaluate more than 200 proposals, particularly given the solicitation's requirement for oral presentations. Accordingly, we fashioned our protest recommendations, cognizant of the discretion retained by the contracting agency in implementing corrective action. See BNF Techs., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258 at 3. Thus, we suggested several different actions the agency could take to remedy the statutory and regulatory violations in its conduct of the procurement. We stated that the agency could evaluate the proposals as submitted in accordance with the solicitation requirements; this would require the conduct of oral presentations by all offerors whose proposals were found to be technically acceptable after the evaluation of all evaluation factors. We also stated that Commerce could instead amend the solicitation to inform offerors of a change in the evaluation criteria or the requirement for oral presentations by all offerors.[2] If the agency chose to amend the solicitation, we stated that the agency would need to obtain revised proposals.

We find Commerce's proposed corrective action to be consistent with the recommendations contained in our decision in all but one aspect; that one difference is fundamental, however. That is, Commerce may amend the solicitation to limit the opportunity for oral presentations to those offerors that are found, after evaluation of proposals under all the solicitation criteria, including price, to be the most competitive. However, the agency may not change the basis upon which offerors' proposals are considered without obtaining and considering offerors' revised proposals under the new evaluation scheme.

It is fundamental that offerors in a negotiated procurement must be informed of the criteria against which their proposals will be judged. 41 U.S.C. § 253b(a); The Faxon Co., B-227835.3, B-227835.5, Nov. 2, 1987, 87-2 CPD ¶ 425 at 4. It is equally fundamental that, where an agency revises the criteria against which offers are to be evaluated or otherwise materially changes the solicitation's evaluation scheme, offerors must be given a reasonable opportunity to respond to the revised criteria or evaluation scheme; otherwise, the statutory requirement to notify offerors of the criteria upon which their offers will be evaluated is meaningless. See Labat-Anderson Inc., B-246071, B-246071.2, Feb. 18, 1992, 92-1 CPD ¶ 193 at 6-7 (agency evaluation which emphasized oral presentations beyond what the solicitation contemplated was improper because offerors were not provided an opportunity to revise their proposals to address the agency's evaluation emphasis on oral presentations).

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[2] We also indicated that the agency could choose to conduct discussions and, in this event, establish a competitive range of those offerors with which the agency would conduct discussions.

Commerce's plan to limit oral presentations to highly-rated offerors (based upon the agency's re-evaluation of previously submitted proposals) without providing offerors an opportunity to revise their proposals consistent with this new evaluation scheme ignores a principal and undisputed finding in our prior decision. That is, offerors, including the protesters, prepared proposals in the expectation that all acceptable offerors would be given an opportunity to make an oral presentation, which was an important part of the technical proposal. In fact, the RFP limited the past performance information that could be provided in the written proposals and informed offerors that this information could be provided in the oral presentation. Offerors, such as the protesters, who relied upon the RFP evaluation scheme that promised oral presentations, will be prejudiced if they are not allowed an opportunity to revise their written proposals, given that Commerce proposes that only offerors whose written proposals meet a certain threshold will be provided with the opportunity to orally supplement those proposals. See id.

Commerce also contends that it would be unfair to allow the submission of revised proposals after revision of the solicitation here because unsuccessful offerors, such as Kathpal and CHM, would allegedly have a competitive advantage over the awardees, given the debriefings the unsuccessful offerors have received. We disagree. Generally, no unfair competitive advantage results where an agency carries out the FAR requirements for notices of award and post-award debriefings and later events require the reopening of proceedings under the procurement. NavCom Defense Elecs., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 4. In this regard, Commerce has not shown that unsuccessful offerors, such as Kathpal and CHM, would actually have a competitive advantage. Nevertheless, if Commerce has concerns in this regard, it has the discretion to offer a debriefing to any offeror, whether previously successful or not, see FAR § 15.506, or to conduct discussions with the offerors, including the awardees, if the agency believes this is necessary to ensure a fair and equal competition.

Finally, Commerce states that the performance of task orders by various awardees will be unduly disrupted if there is a major reshuffling of the awardees. Agency Request at 3. However, our recommendation does not require the termination of task orders that were already awarded under the RFP.

The request for modification of our protest recommendations is denied.

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