

B- 275554, 97-1 CPD P 114, 1997 WL 113958
(Comp.Gen.)

REDACTED VERSION^{FN[FNa1]}

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COMPTROLLER GENERAL

***1 Matter of:** International Business Systems,
Inc.

March 3, 1997

Robert E. Cohen, Esq., Robert E. Cohen & Associates, for the protester.

Amer M. Syed, Esq., for Dulles Networking Associates Inc., the intervenor.

Dennis Foley, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency's evaluation of past performance was unreasonable is sustained where the technical evaluation scheme envisioned a price/past performance tradeoff among technically acceptable proposals to determine the best value to the government, and where the agency failed to consider the past performance of the protester on a contract involving the same agency, the same services, and the same contracting officer because an individual in the agency did not complete and return the past performance evaluation materials.

2. Contracting agency is responsible for evaluating the data submitted by an offeror and ascertaining if it provides sufficient information as

required by the solicitation to determine the technical conformance or acceptability of the offeror's proposal, and General Accounting Office will not disturb this technical determination where the record shows that it is reasonable.

DECISION

International Business Systems, Inc. (IBSI) protests the award of a contract to Dulles Networking Associates Inc. (DNA) by the Department of Veterans Affairs (VA) pursuant to request for proposals (RFP) No. 101-05-96, issued to purchase a replacement telephone system for the VA Medical Center, Wilkes-Barre, Pennsylvania. IBSI argues that the agency's evaluation of past performance was unreasonable, and that DNA's proposal was noncompliant with certain mandatory technical requirements in the solicitation.

We sustain the protest.

BACKGROUND

The solicitation for the replacement telephone system here was issued on April 24, 1996, via the VA Bulletin Board System and the Internet, and envisioned a competition limited to participants in the Small Business Administration's (SBA) section 8(a) small disadvantaged business program, pursuant to [15 U.S.C. § 637\(a\) \(1994\)](#). The RFP anticipated award of a fixed-price contract to the offeror whose proposal was determined most advantageous to the government. The evaluation scheme incorporated a two-step review. First, technical proposals were to be evaluated on a pass/fail basis. In this regard, the solicitation advised that:

“Technical proposals must meet all mandatory requirements stated in Section B, Part 1 of this solicitation. Proposals which fail to meet all of the mandatory requirements will not be eligible for award.”RFP, Amend. No. 4, Chapter E, Part 3, p. E-35. Next, the RFP anticipated review of the price and past performance of technically acceptable offerors.

The RFP advised that merit ratings would be assigned to the past performance portion of the proposal, and that price and past performance would be approximately equal in weight. Id.

*2 Six proposals were received by the closing date of July 31. Initially, three of the proposals--including the proposal submitted by IBSI--were evaluated as technically compliant with the specifications, and three of the proposals--including the proposal submitted by DNA--were viewed as noncompliant. Prior to making a final decision, however, the agency determined that the DNA proposal was, in fact, compliant, and clarification questions were asked of DNA--as they had been asked of the other three offerors whose proposals were considered compliant.

For the evaluation of past performance, the agency reviewed the references provided by each offeror and assigned adjectival ratings to each proposal. The specifics of the initial past performance review are not relevant here as the agency scrapped its initial review and reevaluated past performance while preparing the agency report in response to this protest. The reevaluation of past performance is discussed below.

To make its final selection decision, the agency compared the price and past performance rating of each of the four technically acceptable offerors. In this review, the contracting officer rejected one of the four proposals for reasons unrelated to this protest. Thus, the agency compared the following results:

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OFFEROR	PRICE	PAST PERFORMANCE RATING
DNA	\$ 2,448,361	Excellent
IBSI	\$ 2,903,742	Good
Offeror A	\$ 5,558,131	Excellent

Based on this assessment, the agency concluded that DNA's proposal with its lowest price and excellent past performance rating offered the greatest value to the government. Thus, award was made to DNA, and this protest followed.

Re-evaluation of Past Performance

One of IBSI's challenges in its initial protest was that DNA's excellent past performance rating was unreasonable given that DNA did not have direct experience as a prime contractor furnishing and installing telephone systems. In response to this assertion, the contracting officer (CO) decided "to take corrective action" by reevaluating the past performance of DNA and IBSI. CO's Statement, Dec. 20, 1996, at 39. In essence, the CO opted to cull from her past performance review any reference involving a contract for other than furnishing and installing telephone systems, and any reference for which the offeror was not the prime contractor.

In reevaluating DNA's proposal, the contracting officer decided that none of DNA's references was directly applicable to furnishing and installing telephone systems. Under the terms of the RFP, offerors were advised that if they lacked past experience relating to this requirement, the proposal would "not be evaluated favorably or unfavorably on these factors." RFP, Amend. No. 4, Chapter E, Part 3, p. E-36. Thus, the CO awarded DNA's proposal a "neutral" rating under the past performance factor.

*3 In reevaluating IBSI's proposal, the contracting officer identified two references directly applicable to this solicitation--both involving installation of telephone systems at VA hospitals. However, the CO based her review on only one of the references. The CO explained that the second reference--involving the installation of a similar telephone system at the VA Medical Center in Brockton/West Roxbury, Massachu-

setts--was not considered because the individual within the agency responsible for completing the form did not do so.^{FN[FN1]} Using the one completed relevant reference, the CO concluded that IBSI's past performance should be rated "good."

In comparing the neutral rating of DNA and the good rating of IBSI, the CO concluded that the two offerors were essentially equal in the area of past performance. Thus, the agency report explains that DNA would continue to be the awardee given its lower price.

ANALYSIS

IBSI argues that the agency unreasonably evaluated past performance and wrongly concluded that DNA's proposal was compliant with the mandatory requirements of the specifications. With respect to past performance, IBSI argues that the agency was required to consider its installation of a telephone system for the Brockton/West Roxbury VA Medical Center, and that had it done so, it could not reasonably conclude that IBSI and DNA were equal in past performance. With respect to technical compliance, IBSI argues that the evaluation of DNA's proposal was unreasonable in four areas.

Past Performance

IBSI's challenge to the past performance evaluation is that the agency could not reasonably ignore IBSI's past performance on the Brockton/West Roxbury contract when that contract involved the same agency, the same CO, and virtually the same services as here. IBSI further argues that this result is untenable when other evidence--*i.e.*, the CO's letter to the SBA--demonstrates the CO's first-hand knowledge of IBSI's past performance of this work. Thus, IBSI argues that the inclusion of the Brockton/West Roxbury experience would have enhanced its standing in the area of past performance, and would have made less likely a finding that the

two offerors were equal in this area. We agree.

We start our review with the evaluation approach outlined in the agency report. As described above, the conclusion that IBSI and DNA were essentially equal under the past performance factor, leading to a selection decision based on price, was based on an evaluation of one relevant reference for IBSI and no relevant references for DNA. Thus, the contracting officer compared a rating of “good” with a rating of “neutral” to reach her conclusion that the offerors were essentially equal. In the abstract, we have no basis to disagree with this conclusion.

Where an RFP identifies past performance and price as the evaluation factors and indicates that an offeror with a better past performance record than that of another offeror can expect a higher past performance rating, proposals must be evaluated on that basis. The selection official, however, has the discretion to decide the appropriate trade-off between past performance and price in determining which proposal represents the best value to the government. [Excalibur Sys., Inc., B-272017](#), July 12, 1996, [96-2 CPD ¶ 13 at 3](#). Such a trade off is not precluded under an evaluation scheme specifying a “neutral” rating for vendors with no past performance record. [Engineering and Computation, Inc., B-275180.2](#), Jan. 29, 1997, [97-1 CPD ¶ 47 at 4-5](#); [Excalibur Sys., Inc., supra](#) u.

*4 Our disagreement with the agency springs from its overly mechanical application of its procedures for evaluating past performance. While the VA is correct in its view that there is no legal requirement that all past performance references be included in a valid review of past performance, [Dragon Servs., Inc., B-255354](#), Feb. 25, 1994, [94-1 CPD ¶ 151 at 8](#); [Questech, Inc., B-236028](#), Nov. 1, 1989, [89-2 CPD ¶ 407 at 3](#), some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information. See [G. Marine Diesel, 68 Comp. Gen. 577 \(1989\)](#), [89-2 CPD ¶ 101 at 5-6](#); [New Hampshire-Vermont](#)

[Health Serv., 57 Comp. Gen. 347 \(1978\)](#), [78-1 CPD ¶ 202 at 12-13](#); [Continental Maritime of San Diego, Inc., B-249858.2](#); [B-249858.3](#), Feb. 11, 1993, [93-1 CPD ¶ 230 at 6-8](#); [G. Marine Diesel; Phillyship, B-232619](#); [B-232619.2](#), Jan. 27, 1989, [89-1 CPD ¶ 90 at 4-5](#); [Inlingua Schools of Languages, B-229784](#), Apr. 5, 1988, [88-1 CPD ¶ 340 at 5](#).

Here, the record shows that IBSI's proposal clearly identified a recent contract involving the same agency, the same services, and the same contracting officer, and asked that its performance of this contract be considered as part of its evaluation, as the solicitation anticipated and required. The record also shows that the contracting officer was aware of IBSI's performance of this contract and had termed it “exemplary” in a letter to the SBA written barely 4 months before the award decision here. Under these circumstances, we conclude that the agency unreasonably failed to consider IBSI's performance on its earlier contract simply because an individual in the agency did not complete the assessment required. See [G. Marine Diesel; Phillyship, supra](#) (protest sustained where Navy elected not to consider unsatisfactory past performance of awardee involving similar services and the same command because awardee did not include the controversial contract on its list of references for the past performance review).

Finally, even though we consider the agency's evaluation of IBSI's past performance to be unreasonable, we note that competitive prejudice is an essential element of a viable protest. [Lithos Restoration Ltd., 71 Comp. Gen. 367 \(1992\)](#), [92-1 CPD ¶ 379](#). Where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. [Merrick Eng'g, Inc., B-238706.3](#), Aug. 16, 1990, [90-2 CPD ¶ 130](#), recon. denied, [B-238706.4](#), Dec. 3, 1990, [90-2 CPD ¶ 444](#).

We conclude that IBSI was likely prejudiced by the agency's failure to evaluate its past experience on the Brockton/West Roxbury VA Med-

ical Center contract. In the agency's reevaluation of past performance, it compared IBSI's "good" past performance rating with DNA's "neutral" rating, concluded that the two proposals were essentially equal under this factor, and selected DNA's lower-priced proposal. Although the CO did not consider IBSI's performance of the Brockton/West Roxbury contract, the record shows that the CO has described IBSI's performance there as "exemplary." While we recognize that this one-word description of IBSI's performance may not translate directly to a superlative review under the more nuanced assessment of past performance the agency is using in this evaluation, it does suggest a likelihood that IBSI will receive at least a rating of "good." If so, there is no way to conclude with certainty that the agency would have made the same best value tradeoff when faced with two "good" ratings on identical contracts compared with DNA's "neutral" rating. See Engineering and Computation, Inc., supra, at 4-5 ("... a determination to award to a higher-cost offeror with a good past performance record over a lower-cost offeror with a neutral past performance rating is not precluded since such a determination is consistent with making a cost/technical tradeoff to determine if one proposal's technical superiority is worth the higher cost associated with that proposal."). In addition, if IBSI's rating is higher than "good," the outcome of the tradeoff decision is even less certain.

Technical Evaluation

*5 IBSI argues that DNA's system did not comply with the mandatory technical requirements set forth in the RFP in four separate areas--the optical power meter, back-up ringing capability, distribution of calling traffic, and call pick-up capability.^{FN[FN2]} In considering such claims, we note that contracting agencies are responsible for evaluating the data submitted by an offeror and ascertaining if it provides sufficient information as required by the solicitation to determine the technical conformance or acceptability of the offeror's item; we will not disturb this technical determination unless it is

shown to be unreasonable. [AlliedSignal, Inc., B-272290](#); [B-272290.2](#), Sept. 13, 1996, [96-2 CPD ¶ 121 at 5](#). Based on our review of the record, including written responses to questions prepared by our Office, and a technical roundtable discussion of the configuration of the offered system, we conclude that the agency reasonably decided that DNA's system complied with the specifications.

Two of the four technical challenges pursued by IBSI were resolved by our Office based on the written record. With respect to the issue of call pick-up capability, paragraph B.1.2.16.4 of the RFP required that stations must be able to answer "a ringing, but unanswered call, within a pre-designated group of station lines by dialing a feature code or activating a feature button." Both the agency and DNA conceded that the offered system was not initially compliant with this requirement, but both explained--and IBSI acknowledges-- that this issue was addressed by a software change to the existing Mitel system scheduled to be completed in February or March 1997. In our view, there was nothing unreasonable about concluding that the Mitel system was acceptable pending completion of the software change.

With respect to the issue of the optical power meter, our review indicates that DNA's proposal simply does not read as IBSI claims. The protester claimed that "[t]he DNA proposal explicitly does not agree" to maintain the optical power meter for the life of the contract as required by paragraph B.1.2.49.9. After our Office was unable to locate an explicit refusal in the DNA proposal, IBSI was asked to identify the location of this information. IBSI directed our Office to page 2-B-123 of the DNA proposal which discusses the characteristics of the optical power meter and provides that it will eventually become the property of the government. There is nothing in the DNA proposal reflecting a refusal to maintain the power meter, and, in fact, the proposal quotes the requirement in full on this page. Nothing in this record supports a conclusion that DNA is refusing to comply with this

requirement.

To complete our review of the remaining two issues, we convened a meeting of engineers from Mitel, DNA, IBSI, the agency, and our Office to discuss (1) the compliance of the Mitel system with the requirement for back-up ringing capability, and (2) the calculations regarding the distribution of calling traffic used to assess the capacity of the offered system.^{FN[FN3]} Our conclusions from this conference are set forth below.

*6 Paragraph B.1.2.20 of the specifications set forth requirements on supervisory signaling and ringing of the offered telephone systems. Of the five subsections within this requirement, the following two are relevant here:

“B.1.2.20.1 Provide dual solid state signal generating devices, or equivalent, which produce standard supervisory signaling, i.e., ringing, dial tone, busy tone, etc. The failure of any one signal generating device shall not affect the installed main station capacity. B.1.2.20.2 Dual solid state signal generating devices shall provide automatic transfer to the alternate signal generating device in the event of failure of the primary device.

According to the protester, the Mitel system proposed by DNA does not meet this requirement because there is no back-up ringing generator as required by the specification.

To address this issue, we must first explain that the Mitel SX-2000 LIGHT system offered here is an EPABX (Electronic Private Automatic Branch Exchange) microprocessor which contains a redundant controlled, fiber distributed architecture system. Since each SX-2000 LIGHT system has a capacity of approximately 2,000 ports--and since offerors here were required to assume a maximum growth to 2,690 ports--two complete systems are connected to meet the agency's total requirement. Our discussions revealed that all parties agree that the redundant main processor--called the control module in Mitel's materials--contains the on-line

and standby central processors and switching matrix “as well as the overhead and supervision components necessary to accomplish voice and data switching.” DNA Proposal at 2-A-6. All parties also agree that the redundant digital signal generators in the control module are the source of the initial signal that is ultimately transmitted to a telephone instrument to make it ring. Thus, there is no dispute that the Mitel system has a back-up ringing capability at the control module level.

The source of the dispute here is that the network architecture of the Mitel system contains peripheral modules connected to the control modules via multi-mode fiber optic cable. As explained in DNA's proposal, the peripheral modules contain the direct connection interface to the telephone instruments, data sets, and other equipment via printed wiring boards. *Id.* To provide the service required for this application, a total of eight peripheral nodes are used within the architecture here. When a ringing signal is received from one of the redundant digital signal generators in the control module, the appropriate destination for the ring is accessed via the printed wiring board, and the signal is converted by transistor to an 80-volt charge which activates the ringer on the individual telephone. The protester correctly points out that there is no back-up capability in the peripheral node for transmitting the 80-volt signal to a telephone instrument to make it ring. Again, there is no dispute among the parties on this fact.

*7 The issue for our consideration is whether the agency reasonably concluded that the Mitel system meets the specification's requirement for redundancy by providing redundancy at the control module level, but not at the peripheral module level. We conclude that it did. The RFP requirement here addresses itself to supervisory signaling and ringing, and requires that “[t]he failure of any one signal generating device shall not affect the installed main station capacity.” RFP ¶ B.1.2.20.1. This requirement, on its face, addresses main station capacity, and there is no dispute that the offered system provides the re-

quired redundancy at the main station level. In addition, we note that the control modules are the repository of the supervisory functions for this system. DNA Proposal at 2-A-6. There is no requirement for such redundancy at every level in the system.^{FN[FN4]} Thus, we conclude that the Mitel system meets the specification in this area.

The second area challenged by IBSI and discussed at the conference is the reasonableness of the agency's decision to accept the awardee's calculations and assumptions regarding the distribution of calling traffic for this facility. These calculations and assumptions were required by the RFP to support an offeror's claim that its system has the capacity to meet the agency's needs. Our Office decided to explore this issue in greater depth after asking for a written explanation of the agency's position and receiving a response that appeared to omit a significant subset of calling traffic.

During the course of the conference, the parties recreated the initial calculations that led to the controversy here, and recalculated the distribution of calling traffic in two different ways--first, traffic was calculated using the capacity requirements of the RFP of 7.0 centum call seconds, a measurement of calling traffic volume; second, traffic was calculated using the total number of calling stations at maximum growth (2,690). These additional calculations both explained why the initial calculations were unclear, and buttressed the agency's and awardee's contention that the offered system has the capacity to meet the requirements of the RFP. Although the protester correctly points out that the calculations do not show a large margin of excess capacity in the Mitel system,^{FN[FN5]} it does not claim that the calculations were erroneous or unreasonable. In fact, at the conclusion of the conference the protester agreed that the calculations appeared correct, and in compliance with industry standards. Under these circumstances, we conclude that the agency reasonably accepted DNA's offer of the Mitel SX-2000 LIGHT switch.

RECOMMENDATION

For the reasons stated above, we conclude that the agency's failure to evaluate IBSI's past performance on a recently completed contract involving the same agency, the same services, and the same contracting officer, was unreasonable. We recommend that the agency evaluate IBSI's performance of the Brockton/West Roxbury VA Medical Center contract, and include IBSI's performance of this contract in its past performance review and best value determination. If, at the conclusion of the agency's reevaluation, the revised best value determination shows that IBSI's proposal, and not DNA's, represents the best value to the government, the agency should terminate the contract awarded to DNA--performance of which has been suspended pending the resolution of this protest--and award to IBSI. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest including attorneys' fees. Bid Protest Regulations, § 21.8(d), 61 Fed. Reg. supra (to be codified at [4 C.F.R. § 21.8\(d\)](#)). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, [§ 21.8\(f\)\(1\)](#), 61 Fed. Reg. supra (to be codified at [4 C.F.R. § 21.8\(f\)\(1\)](#)).

***8** The protest is sustained.

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FN1. The record also shows that the CO here served as the CO on the Brockton/West Roxbury contract as well. Further, in a letter provided to the SBA on an unrelated matter, the CO describes IBSI's performance on the Brockton/West Roxbury contract as "exemplary." Letter from Deborah M. Martinez to the Washington District Office of the SBA, June 13, 1996.

FN2. IBSI's initial protest letter raised more than 25 separate challenges to the compliance of DNA's proposed telephone system to the mandatory specifications. Although the agency responded in detail to these allegations, IBSI's

comments--prepared with the assistance of a consultant specializing in these systems--pursues only four technical contentions. As a result, we consider the remainder of the initial challenges abandoned, and we will not discuss them further. [Banknote Corp. of Am., Inc., B-245528; B-245528.2, Jan. 13, 1992, 92-1 CPD ¶ 53 at 5.](#)

FN3. Our Office is permitted to use flexible alternate procedures to promptly and fairly resolve bid protests. Bid Protest Regulations, section 21.10(e), [61 Fed. Reg. 39039, 39046 \(1996\)](#)(to be codified at [4 C.F.R. § 21.10\(e\)](#)). Here, we concluded that a meeting involving engineers for each party in a roundtable discussion of the requirements of the specifications and the capabilities of the awardee's offered system would provide the most thorough airing of these technical issues. To permit this exchange, the awardee voluntarily waived any objection to including technical representatives of the protester--in addition to the protester's expert admitted to the protective order-- in this discussion.

FN4. For example, one might elect to design a system requiring redundancy at even the lowest level--reaching from the control module, through the peripheral module, to the telephone instrument itself. However, this level of redundancy was not required by the specification.

FN5. Mitel responds to this observation with a claim that it could greatly expand its capacity in this area at little or no extra cost by reconfiguring its call path tie lines to European standards if the calculations had shown a capacity shortfall.

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