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# Decision

**Matter of:** DevTech Systems, Inc.

**File:** B-284860.2

**Date:** December 20, 2000

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Alex D. Tomaszczuk, Esq., John E. Jensen, Esq., and Daniel S. Herzfeld, Esq., Shaw Pittman, for the protester.
Kevin F. O'Donnell, Esq., Agency for International Development, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Agency failed to conduct meaningful discussions with the protester where, in taking corrective action in response to a prior protest, it reevaluated the protester's proposal as having a number of weaknesses and deficiencies that had not been previously identified and were critical to the contracting officer's determination not to select the proposal for award, and the weaknesses and deficiencies were not raised with the protester by the agency during discussions.

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## DECISION

DevTech Systems, Inc. protests the award of contracts to the Academy for Educational Development (AED) and Creative Associates International, Inc., (CAI) under request for proposals (RFP) No. M/OP-99-644, issued by the U.S. Agency for International Development (USAID) for professional short-term advisory and technical assistance services. DevTech argues that the agency failed to conduct meaningful discussions with it, and that the agency's evaluation of its proposal and selection for award of the proposals submitted by AED and CAI were unreasonable.

We sustain the protest.

The RFP provided for the award of indefinite-delivery/indefinite-quantity contracts for a 3-year period.[1] The successful contractors under the RFP will be required to provide USAID with short-term advisory and technical assistance services in the areas of education, training, telecommunication/information technologies, and related human development. RFP at 8.

The RFP stated that the awards would be made to the offerors submitting the proposals representing the best overall value to the government, with technical merit considered more than twice as important as price. RFP at 74. The solicitation listed the following evaluation criteria: understanding of the scope of work, corporate capability, management structure, and past performance. RFP at 72-73. The RFP informed offerors that the understanding of the scope of work and past performance criteria were equal in importance, and approximately 1½ times more important than the equally weighted corporate capability and management structure criteria. RFP at 74. The RFP further stated that "[t]he Government intends to evaluate proposals and award a contract after conducting discussions with offerors whose proposals have been determined to be within the competitive range." RFP at 59.

The agency received seven proposals by the RFP's closing date. The proposals were evaluated, and the agency included four proposals, including those submitted by DevTech, AED and CAI, in the competitive range. Agency Report at 4. The agency forwarded written discussion questions to each of the offerors whose proposals had been included in the competitive range, and requested that the offerors submit revised proposals. Agency Report, Tabs H-K, USAID Discussion Letters to Offerors.

Revised proposals were received and evaluated, with AED's proposal receiving a score of [DELETED] out of 100 points at an evaluated price of [DELETED] per labor hour, CAI's proposal receiving a score of [DELETED] points at an evaluated price of [DELETED], DevTech's proposal receiving a score of [DELETED] points at an evaluated price of [DELETED], and the proposal of the fourth offeror receiving a score of [DELETED] points at an evaluated price of [DELETED].[2] Agency Report, Tab M, Negotiation Memorandum, Feb. 15, 2000, at 4. The agency determined that

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[1] The RFP informed offerors that the agency anticipated making three awards under the solicitation, with two awards being made on the basis of an unrestricted competition, and one contract being awarded on the basis of a competition restricted to small business concerns. RFP at 64-65. This protest only concerns the two unrestricted awards.

[2] The offerors' price/business proposals were evaluated in accordance with the instructions set forth in the RFP, which provided, in essence, that the agency would calculate an average hourly burdened rate (comprised of the rates for the 34 labor categories) for the three skill levels (senior, mid-level, junior) set forth in the RFP, and would then apply a utilization factor for each level to determine a single evaluated hourly rate for each offeror. RFP at 3-6, 74.

the proposals submitted by AED and CAI represented the best value to the government, and on February 17, 2000, awarded contracts to those firms. Agency Report at 5.

After requesting and receiving a debriefing, DevTech protested the awards, contending that the agency had failed to conduct meaningful discussions with it, that the agency's evaluation of its proposal was unreasonable, and that the selection for award of the proposals submitted by AED and CAI was unreasonable. DevTech specifically argued that the agency had failed to inform it during discussions of a perceived weakness or deficiency in its past performance that resulted in DevTech's proposal receiving a relatively low rating under the past performance criterion. Protest, Mar. 7, 2000, at 10-11.

In response to the protest, the agency informed our Office that its "examination of the record suggests that there may have been shortcomings and also inadequacies in documentation concerning this procurement." Agency Report/Corrective Action Letter, Apr. 5, 2000, at 1. The agency stated that, because of this, it would take "corrective action" by "conven[ing] an evaluation panel whose function will be to carry out a fresh technical evaluation of the proposals of those four companies originally in the competitive range." Id. at 2. The agency argued that its proposed corrective action rendered the protest academic given that "a new round will now take place and, of course, a new award pattern may take place at the completion of that round." Id. We agreed and dismissed DevTech's protest as academic on April 12, 2000.

A new technical review panel reevaluated the original and revised proposals of AED, CAI, DevTech, and the fourth competitive range offeror. Agency Report, Tab U, Negotiation Memorandum, Aug. 8, 2000, at 2. The new panel members were "advised to obtain all new past performance feedback and were not given access to any of the comments collected or created by the original technical panel." Id. The new panel was also informed that "initiating another round of proposals/reviews was an option if they perceived that an offeror had a reasonable chance of substantially increasing their standing with their response." Id. The panel chose not to conduct discussions, and assigned scores of [DELETED] out of 100 points to AED's proposal, [DELETED] points to CAI's proposal, [DELETED] points to the fourth offeror's proposal, and [DELETED] points to DevTech's proposal. Agency Report, Tab T, Technical Review Panel Memorandum, July 18, 2000, at 1; Tab U, Negotiation Memorandum, Aug. 8, 2000 at 2.

As noted, DevTech's proposal's total point score fell from [DELETED] points to [DELETED] points. In the reevaluation DevTech's revised proposal received [DELETED] out of [DELETED] points under the understanding of the scope of work criterion, whereas its revised proposal had originally received [DELETED] points under this criterion. In the reevaluation DevTech's proposal received [DELETED] and [DELETED] points under the corporate capability and management structure

criteria, respectively, whereas its proposal had originally received scores of [DELETED] and [DELETED] points under these same criteria. Finally, DevTech's past performance score remained at [DELETED] of [DELETED] points. Agency Report, Tab T, Technical Review Panel Results, July 18, 2000, at 1; Tab Q, USAID Post-Award Debriefing Letter to DevTech, Mar. 3, 2000. The new technical review panel prepared narratives that describe, consistent with the panel's scoring, a number of weaknesses and deficiencies in the protester's proposal.

Based on this reevaluation, the agency again determined that AED's and CAI's proposals represented the best values to the government, and authorized commencement of the contracts previously awarded to those firms. After another debriefing, this protest followed.

The protester primarily argues that it did not receive meaningful discussions on the weaknesses and deficiencies identified by the new panel for the first time during the reevaluation that formed the basis for DevTech's proposal's significantly lower score. The protester notes that, except with regard to past performance, none of these weaknesses and deficiencies had been identified in the initial evaluation and thus had not been raised with the protester during discussions, and argues that the agency erred in failing to conduct discussions regarding these weaknesses and deficiencies. As in its prior protest, the protester argues that the agency erred in not informing the protester during discussions of the agency's perceived deficiencies in the protester's past performance.

Where contracting agencies conduct discussions with offerors whose proposals are within the competitive range, the discussions must be meaningful; that is, an agency is required to point out weaknesses or deficiencies in a proposal as specifically as practical so that the agency leads the offeror into areas of its proposal which require amplification or correction. Professional Servs. Group, Inc., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 at 3. Discussions cannot be meaningful if an offeror is not advised of the weaknesses, deficiencies, or excesses in its proposal that must be addressed in order for the offeror to be in line for award. Mechanical Contractors, S.A., B-277916.2, Mar. 4, 1998, 98-1 CPD ¶ 68 at 4; CitiWest Properties, Inc., B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ 3 at 5.

This case highlights the challenge that an agency may face when, for whatever reason, it reevaluates initial proposals after discussions are complete. If during the reevaluation of proposals the agency identifies concerns that would have had to be raised had they been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offerors. Mechanical Contractors, S.A., supra, at 5-6; CitiWest Properties, Inc., supra, at 5. The key fact is

that the concerns (while identified relatively late) relate to the proposals as they were prior to discussions.[3]

Here, as noted, USAID initially conducted discussions with DevTech (as well as other competitive range offerors), which were followed by submission of revised proposals. The initial evaluation panel found that for the most part DevTech's revised proposal addressed the concerns that had been raised during discussions, with the panel remaining concerned only with DevTech's [DELETED]. Agency Report, Tab M, Negotiation Memorandum, Feb. 15, 2000, at 3. As mentioned previously, the initial panel assigned DevTech's revised proposal a score of [DELETED] out of 100 points.

In contrast, the record reflects that the new evaluation panel found DevTech's revised proposal to be considerably weaker than did the original evaluation panel, with the same revised proposal receiving a score of only [DELETED] out of 100 points. In this regard, the negotiation memorandum prepared in response to the reevaluation states that:

> [DELETED]

Agency Report, Tab U, Negotiation Memorandum, Aug. 8, 2000, at 3-4. The record reflects that these "primary weaknesses" resulted in DevTech's proposal being downgraded to [DELETED] out of 100 points, and were critical to the agency's decision not to select DevTech's proposal for award. These weaknesses (with the exception of weakness (6) relating to DevTech's past performance) were first identified by the new evaluation panel, which chose not to conduct discussions with DevTech or the other competitive range offerors. Agency Report at 7 (discussions not held because "further lines of inquiry or areas of clarification" were not identified by the new evaluation panel); Tab K, Contracting Officer's Letter to DevTech, Dec. 10, 1999. The weaknesses identified do not appear to have arisen because of changes made through DevTech's proposal revisions; that is, the weaknesses all appear to relate to DevTech's proposal as it was prior to the discussions. Because of the significance of these "primary weaknesses," the agency would have had to raise them during discussions, if they had been identified before discussions were held. None of them, however, was raised with DevTech during discussions.

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[3] This contrasts with the situation where an offeror introduces an element in a post-discussion revision to its proposal that the agency views as a deficiency or a weakness. In that situation, the agency is not required to reopen discussions to address the new concern. See Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 7.

Because DevTech was not informed during discussions of the weaknesses and deficiencies that formed the basis for DevTech's proposal not being selected for award, we conclude that the firm was not provided with meaningful discussions, and we therefore sustain the protest. We recommend that the agency reopen and conduct appropriate discussions with all offerors whose proposals are in the competitive range, request revised proposals, and make a new source selection.[4] If DevTech's proposal is selected, the agency should terminate for convenience the appropriate contract, and award a contract to DevTech. In addition, we recommend that DevTech be reimbursed the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2000).

Anthony H. Gamboa
Acting General Counsel

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[4] DevTech also protests that USAID's evaluation of its proposal and selection of the awardees' proposals for awards were unreasonable. However, we need not address the propriety of USAID's evaluation or source selection given our recommendation that the agency reopen discussions, and request and evaluate revised proposals.