

CYRUS E. PHILLIPS, IV

ATTORNEY AT LAW

1828 L STREET, N.W., SUITE 660
WASHINGTON, D.C. 20036-5112
TELEPHONE: 202.466.7008
FACSIMILE: 202.466.7009

HOME PAGE: [HTTP://WWW.PROCUREMENT-LAWYER.COM](http://www.procurement-lawyer.com)

E-MAIL: LAWYER@PROCUREMENT-LAWYER.COM

VIA OVERNIGHT DELIVERY

November 26th, 2003

Edward Goldstein, Esq.
Senior Attorney
Office of the General Counsel
Procurement Law Division
United States General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548-0002

File No.: B-293001, B-293001.2, B-293020, & B-293020.2.
Protestor: American Fuel Cell & Coated Fabrics Company.
Agency: Defense Logistics Agency,
Defense Supply Center Richmond.
Nos.: Solicitation Number SP0475-03-R-3379, Contract Number SP0475-03-D-1450
& Solicitation Number SP0475-03-R-3377, Contract Number SP0475-03-D-1428.

Dear Mr. Goldstein:

On behalf of Engineered Fabrics Corporation, Rockmart, Georgia (Engineered Fabrics), I am filing Supplemental Comments on the Supplemental Agency Reports filed November 20th and 21st, 2003. These Supplemental Comments are timely filed, as required by your memorandums of November 14th, 2003.

Engineered Fabrics finds the Supplemental Agency Reports again to be comprehensive, and thorough, rebuttals of the matters raised in the Supplemental Protests filed November 3rd and 6th, 2003 by American Fuel Cell & Coated Fabrics Company, Magnolia, Arkansas (Amfuel), the protestor here, and thus Engineered Fabrics will merely provide observations and documents that supplement those already put on record in the Supplemental Agency Reports.

**Redacted Version
For Public Release**

The Discussions Were Proper.

Defense Supply Center Richmond opened discussions with Amfuel and with Engineered Fabrics on Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) on August 22nd, 2003. Each Offeror was asked to cut its offered prices. The required delivery schedule set out in the Solicitation was revised. Delivery schedules proposed in initial competitive proposals were addressed—Engineered Fabrics was told that its proposed phased delivery schedule (12 fuel cells per month within 84 days) was acceptable (Declaration of Carl Simmons, ¶ 9.); Amfuel was told that phased deliveries () would be acceptable (Agency Report, B-293001, Tab H).

Defense Supply Center Richmond opened discussions with Amfuel and with Engineered Fabrics on Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) on August 26th, 2003. Each Offeror was asked to cut its offered prices. The required delivery schedule set out in the Solicitation was revised. Delivery schedules proposed in initial competitive proposals were addressed—Engineered Fabrics was told that its proposed phased delivery schedule (11 fuel cells per month within 84 days) was acceptable (Declaration of Carl Simmons, ¶ 10.); Amfuel was told that phased deliveries () would be acceptable (Agency Report, B-293020, Tab G).

Amfuel asserts that Defense Supply Center Richmond acted improperly when Defense Supply Center Richmond failed to establish a revised delivery schedule by issuing a modification to each Solicitation, and Amfuel cites your Office to Federal Acquisition Regulation 15.206(a). (“When, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.”) Amfuel misses the point—in the initial competitive proposals, neither Offeror proposed a delivery schedule that was completely acceptable to Defense Supply Center Richmond. Thus Defense Supply Center Richmond was negotiating for better delivery schedules, and each Offeror was told what delivery schedules Defense Supply Center Richmond would consider acceptable. More is not required. *Avitech, Inc.*, B-214749, September 17th, 1984, at 4 (“offerors were informed of the agency’s delivery requirements during the course of negotiations”).

Discussions may be neither misleading nor prejudicially unequal. *S³ LTD*, B-287019.2, B-287019.3, B-287021.2, B-287021.3, September 14th, 2001, at 4-5. Just this happened, i.e., discussions were neither misleading nor prejudicially unequal. Each Offeror understood from Defense Supply Center Richmond that Defense Supply Center Richmond wanted cuts in offered prices, each Offeror understood that the required delivery schedules set out in the Solicitations were revised, Engineered Fabrics was told that its proposed phased delivery schedules were acceptable, and Amfuel was told just what phased delivery schedules would be acceptable to Defense Supply Center Richmond. No one was misled. The discussions were not unequal—each Offeror was directed to price and delivery.

Engineered Fabrics submitted a revised competitive proposal in response to Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) on August 26th, 2003 (Declaration of Carl Simmons, ¶ 11.). Amfuel submitted a revised competitive proposal in response to Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) on August 26th, 2003 (Agency Report, B-293001, Tab I). Engineered Fabrics submitted a revised competitive proposal in response to Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) on August 27th, 2003 (Declaration of Carl Simmons, ¶ 12.). Amfuel submitted a

**Redacted Version
For Public Release**

revised competitive proposal in response to Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) on August 28th, 2003 (Agency Report, B-293020, Tab H).

Each Offeror conducted further discussions with Defense Supply Center Richmond after submission of revised competitive proposals. On Friday, September 5th, 2003 Amfuel revised the delivery schedule that it had proposed in response to Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) (Agency Report, B-293001, Tab J), and, likewise, Amfuel revised the delivery schedule that it had proposed in response to Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) (Agency Report, B-293020, Tab I). On Wednesday, September 3rd, 2003 Engineered Fabrics further cut the prices offered in its revised competitive proposal in response to Solicitation Number SP0475-03-R-3379 (Declaration of Carl Simmons, Enclosure 5). On Tuesday, September 16th, and again on Wednesday, September 17th, 2003 Engineered Fabrics confirmed for Defense Supply Center Richmond Engineered Fabric's intent to accept the phased delivery schedules that Defense Supply Center Richmond considered acceptable for Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) and for Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) (Declaration of Carl Simmons, ¶¶ 13., 14.).

Defense Supply Center Richmond did not, as required by Federal Acquisition Regulation 15.307(b), ask for final proposal revisions, nor did Defense Supply Center Richmond establish a common cut-off date for receipt of final proposal revisions. Nonetheless, neither of these lapses is a reason to undo these awards. Federal Acquisition Regulation 15.307(b) permits reopening discussions, Amfuel has not asserted that it expected additional opportunities to submit proposal revisions, *Spectrum Sciences & Software, Inc.*, B-282373, June 22nd, 1999, at 3-4, and, at this late date, any assertion of a violation of Federal Acquisition Regulation 15.307(b) would be untimely, *Amcare Medical Services, Inc.*, B-271595, July 11th, 1996, at 2 n.l.

The only issue here is whether or not the discussions that were conducted were meaningful, equitable, and not misleading. *TDS, Inc.*, B-292674, November 12th, 2003, at 7. To be meaningful, discussions must lead offerors into those areas of each competitive proposal that must be addressed, or that need correction, or amplification, or revision. *ACS Government Solutions Group, Inc.*, B-282098, B-282098.2, B-282098.3, June 2nd, 1999, at 14. There were only two such areas here—price and delivery. Engineered Fabrics and Amfuel both were pointed to just these two areas. Contrary to Amfuel's complaints, Defense Supply Center Richmond was not required to tell Amfuel to offer a better delivery schedule, Defense Supply Center Richmond was not required to make the choice for Amfuel between better deliveries and low price, and Defense Supply Center Richmond was not required to tell Amfuel that phased deliveries at the rate suggested by Defense Supply Center Richmond would be more important than low price. *Cube-All Star Services Joint Venture*, B-291903, April 30th, 2003, at 12. (“[A]n agency is not required to describe how the offeror should revise its proposal to cure an existing weaknesses or defect; indeed, one of the objectives in proposal evaluation is to assess an offeror's own understanding of the solicitation requirements, and its perception of the best method to meet those requirements.”)

Amfuel's Dilemma Results From Poor Business Judgment, Not Improper Agency Action.

John Skubina, Engineered Fabrics' President, explains that the marketplace of domestic suppliers of military fuel cells has declined to two firms: Amfuel and Engineered Fabrics. Competition is aggressive,

**Redacted Version
For Public Release**

and competition is typically conducted on a “best value” basis. Both Amfuel and Engineered Fabrics very well know that price and delivery schedule have driven the military fuel cell market for at least the last ten to fifteen years. Engineered Fabrics has qualified a polyurethane construction for the T-38 forward main fuel cell and for the T-38 aft main fuel cell, and use of this material enables Engineered Fabrics to produce these fuel cells at higher rates, and to meet required delivery schedules, with little impact on price. (Declaration of John Skubina, ¶¶ 4., 12., 22., & 25.)

The affidavits from Robert James, Amfuel’s President, that are submitted with Amfuel’s Comments (Amfuel Comments, B-293020, November 3rd, 2003, Exhibit G; Amfuel Comments, B-293001, November 6th, 2003, Exhibit H) clearly and convincingly demonstrate that Amfuel’s failure to win the proposed indefinite delivery, indefinite quantity Contracts proposed by Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell) and by Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell) result from poor business judgment, not improper agency action. Save for the National Stock Number, the affidavits are identical. Here is what Robert James says:

4. AMFUEL has been delivering T-38 fuel tanks to DSCR for the past five years for its most recent contract awarded on September 16, 1998. Our production has stabilized at approximately tanks per month for the last several years. *As such, we have been able to optimize our costs at this production rate.*
5. Because the most recent RFP for NSN 1560-00-739-8342 stated that price was most important, *I decided that we should offer the same production rate (per month) for the next contract so as to provide the best price to the government and increase our chance of award.*
6. AMFUEL can produce these T-38 tanks at a much higher rate. Increased production is only a matter of increased manpower, but *to increase production above current levels would increase the unit cost in order to amortize the increased production start-up costs of hiring and training additional workers plus the cost of inefficiency as the production ramps up.*

Amfuel Comments, B-293020, November 3rd, 2003, Exhibit G (emphasis added).

Contrary to what Robert James now tells us, the Contract proposed by each of these Solicitations was to be awarded on a “best value” determination, and each Solicitation provided that *all evaluation factors were approximately equal to cost or price*, that the final award decision “may involve a trade-off among cost or price and non-cost factors, and that factors that would be considered were “[i]tem criticality and weapons system application” and “[d]elivery schedule and current inventory status.” Agency Report, B-293001, Tab B, page 21 of 22 (emphasis added); Agency Report, B-293020, Tab A, page 23 of 24 (emphasis added).

When discussions commenced, Amfuel was explicitly told just what phased delivery schedules would be acceptable to Defense Supply Center Richmond. For Solicitation Number SP0475-03-R-3379 (T-38 forward main fuel cell), Amfuel was told that phased deliveries of units per month beginning 90 days after receipt of order would be acceptable. Agency Report, B-293001, Tab H. Amfuel was never told that phased deliveries of units per month would be acceptable. For Solicitation Number SP0475-03-R-3377 (T-38 aft main fuel cell), Amfuel was told that phased deliveries of units per month beginning 90 days

**Redacted Version
For Public Release**

after receipt of order would be acceptable. Agency Report, B-293020, Tab G. Amfuel was never told that phased deliveries of units per month would be acceptable.

Each of these Solicitations announced that for each of these acquisitions of fuel cells for military aircraft, delivery schedule and weapons systems application were of equal importance to low price. It was poor business judgment to suppose, as Robert James did, “that price was most important.”

All that is required is, as here, that Amfuel was told what delivery schedules Defense Supply Center Richmond would consider acceptable. Thereafter, the choice between low price and a better delivery schedule, and the consequence of that choice, was for Amfuel, not Defense Supply Center Richmond:

Thus, to the extent that DSG argues that it was not adequately apprised of how it needed to revise its proposal, its contention is without merit. The record clearly shows that during several rounds of discussions, the agency advised DSG of areas of its proposal requiring revision, and DSG simply failed to do so. Further, there is no legal requirement for an agency to inform an offeror of the premium it is willing to spend for an improved proposal. Thus, DSG’s failure to cure weaknesses in its proposal to its detriment—because it feared that such corrections might have affected favorable ratings assigned its cost proposal—reflects DSG’s own business judgment, and was not the result of any improper action on the agency’s part.

Digital Systems Group, B-286931, B-286931.2, March 7th, 2001, at 8.

Conclusion.

Amfuel was given an opportunity, as was Engineered Fabrics, to submit a competitive proposal, and to revise that competitive proposal, making a choice in each instance between low price and better deliveries. Amfuel chose unwisely. It would be manifestly unfair to now give Amfuel another opportunity, to relieve Amfuel of the poor business judgments made by Amfuel, poor business judgments that did not result from improper agency action.

Sincerely,

Cyrus E. Phillips, IV

Enclosures (as stated)

**Redacted Version
For Public Release**

Cc:

Benjamin G. Perkins, Esq.
Associate Counsel
Defense Logistics Agency
Office of Counsel (DCSR-G)
Defense Supply Center Richmond
8000 Jefferson Davis Highway
Richmond, Virginia 23297-5701
(w/cys of enclosures)
(via overnight delivery)

Robert A. Klimek, Jr., Esq.
Klimek, Kolodney & Casale, P.C.
Farragut Park Building
1701 K Street, N.W., Suite 900
Washington, D.C. 20006-1513
(w/cys of enclosures)
(via overnight delivery)

**Redacted Version
For Public Release**



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Amcare Medical Services, Inc.

File: B-271595

Date: July 11, 1996

Gary C. Crossen, Esq., Foley, Hoag & Eliot, for the protester.

John A. Cohan, Esq., Cohan & Associates, for Nahatan Medical Services, an intervenor.

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

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly made award to firm submitting technically noncompliant offer is denied where protester has neither alleged nor demonstrated that agency's actions were prejudicial; prejudice is an essential element of every viable protest, and where none is shown, General Accounting Office will not sustain a protest, even where the agency's actions may have been improper.
2. Protester is not an interested party to maintain that awardee acted in bad faith where another offeror would be in line for award should the protester's allegation prove correct and awardee be eliminated from the competition.

DECISION

Amcare Medical Services, Inc. protests the award of a contract to Nahatan Medical Services under request for proposals (RFP) No. 523-38-95, issued by the Department of Veterans Affairs (VA) for the acquisition of home oxygen services. Amcare challenges the award on several grounds.

We deny the protest in part and dismiss it in part.

The RFP called for offers to provide home oxygen services and provided for award on a best value basis. Six proposals were received, four of which were determined to be within the competitive range. After engaging in both technical and cost discussions with the competitive range offerors and receiving proposal revisions in

response thereto, the agency solicited and received best and final offers (BAFO).¹ Based on the BAFO evaluation, Amcare's proposal was ranked third technically (with a technical score of 77.25 points) and was highest priced. Nahatan's proposal was ranked first technically (with a score of 91.5 points) and was the lowest priced. The proposal of a third offeror, NMC Homecare, was ranked second technically (with a score of 87 points), and was priced between Amcare's and Nahatan's. Based on these evaluation results, the VA made award to Nahatan as the firm submitting the proposal deemed to offer the best overall value to the government.

TECHNICAL EVALUATION

Amcare maintains that the agency misevaluated its technical proposal in several respects. The VA provided our Office a detailed report addressing each of Amcare's contentions regarding the technical evaluation, however, and Amcare provided no substantive response to the agency's position in its comments; it stated only that this was one of several issues that ". . . can be determined based upon the agency report and relevant documents. . . ." We have reviewed Amcare's arguments regarding the evaluation in light of the agency's explanation. As there is nothing on the face of the evaluation which brings the reasonableness of the agency's conclusions into question, and Amcare has not rebutted the agency's position, there is no basis for questioning the evaluation. See TRW, Inc.; Systems Research and Applications Corp., B-260968.2, et al., Aug. 14, 1995, 95-2 CPD ¶ 101. We therefore deny this aspect of Amcare's protest.²

¹The offerors were not required to submit these BAFOs at the same time; Amcare was required to submit its BAFO 17 days earlier than any other offeror. Amcare contends that the agency erred in not establishing a common cut-off date for the submission of BAFOs. The record shows, however, that Amcare was advised on February 21, 1996 that the other offerors had not been required to submit their BAFOs at the time Amcare made its submission. Since Amcare did not raise this contention until March 29 when it protested to our Office, we dismiss this allegation as untimely. 4 C.F.R. § 21.2(a)(2) (1996).

²Similarly, while Amcare initially maintained that the VA unreasonably delayed the award of a contract, the VA provided a detailed, reasonable explanation of the various events that resulted in delays of the award, and Amcare made no further substantive comment on this issue. Thus there is no basis for finding any impropriety on the agency's part. TRW, Inc.; Systems Research and Applications Corp., supra.

NONCOMPLIANCE WITH SPECIFICATIONS

Amcare maintains that Nahatan's BAFO did not comply with the specifications in certain material respects and that the agency improperly allowed Nahatan, but not the other offerors, to submit a proposal based on noncompliant equipment. Amcare maintains that Nahatan offered a "liquid low loss" oxygen system rather than a "LINDE" liquid oxygen system or equal (as specified in the RFP) and also offered "M" size oxygen cylinders rather than the "E" and "H" size cylinders called for by the solicitation.

The record (our Office conducted a hearing in connection with this issue) confirms that the agency made award based on Nahatan's alternate proposal for a "liquid low loss system," as Amcare alleges. However, prejudice is an essential element of every viable protest and where none is shown, our Office will not sustain a protest, even where the agency's actions may have been improper. IT Corp., B-258636, et al., Feb. 10, 1995, 95-1 CPD ¶ 78. At the conclusion of the hearing, the parties were asked to address prejudice in connection with this issue. In its post-hearing comments, Amcare neither alleges nor demonstrates that it was prejudiced by the agency's actions. Specifically, while Amcare maintains only that the Nahatan offer was technically noncompliant, and that the agency should reopen the competition to provide all firms an opportunity to submit offers based on the alternate equipment, it does not assert—and there is nothing in the record which suggests—that it would or could have offered the alternate equipment, or that any such offer would have been significantly lower priced (in the context of this competition). In view of these considerations (and, to some limited extent, the fact that both Nahatan and NMC submitted BAFOs that were rated technically superior to and offered the compliant system at lower prices than Amcare's), there is no basis for concluding that the VA's actions were prejudicial to Amcare.

BAD FAITH

In its initial protest, Amcare alleged that a senior official at one of VA's installations for this acquisition had a conflict of interest. Specifically, Amcare alleged that the Chief of Respiratory Therapy at one installation was on the board of medical advisors for Nahatan and that, because he was the supervisor for one of the technical evaluators, he had an opportunity to improperly influence the outcome of the procurement. During the hearing, we obtained testimony showing that the Chief of Respiratory Therapy had in fact entered into a paid consultant relationship with Nahatan, but that at the time he entered into the relationship, he was unaware of the fact that Nahatan was competing for the requirement. The testimony further showed that the Chief of Respiratory Therapy and the evaluator in question never had substantive discussions concerning the ongoing competition or the firms involved. There was no evidence, and the record gives no reason to believe, that the Chief of Respiratory Therapy ever directly or indirectly attempted to influence

the outcome of the competition, or that the evaluator was either aware of, or influenced by, the existence of a relationship between the Chief Respiratory Therapist and Nahatan.

In its post-hearing comments, Amcare apparently abandoned its conflict of interest allegation.³ Amcare argues instead that Nahatan's actions in establishing a relationship with the Chief of Respiratory Therapy constituted bad faith.⁴ It is not apparent on what basis Amcare would have us sustain its protest, since there is no evidence or allegation of either a legal impropriety on Nahatan's part, or that the evaluation was improperly influenced. In any case, we need not decide this issue since Amcare is not an interested party for purposes of advancing the argument. Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(a) and 21.0(a), require a protester to be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. As noted, there was another offeror, NMC, whose proposal was found technically superior to, and lower priced than, Amcare's. Amcare has not challenged the evaluation of NMC's proposal, or otherwise raised allegations that would bring into question its relative competitive standing. Thus, even if Nahatan were eliminated from the competition, NMC, not Amcare, would be in line for award. Amcare therefore is not an interested party for purposes of this allegation.

The protest is denied in part and dismissed in part.

Comptroller General
of the United States

³To the extent that Amcare's post-hearing submission can be interpreted as commenting on the conflict of interest protest basis, we deny the allegation. There is no evidence to show that the consulting relationship between the Chief Respiratory Therapist and Nahatan either directly or indirectly affected the outcome of the procurement; thus, there is no basis to sustain Amcare's allegation in this regard. TRESP Assocs., Inc.; Advanced Data Concepts, Inc., B-258322.5; B-258322.6, Mar. 9, 1995, 96-1 CPD ¶ 8.

⁴Amcare also alleged, without supporting evidence, that Nahatan had purchased equipment to be used in connection with the contract prior to the award. Even if Amcare's allegation were true, however, it would show no more than that Nahatan had decided to buy certain equipment, a decision not necessarily related to the performance of this particular contract.



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: ACS Government Solutions Group, Inc.

File: B-282098; B-282098.2; B-282098.3

Date: June 2, 1999

Timothy B. Harris, Esq., for the protester.

Frances Cox Lively, Esq., Department of Housing and Urban Development, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to evaluate offers consistent with instructions to offerors in solicitation for comprehensive loan servicing services is sustained where offerors were prohibited from proposing a solution that assumed that the agency would permit an electronic interface between the agency's and the successful offeror's data systems, and the record shows that the awardee's technical approach and price relied significantly on the existence of such an interface for performing the requirement.
2. Allegation that agency improperly evaluated the awardee's proposal under the prior experience evaluation factor is sustained where the solicitation contemplated the evaluation of corporate and key personnel experience separately, and the record contains no basis upon which the agency could reasonably have determined that the awardee's demonstrated corporate performance was, in accordance with the terms of the solicitation, the "same" as or "similar" to the solicitation requirements.
3. Allegation that discussions with protester were not meaningful is sustained where the record shows that the evaluators were concerned over the protester's pricing methodology and the source selection official shared that concern, but the protester was not afforded an opportunity during discussions to explain its pricing strategy.

DECISION

ACS Government Solutions Group, Inc. (ACS) protests the issuance of a task order to Deloitte & Touche (D&T) under request for proposals (RFP) No. R-DEN-00614, issued

by the Department of Housing and Urban Development (HUD) for comprehensive loan servicing services. ACS argues that HUD failed to adhere to the instructions to offerors; improperly evaluated the awardee's proposal; failed to conduct meaningful discussions with ACS and held improper discussions with the awardee; and based its selection on a flawed price/technical tradeoff analysis.

We sustain the protest.

Background

The RFP, issued on November 19, 1998, contemplated the issuance of a task order for a base period with up to three 1-year option years. RFP § B, ¶ 1.3, at B-1, B-2 and § E ¶ 1.3(f)(1). The contractor is to perform a full range of comprehensive servicing of HUD's Secretary-held single family mortgage portfolio. *Id.* § C-1, ¶ 1.1. The required services include initial loan set-up, servicing the loan, and accounting-related functions. *Id.* The RFP specifically limited proposals to those firms included on a General Services Administration Federal Supply Schedule (FSS), for Loan and Other Asset Servicing/Management services. *Id.* § E, ¶ 1.2.

The RFP provided for a two-phase procurement cycle. In the first phase, offerors were required to submit a statement of qualifications and past performance, which was to be reviewed by an evaluation panel to determine which firms would be invited to participate in the second phase of the procurement. *Id.* § E, ¶ 1.2(b). In the second phase, offerors were required to submit a written business proposal and provide an oral presentation for their technical and management proposals. *Id.* Upon completion of the oral presentations, a technical evaluation panel (TEP) was to conduct discussions and obtain clarifications from the offerors. The RFP stated that upon conclusion of all oral presentations, the TEP would perform a final technical evaluation of the presentations and offerors would be afforded an opportunity to submit written final proposal revisions (FPR) based upon the discussions. *Id.*

The RFP listed the following technical evaluation factors in descending order of importance (respective weights, which were not disclosed in the RFP, are shown in parentheses): quality control (50 points), plan of accomplishment (40 points), management capability (35 points), and prior experience (25 points), for a maximum possible score of 150 points. *Id.* § E, ¶ 1.7(a)(2); Contracting Officer's (CO) Statement, Mar. 30, 1999 at 3. Price was not to be numerically scored.¹ RFP § E, ¶ 1.8(a). The RFP stated that combined relative merit under the technical evaluation factors was to be considered more significant than price. *Id.* ¶ 1.8(a). HUD would

¹In addition to requiring a total price for start-up costs, for each of the base and option years, offerors were required to submit unit prices per month for servicing estimated quantities of loans and partial claims. RFP amend. 3, § B.

issue a task order to the responsible offeror whose offer conformed to the solicitation and was deemed more advantageous to the government. Id.

Of the four firms invited to participate in the second phase of the procurement, three firms, including ACS and D&T, responded by the November 30, 1998 closing date. CO Statement at 3. Oral presentations were limited to 1 hour for each firm; discussions were held immediately following each oral presentation; and the TEP then convened to arrive at initial consensus ratings. The agency then requested FPRs, and the TEP reevaluated proposals based on the FPRs, with the following final consensus results for the protester and the awardee:

Firm	Score	Risk	Total Price
D&T	146	Low	\$36,634,084.20
ACS	141	Low	20,183,094.32

Agency Report (AR), exh. 50, Memorandum from the CO to the Source Selection Official (SSO) at 2nd and 3rd unnumbered pages (Dec. 31, 1998).

Based on the results of the evaluation, the TEP recommended to the CO that D&T be issued the order as the firm offering the best overall value to the government. AR, exh. 51, Memorandum from TEP to CO at 5 (Jan. 4, 1999).² That recommendation was then forwarded to the SSO for a final decision. The SSO accepted the TEP's recommendation, concluding that D&T offered a higher level of experience, technical ability and additional benefits to HUD, especially in the areas of tax and due diligence services, which justified paying a premium for D&T's proposal. AR, exh. 56, Memorandum from the SSO to the CO at 3rd unnumbered page (Jan. 19, 1999). By letter dated February 10, HUD informed ACS that the task order had been issued to D&T. This protest to our Office followed a written debriefing.³

Protester's Contentions

ACS primarily argues that in issuing the order to D&T, HUD improperly disregarded the solicitation's instructions that offerors were required to use HUD's loan servicing software system, referred to in the record as "Strategy," and because, in further

²During the course of these proceedings, the agency discovered that there are two slightly different versions of this document in the record, both dated January 4 and signed by the TEP Chairperson. Our comparison of these two documents, however, reveals no material differences that affect the TEP's recommendation or our analysis of the issues presented in this protest.

³Pursuant to Federal Acquisition Regulation (FAR) § 33.104(c)(2)(i) and (ii), the head of the contracting activity authorized D&T to continue performance of the contract notwithstanding the protest.

disregard of HUD's instructions to offerors, D&T's approach assumed that HUD would permit an electronic interface between Strategy and D&T's data systems.

ACS also argues that HUD improperly evaluated D&T's proposal under the prior experience factor. In this connection, ACS maintains that the evaluators improperly awarded D&T's proposal a nearly perfect score in this area despite the fact that neither D&T nor its teaming partner demonstrated corporate experience in performing loan servicing that was the "same" as or "similar" to the solicitation requirements.

The protester also argues that HUD conducted improper discussions with D&T and failed to conduct meaningful discussions with ACS, and that the agency's price/technical tradeoff decision was flawed.

Discussion

Instructions to Offerors

ACS's primary ground of protest is that HUD provided specific instructions to offerors which were designed to permit the agency to evaluate proposals on an equal basis, and that in accepting D&T's proposal, HUD improperly disregarded those instructions. Specifically, ACS contends that the solicitation required offerors to use HUD's software system, Strategy, which HUD was developing specifically for this loan portfolio. In addition, ACS argues that HUD instructed offerors not to propose the use of an electronic interface between their system and Strategy, and to reserve proposing additional services and capabilities until after award. According to ACS, D&T disregarded the agency's specific instructions that offerors were to use HUD's Strategy system and proposed an electronic interface between its data systems and HUD.

HUD takes the position that this is a "performance-based" solicitation, where the RFP explained HUD's objectives and left it up to the offerors to determine how to accomplish the tasks. Memorandum of Law, Mar. 30, 1999, at 16-17. The agency states that while offerors were instructed to use HUD's Strategy system, they were not prohibited from proposing their own data system to augment Strategy; they could not, however, use their own data system in place of Strategy. The agency states that offerors were also instructed that their computer system could not interface with HUD's system. *Id.* at 19-21. HUD maintains that, consistent with the instructions to offerors, D&T proposed its own system to augment Strategy, and that D&T's approach does not assume an electronic interface between Strategy and D&T's systems.

It is thus undisputed that offerors were expected to use HUD's Strategy system, and were further instructed not to assume that HUD would permit an electronic interface between Strategy and their own system. The issue presented for our resolution,

therefore, is whether in issuing the order to D&T, HUD disregarded these instructions and effectively waived the requirement that offerors use Strategy, or relaxed the prohibition against assuming an electronic interface between HUD's system and D&T's systems.

In response to phase I of the competition, D&T provided a statement of its qualifications and past performance in which the firm explained that it would be teaming with The Clayton Group, Inc. to perform the required services. AR, exh. 4, D&T's Nov. 30, 1998 response to RFP, at 4. In this connection, D&T explained that it would use its experience to develop and manage a comprehensive quality control program tailored to the solicitation's requirements, while personnel from its teaming partner would perform all other servicing and asset sale support functions. Id. Regarding Clayton's loan servicing capabilities, D&T's response stated as follows:

Clayton's performing loan servicing and administration units operate from a [DELETED], which is electronically wrapped by ARSENAL, an industry-leading, proprietary, default management operating system.

Id.

In its business proposal, under a section entitled "Equipment," D&T describes its proposed systems as follows:

Systems - The Deloitte/Clayton Team utilizes a [DELETED] servicing platform for Loan Administration functions. The system is year 2000 compliant and fully capable of accepting the 12,673 loans contemplated under this contract. As required by HUD, Deloitte/Clayton is prepared to utilize the new Strategy loan servicing system. However, we strongly recommend an interface that would allow Strategy and [DELETED] to run concurrently. This interface will significantly reduce the unit cost of servicing each loan, by automating critical servicing functions including escrow analysis, collection letters and reporting. Our pricing is based on this system interface. The per-unit price will increase if servicing functions that are normally automated have to be performed manually.

[DELETED] is electronically wrapped by ARSENAL, an industry leading, proprietary, default management operating system. ARSENAL . . . is one tool in the Clayton Technologies suite . . . that utilized together, provide unequalled loan analysis, management and reporting capabilities.

AR, exh. 12, D&T Business Proposal, Dec. 11, 1998, at 5 (emphasis added).

Under a section entitled “ROUTINE SERVICING,” D&T’s proposal further explained that “[DELETED] has the built-in capabilities to track escrow, complete escrow analysis and [produce] year-end statements.” Id. at 8. D&T’s proposal further states that “[i]t is our intent, with the approval of the GTR and the GTM to build a bridge between our servicing system, our default system and Strategy, to enable HUD to receive both their own reports and take advantage of the robust reporting capabilities of our proprietary software.” Id. Under a section entitled “REPORTING,” the proposal explains the various reporting capabilities and benefits to HUD, and specifically states that “ARSENAL will seamlessly interface with the HUD systems.” Id. at 23. D&T further explained during discussions that if [DELETED] cannot be electronically linked with HUD’s Strategy system, the value of ARSENAL to HUD would decrease dramatically. AR, exh. 15, Video Recording of D&T’s Discussions.

The agency’s argument that D&T’s approach did not involve an electronic interface is further undermined by the following exchange between HUD’s Director of Denver Field Contracting Operations (DDFCO) and D&T during oral discussions:

DDFCO: I still have one question on the interface that you have that you’re going to need—it’s not . . . I don’t know how much of that is integral to your proposal but we don’t know yet whether there actually can be an interface at our headquarters which will allow an interface to a HUD system to be developed. . . . So, I don’t know how critical that is to your proposal.

.

D&T: And I think the challenge that you’re giving me that I want to make sure I measure ourselves against is we may have priced this to be overly efficient on the assumption that we could do an electronic bridge. So I think we need to make sure that what happens to our pricing if we can’t, because I think we’ve been operating on the assumption that that’s imminently do-able and it may be a bad assumption.

HUD’s Post-Hearing Comments, May 6, 1999, attach. 3, transcript of portions of Dec. 15, 1998 discussions with D&T, at 2.

The record is thus clear that based on HUD’s review of D&T’s proposal, as shown by the exchange during oral discussions quoted above, HUD understood that D&T proposed an electronic interface between its data systems and HUD’s Strategy. Further, D&T made it clear both in its proposal and during discussions that its pricing assumed that the agency would permit

an electronic interface between the agency's and D&T's system. HUD's assertion, therefore, that there is "no electronic connection shown between [D&T's] system and HUD's Strategy system," HUD's Post-Hearing Comments, May 6, 1999, at 12, not only disregards the facts in the record, but is inconsistent with D&T's own explanation that its systems will "seamlessly" interface with HUD's system, and that its pricing was based on the existence of that electronic interface.

It is a fundamental principle of government procurement that offerors must be provided with a common basis for the preparation of their proposals. Meridian Management Corp.; Consolidated Eng'g Servs., Inc., B-271557 et al., July 29, 1996, 96-2 CPD ¶ 64 at 5. Thus, award must be based on the requirements stated in the solicitation, and offerors notified of the government's changed or relaxed requirements. Id. We will sustain a protest where an agency, without issuing a written amendment, fails to notify all offerors of its changed requirements or relaxes an RFP specification to the protester's possible prejudice (e.g., where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements). Container Prods. Corp., B-255883, Apr. 13, 1994, 94-1 CPD ¶ 255 at 4.

The record shows that HUD wanted to ensure that the offerors used Strategy, and made this clear during the preproposal conference. Further, while offerors could propose to use their own data systems, they were specifically instructed not to assume that HUD would permit an electronic interface between their own systems and Strategy. Based on our review of the entire record, including D&T's statement of qualifications and experience submitted during phase I of the competition, its business proposal, and the transcript of the video recording of its discussions, we conclude that by issuing D&T the order, HUD essentially waived the instructions given offerors concerning the interface, and improperly accepted a proposal which relied significantly on the existence of that interface. Although D&T's proposal states that the firm is prepared to use HUD's Strategy system, it is clear that the firm's entire approach to loan servicing and reporting significantly relies on, and assumes, the existence of an electronic interface between HUD's Strategy system and Clayton's servicing software to perform the contract. Indeed, the awardee specifically stated that D&T's pricing is based on such an assumption; that, without the interface, the value of D&T's ARSENAL system to HUD would decrease dramatically; and that, without the interface, D&T's price would increase because critical servicing functions that are normally automated (e.g., escrow analysis, collection letters, and reporting) will have to be performed manually. The agency's action prejudiced the protester because ACS was not notified of the waiver and its approach was premised on using HUD's Strategy system and its own data system concurrently, without assuming an electronic interface between its own systems and Strategy. Given the significant

difference between the vendors' prices--and in light of the fact that without an interface, D&T's total price is likely to increase--and the closeness of the final technical scores, we think that there is a reasonable possibility that ACS was prejudiced by the agency's waiver of the stated instructions. Accordingly, we sustain this aspect of the protest.

Evaluation of D&T's Prior Experience

ACS argues that HUD improperly evaluated D&T's proposal under the prior experience evaluation factor. Specifically, ACS contends that HUD unreasonably rewarded D&T for having corporate experience "the same as or substantially similar to" that required by the solicitation, which D&T did not demonstrate in its proposal.

The agency takes the position that this evaluation factor did not require that corporate experience and key personnel be separately evaluated. As such, the agency contends that the evaluation of D&T's proposal was reasonable because the evaluators considered the experience of its key personnel to satisfy the criterion.

Under the FSS program, agencies are not required to request proposals or to conduct a competition before using their business judgment in determining whether ordering supplies or services from an FSS vendor represents the best value and meets the agency's needs at the lowest overall cost. FAR §§ 8.401, 8.404(a); Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD ¶ 161 at 3. Where, as here, an agency conducts a competition, however, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Information Sys. Tech. Corp., B-280013.2, Aug. 6, 1998, 98-2 CPD ¶ 36 at 3; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. We have reviewed the individual evaluators' worksheets, the TEP's consensus evaluation reports, and the award recommendation memorandum, and find that the evaluation of D&T's proposal under the prior experience factor was unreasonable.

The RFP explains the purpose of the contemplated contract, in part, as follows:

The purpose of this contract is to engage a loan servicing organization to perform a full range of comprehensive servicing of the Department's Secretary-held Single Family mortgage portfolio. These services will range from the initial loan set-up, to the servicing of the loan, to the accounting related functions (perform disbursement data review and entry functions, print and mail checks, accounts receivable and payable, and financial adjustments), to the satisfaction of the mortgage or to ensure completion of legal actions, if appropriate.

In addition, the contractor shall also be responsible for servicing the Department's Loss Mitigation Partial Claims Mortgages and their legal instruments.

RFP § C-1, ¶ 1.1.

The RFP estimated that the successful contractor would provide comprehensive servicing for more than 12,000 Secretary-held single family mortgages, and more than 1,000 partial claim subordinate mortgages. *Id.* § C, Technical Exh. 2. The CO states that the majority of the mortgages currently in the loan servicing portfolio are considered delinquent. CO's Statement, Mar. 30, 1999, at 1.

In order to evaluate the offerors' prior experience, firms were required to provide "evidence of [their] corporate and staff experience in servicing a large portfolio of delinquent loans" during the 5 years immediately preceding the solicitation. RFP § E, ¶ 1.7(a)(2)(iv).⁴ In addition to the information required by the RFP, by letter dated November 19, 1998, HUD requested the following specific information from each offeror:

Provide evidence of your corporate and staff experience in performing work and providing deliverables the same as, or substantially the same as the primary services required [by the RFP] during the five (5) years immediately preceding this solicitation. This includes any key personnel, subcontractors, partnerships, etc. necessary to perform the primary services required.

Provide a list of all clients including Federal, state and local governments and commercial customers for whom you performed the same or similar services as those required during the five (5) years immediately prior to this solicitation which includes the following:
Name of the contracting office, contract number, total contract value,

⁴Testimony at the hearing shows that at least two members of the TEP did not consider the 5 years to be a "minimum requirement," Hearing Transcript (Tr). at 56, 156, while the TEP Chairperson testified that offerors were required to have a minimum of 5 years experience immediately prior to the solicitation in servicing a large portfolio of delinquent loans. Tr. at 224. It thus appears that the 5 year requirement for servicing loans was not consistently applied by the evaluators. The record further shows that, in its report to the CO, the TEP concluded that ACS "meets the 5 year minimum requirement of for loan servicing . . ." AR, exh. 51, Memorandum from the Chairperson, TEP, to the CO at 3 (Jan. 4, 1999). However, the TEP report makes no similar assessment with respect to D&T.

contracting officer name and telephone number, program manager name and telephone and list of major subcontractors.

Provide evidence of your successful performance of work—including meeting delivery dates and schedules the same as or substantially similar to that required during the five (5) years immediately preceding this solicitation.

AR, exh. 2, HUD letters to offerors, Nov. 19, 1998, at 1.

Here, the solicitation and the agency's request for information quoted above clearly indicated that HUD considered a firm's experience to be different from its employees' individual experience. The RFP specifically requested offerors to provide evidence of their corporate and staff experience in servicing a large portfolio of delinquent loans. RFP § E, ¶ 1.7(a)(2)(iv). Offerors were also instructed to provide evidence of their corporate and staff experience pertinent to performing work the same as, or substantially similar to, the primary services required by the RFP during the past 5 years. Although the RFP stated that both corporate and personnel experience were to be evaluated under the prior experience factor, given the reference in the RFP to corporate and staff experience, id., and the type of information HUD specifically requested in its November 19 letter, we conclude that, contrary to the agency's position, under this evaluation factor, the RFP clearly contemplated a separate evaluation of corporate and key personnel experience.⁵

Our review of the record, including testimony at the hearing, shows that the TEP's conclusion was based almost entirely on its evaluation of D&T's proposed key personnel, and that the TEP did not conduct a separate evaluation of the firm's corporate experience. The TEP awarded D&T's proposal 23 out of 25 points under the prior experience factor. AR, exh. 46, TEP Final Consensus Score Sheet, at 6th unnumbered page. The TEP found that as a company, including its key personnel, D&T "has been performing the primary services required under this contract for a large portfolio of delinquent loans for a significant portion of the five years immediately preceding the solicitation." Id. The TEP further noted that D&T had demonstrated

⁵In further support of our conclusion, we note that in the individual evaluator score sheets and the consensus score sheets, in order for a proposal to earn a "high" score (17-25 points) under the prior experience evaluation factor, the offeror had to clearly demonstrate that both as a company and its key personnel had been performing the primary services required under the RFP for a significant portion of the 5 years immediately preceding the solicitation. If the offeror was lacking either in corporate or key personnel experience, the proposal could earn only a "medium" score (8-16 points). AR, exhibits 28, 29, at 6th unnumbered page.

“extensive experience servicing large portfolios of delinquent loans both in the private and public sector,” *id.*, and concluded that D&T “has clearly demonstrated extensive ability in delinquent loan servicing both in the public and private sector.” *Id.* at 7th unnumbered page. We have reviewed the evaluation record, including the individual evaluators’ score sheets, D&T’s proposal, and the video recording of D&T’s oral presentation, and conclude that the TEP’s conclusions are not supported by the record. Below we discuss some examples of the projects the TEP relied on in its evaluation in support of our conclusion.

In its proposal, D&T described a project in support of the Government National Mortgage Association (Ginnie Mae). According to the proposal, D&T “was awarded a multi-year task order contract to support Ginnie Mae’s Office of Finance in evaluating, developing and implementing information and risk management systems.” AR, exh. 4, at 29. The proposal further explains that D&T was “awarded several tasks to address the operational procedures and information systems of Ginnie Mae’s Office of Asset Management.” *Id.* One TEP member, who awarded D&T’s proposal the maximum number of points available in this area, testified that while this particular experience is in developing a desk guide for loan servicing, it is not loan servicing. Tr. 68, 69. With respect to D&T’s corporate experience generally, one evaluator testified that D&T has experience in performing loan servicing reviews, which is different from actually performing loan servicing. Tr. at 65, 66. This evaluator simply could not point to any project where D&T had demonstrated in its proposal having extensive experience in performing loan servicing on large delinquent portfolios in the private sector. Tr. 73, 74. Further, this evaluator could not point to anything in the record to show that D&T had experience in direct loan servicing in either the private or public sector because, according to the witness, D&T does not service loans. Tr. 68-70. Another evaluator who awarded D&T’s proposal 17 points in this area also testified that D&T, as a company, does not have any experience servicing a large portfolio. Tr. 166. In our view, the corporate experience D&T described in its proposal, particularly its work with Ginnie Mae, clearly did not demonstrate that the firm had provided comprehensive servicing of a large portfolio of delinquent single family mortgages as contemplated by HUD’s solicitation.

D&T also relied on work performed by its teaming partner, The Clayton Group, and included six projects to satisfy the corporate experience requirement. D&T described the first project, with [DELETED] Bank, as related to delinquency problems with various consumer loan portfolios secured by auto leases and loans, unsecured line of credit portfolios, and mortgage portfolios. The period of performance for this contract was from January to April 1998. AR, exh. 4, D&T’s proposal, Nov. 30, 1998, at 38. Although the proposal states that this portfolio consisted of 40,000 loans and references “mortgages,” there is nothing in the record to indicate how many loans within this portfolio were

single family mortgages. Tr. 79, 80. Further, it is clear that the contract was primarily for the collection of delinquent auto loans and leases. Specifically, D&T's proposal states that The Clayton Group was retained to resolve an "unacceptably high delinquency rate in [DELETED] automobile loan and lease portfolio." AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 32, 40. Resolving delinquent auto loans and leases, however, is not the same as servicing single family mortgages. For instance, one evaluator testified at the hearing that servicing mortgages is much more complex than servicing auto loans, in that servicing a delinquent first mortgage loan requires "much more intensive labor" and generally involves relatively complex functions (e.g., escrows, paying taxes), which are not usually involved in servicing auto loans. Tr. 59-60. In our view, this contract to resolve delinquent auto loans and leases, clearly does not demonstrate corporate experience the "same as or similar to" providing comprehensive servicing to more than 12,000 delinquent single family mortgages as contemplated by HUD's solicitation.

The Clayton Group describes another project, with [DELETED], as "servicing transfer" of a non-performing loan portfolio. AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 33. Based on the information in D&T's proposal, one evaluator testified that this entire portfolio consisted of approximately 200 to 250 loans. Tr. 77, 78. According to D&T's proposal, this portfolio initially consisted of non-performing loans secured by real estate and some unsecured loans. D&T states in its proposal that [DELETED] employed Clayton to initialize customer contact and counsel the borrowers regarding their loan status to resolve delinquencies. AR, exh. 4, D&T's proposal, Nov. 30, 1998, at 41. This relatively small contract, however, does not appear to involve services that are the "same" as or "similar" to the full range of comprehensive loan servicing contemplated by HUD's solicitation.

Consistent with our conclusion that the contracts cited in D&T's proposal fail to show the required corporate experience, the agency's evaluation record similarly lacks any support to show that D&T's corporate experience is relevant to the contemplated contract. For example, one evaluator, who awarded D&T's proposal a perfect score of 25 points in this area, generally noted D&T's experience of approximately 25 years; that reference checks were excellent; and that D&T had provided an "extensive organizational chart demonstrating knowledge of servicing." AR, exh. 29, Individual Score Sheet, at 6th unnumbered page. However, except for those cursory comments, that document contains no description or discussion of how D&T's experience is relevant to or is the same as or substantially similar to the work contemplated under HUD's solicitation, especially since the record shows that the firm does not perform loan servicing. Likewise, in its recommendation, with which the SSO concurred, the TEP specifically noted that D&T had demonstrated "extensive experience conducting full servicing of seriously delinquent loan portfolios in the public and private sector," and cited as examples [DELETED]." AR, Tab 50, Memorandum from the CO to the SSO at 7 (Dec. 31, 1998). Our review of D&T's proposal reveals no description of a

[DELETED]⁶ contract, however, and, as discussed above, The Clayton Group's [DELETED] contract involved collection of delinquent auto loans and leases, which, in our view, is not "the same as or similar to" providing comprehensive servicing to a large portfolio of single family mortgages as contemplated by HUD's solicitation.

Agencies are required to document their selection decisions so as to show the relative differences among proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR §§ 15.305(a), 15.308; Department of the Army-Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211 at 2. Where there is inadequate supporting rationale in the record for the source selection decision, we cannot conclude that the agency had a reasonable basis for its decision. See American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53 at 6. Based on our review, we think that the TEP's conclusion that D&T demonstrated "extensive experience" in providing the full range of loan servicing to a large portfolio of delinquent mortgage loans is not supported by the record. Accordingly, we think that the evaluation of D&T's proposal under the prior experience factor was flawed, and we sustain this aspect of ACS's protest as well.

Discussions

ACS argues that the agency did not conduct meaningful discussions with the firm. In support of its argument, ACS points out that in its report to the CO, the TEP expressed concern that between the base and option years, ACS's proposal reflected an increase in price per account serviced, and that ACS had not adequately explained this increase. ACS maintains that since its price was of material concern to the TEP in its recommendation, and was also a concern expressed by the SSO, HUD should have given the firm an opportunity to address this during discussions.

The FAR requires that contracting officers discuss with each offeror being considered for award "significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors (41 U.S.C. § 253b(d)(1)(A) (1994); FAR

⁶We note that during its oral presentation, a D&T senior partner briefly mentioned D&T's experience with "large contracts," citing [DELETED] as an example. Except for naming that company, however, D&T did not explain the nature of the [DELETED] contract or provide any details that could reasonably support the TEP's conclusion that D&T had demonstrated "extensive experience conducting full servicing of seriously delinquent loan portfolios in the public and private sector." In fact, the record shows that D&T does not perform loan servicing.

§ 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. Du and Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7. Discussions cannot be meaningful unless they lead an offeror into those weaknesses, excesses or deficiencies of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award. Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430 at 6, recon. denied, Department of the Navy-Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422.

Here, the record shows that in its recommendation to the CO, the TEP expressed concern that ACS's proposal reflected a "large increase between the price per account from ACS for the first year versus the following option years." AR, exh. 51, Memorandum from the Chairperson, TEP, to the CO at 6 (Jan. 4, 1999). The TEP further stated that ACS had not adequately explained this increase, and that it assumed that ACS was "counting on getting the award with [its] lower bid and then HUD would have a note sale and [ACS] would actually make a large amount of money." *Id.* In other words, the TEP believed that ACS's price was an attempt at "buying into" the contract and assumed that HUD would conduct a note sale during the option years, thus resulting in an unreasonable increase in price per account serviced. The record further shows that the SSO concurred with this assessment and also expressed this concern in his selection decision. AR, exh. 56, Memorandum from the SSO to the CO at 3rd unnumbered page (Jan. 19, 1999). While the record is not clear as to what impact ACS's pricing methodology had on the TEP's recommendation or on the SSO's selection decision, it is clear that, at a minimum, it was of sufficient concern for the evaluators to raise it in the TEP's report to the CO, and that the SSO agreed with the TEP's view that ACS had not adequately explained its pricing strategy. Despite this stated concern, however, there is no evidence in the record that HUD raised this issue during its discussions with ACS. We therefore agree with ACS that discussions with the firm regarding its price were not meaningful.⁷

Recommendation

We recommend that the agency reopen discussions with ACS and D&T, and request FPRs from these two firms, including business proposals. Since it is clear from the record that the agency has not changed its position that offerors are prohibited from proposing to use an electronic interface, the proposals should be evaluated accordingly. During discussions, HUD should afford ACS

⁷Because our recommendation that the agency reopen discussions and request another round of FPRs renders the remaining protest issues academic, we need not address them here.

an opportunity to explain its pricing methodology. We also recommend that the agency reevaluate D&T's proposal under the prior experience evaluation factor in accordance with this decision. If upon reevaluation, the agency determines that D&T's proposal does not represent the best value to the government, HUD should terminate the order issued to D&T and issue the order to ACS. We also recommend that ACS be reimbursed its costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for such costs, 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).

The protest is sustained.

Comptroller General
of the United States



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Spectrum Sciences & Software, Inc.

File: B-282373

Date: June 22, 1999

Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for the protester.

Lt. Col. Gary L. Halbert and Capt. Karen L. Deimler, Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misled offeror into believing that it would have an additional opportunity to revise its price because the request for final proposal revision did not state that the government intended to make an award without obtaining further revisions is denied where the notice reasonably conveyed this intention by specifying that discussions had been concluded and requesting a final proposal revision.

DECISION

Spectrum Sciences & Software, Inc. protests the award of a contract to C. Martin Company under request for proposals (RFP) No. F16602-99-R-0003, issued as a small business set-aside by the Department of the Air Force for the operation and maintenance of the Claiborne Bombing Range. The protester objects that the Air Force's letter requesting Spectrum's final proposal revision failed to specify that the agency intended to make an award without obtaining further revisions, thereby leading Spectrum to conclude that it would have a further opportunity to revise its price, which was not provided.

We deny the protest.

The solicitation, issued on December 31, 1998, contemplated the award of a fixed-price requirements contract for a base period of 1 year, with four 1-year options. The RFP stated that award would be made to the responsible offeror whose offer conforms to the solicitation, is determined technically acceptable based on the minimum mandatory evaluation criteria, and offers the lowest evaluated price, based on the total price for the base year and all options years. RFP § M-502. The RFP provided that the technical evaluation would result in a determination of

conformance or non-conformance in respect to the following technical evaluation areas: (1) general and specific tasks; (2) government furnished property; (3) contractor furnished items and services; and (4) specific tasks. RFP § M-502.c.1, c.2. In order to be rated acceptable, a proposal had to achieve a rating of acceptable in each of the technical areas. RFP § M-502.c.3.a. The RFP warned offerors to propose their best offer initially since award could be based on initial proposals without discussions. RFP § M-502.b.3.

Five proposals were received by the February 8, 1999 closing time. Two proposals were rejected as technically unacceptable. Air Force Memorandum of Law at 1. On February 12, requests for additional information and clarifications were sent to the three remaining technically acceptable offerors, in a letter, which stated that it was not a request for final proposal revision. Responses were received and evaluated. On February 22, the three offerors were notified that discussions were concluded and that their proposals were found to be technically acceptable, and each was requested to submit a final proposal revision. The text of Spectrum's notice was as follows:

1. Written discussions have been concluded for subject solicitation and your proposal was found to be technically acceptable. Request you submit your final proposal revision on the attached schedule, pages 2 through 11. Be sure to recheck your figures to eliminate any calculation errors.
2. Final proposal revisions are due in the 2d Contracting Squadron, 841 Fairchild Ave., Suite 204, Barksdale AFB LA 71110-2271, no later than 4:00 P.M. CST on 4 March 1999. If you have any questions, please contact

Agency Report (AR), Tab 8, Memorandum from Contracting Officer to Spectrum (Feb. 22, 1999).

On March 2, Spectrum submitted its response entitled "Final Proposal Revision," referencing the Air Force's February 22 "Request for Final Revision." AR, Tab 12, Letter from Spectrum to Contracting Officer (Mar. 2, 1999). Spectrum's cover letter stated that it was "pleased to provide the enclosed Final Proposal Revision," and the cover sheet to its price schedule stated in large type "Price Proposal Final Revision." Spectrum's price was the highest of the three technically acceptable offerors. On March 17, the Air Force notified offerors that C. Martin Company, Inc. was the low offeror. On March 25, award was made to C. Martin, the unsuccessful offerors were notified, and Spectrum filed this protest with our Office.

Spectrum argues that the award is improper because the Air Force failed to comply with Federal Acquisition Regulation (FAR) § 15.307(b) because it made the award without first explicitly notifying all competitive range offerors that the government intended to make award without obtaining further revisions. Spectrum maintains that because there was no such notice in the agency letter requesting a final proposal revision, “Spectrum concluded that the contracting officer was still in discussion (negotiations) concerning the Price Proposal,” and Spectrum further claims that it “fully intended to submit other price revisions until the contracting officer provided notice that no further revisions would be accepted.” Protest at 2-3.

Part 15 of the FAR has been recently rewritten and contains a new provision concerning requests for final proposal revisions. Currently FAR § 15.307 (b) provides as follows:

The contracting officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the Government intends to make award without obtaining further revisions.

The earlier language, at FAR § 15.611, required that, upon completion of discussions, the contracting officer issue requests for best and final offers (BAFO) to all offerors still remaining in the competitive range, and required that such requests include notice that discussions were concluded, state that this was an opportunity to submit a BAFO, and specify a common cutoff date and time for submission of written BAFOs.

The current language at FAR § 15.307(b), which substitutes the term “final proposal revision” for the previously denominated “BAFO,” includes a requirement that offerors be advised that award is contemplated without obtaining further revisions. While the agency did not include precise language to this effect in its request for final proposal revision, we fail to see how this could reasonably have misled the protester in the manner that it asserts, and Spectrum’s own submission strongly suggests that it was not so misled.

The solicitation provided that award was to be made to the lowest price technically acceptable offeror, and contained a notice of the possibility of award on the basis of initial proposals. In fact, the agency held discussions after which it requested a final proposal revision in a notice that advised each of the competitive range offerors that discussions had been concluded and that their proposals had been found technically acceptable. At this point, Spectrum knew that the only plausible purpose

for the requested final proposal revision was to provide offerors an opportunity to modify their prices. In these circumstances, Spectrum could not reasonably assume that it would be given any additional opportunities to submit its best price.

Moreover, as noted above, Spectrum's submission in response to the agency's request specifically stated in several places that it was a final proposal revision, in particular, labeling its price schedule cover sheet as "Price Proposal Final Revision." Thus, notwithstanding Spectrum's current assertion that it had every intention of submitting additional revisions until the agency specifically stated no further revisions would be accepted, its actual proposal indicates that it understood otherwise.

In its comments on the agency report, Spectrum contends that under FAR § 15.611, the contracting officer had the authority to reopen discussions after requesting BAFOs, while the currently applicable FAR § 15.307(b) does not contain a similar provision. From this, Spectrum concludes that the current scheme "prohibits the Government from reopening the bidding process once it is finally closed, but requires explicit compliance with the FAR in order to close discussions and revisions of offers." Protester's Comments at 3. In fact, the predecessor FAR provision admonished the contracting officer not to reopen discussions after receipt of BAFOs unless it was "clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the best and final offers received." FAR §15.611(c) (June 1997). There is no such admonition against reopening discussions in the new FAR provision. Moreover, under the old FAR provision, we recognized that a request for BAFOs that did not contain the similarly specifically prescribed language was unobjectionable as long it reasonably provided notice that it was a BAFO request. Israel Aircraft Indus., Ltd., B-239211, July 30, 1990, 90-2 CPD ¶ 84 at 4.

Here, the request for a final proposal revision specified that discussions were concluded and reasonably provided notice that the agency was requesting final prices. The protester should have and appears to have understood this to be the case, and has no reasonable basis to complain that it was misled because it did not receive adequate notice.

The protest is denied.

Comptroller General
of the United States



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Digital Systems Group, Inc.

File: B-286931; B-286931.2

Date: March 7, 2001

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

J. Andrew Jackson, Esq., and Tina D. Reynolds, Esq., Dickstein, Shapiro, Morin & Oshinsky, for Oracle Corporation, the intervenor.

Maria G. Bellizzi, Esq., General Services Administration, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's allegation that the evaluation of its technical proposal as posing a "high" risk contradicts the rating of its cost proposal as "low" risk is denied, where the record shows that technical and cost proposals were rated separately by different evaluation teams which considered different factors, and the different ratings merely reflect the independent judgments of the evaluators and are reasonably supported by the record.
2. Agency was not required to conduct discussions regarding two weaknesses identified in the protester's proposal regarding its past performance since the two weaknesses (which pertained to only 2 out of 20 performance questionnaire items) were not considered significant, and protester's performance record was rated acceptable overall. Agencies are not required to point out every element of acceptable proposals that receive less than the maximum evaluation rating.
3. Protester's allegation that the agency improperly conducted discussions is denied, where the record shows that during several rounds of discussions, the agency reasonably led the protester into areas of its proposal requiring revision, and the protester's failure to make those revisions because it feared jeopardizing its favorable cost rating reflected its own business judgment, rather than any improper agency action.
4. Discussions with offeror whose otherwise acceptable proposal took exception to certain solicitation requirements were unobjectionable where agency reasonably

determined that proposal could be made acceptable through discussions and that exceptions were primarily the result of defects in solicitation; ultimate decision to amend the solicitation to cure defects was unobjectionable since agency advised all offerors of the changed requirements and all offerors responded to the amended solicitation in final proposals.

5. Allegation that contracting officer's (CO) multiple roles impermissibly compromised his independence is denied, where there is no evidence in the record that the CO had any influence over the evaluation of technical or cost proposals, or that the CO's carrying out of his responsibilities in any way compromised the source selection.

DECISION

Digital Systems Group, Inc. (DSG) protests the issuance of a blanket purchase agreement (BPA) to Oracle Corporation under request for quotations (RFQ) No. TFW-00-0002, issued by the General Services Administration (GSA), FTS/Financial Management Systems Services Center, for an integrated financial management system for the Peace Corps. DSG challenges the issuance of the BPA on several grounds, including that GSA unreasonably evaluated its technical and cost proposals; failed to conduct adequate discussions with DSG; improperly failed to provide DSG with an opportunity to comment on allegedly negative past performance information obtained from one reference; and improperly conducted multiple rounds of discussions to favor Oracle. DSG also challenges the contracting officer's role in the procurement and contends that the cost/benefit tradeoff decision was not adequately justified.

We deny the protest.

BACKGROUND

The RFQ, issued on April 21, 2000, contemplated that GSA would issue a BPA for the acquisition of an integrated financial management system, for a base year with up to nine 1-year options. Agency Report (AR) exh. 1, RFQ §§ B.1, B.5.1, § L.19.¹ The RFQ stated that the objective was to procure a fully integrated financial management system supporting all of the Peace Corps's financial management and business processes. *Id.* §§ C.2, C.2.1, at C-11, C-12.

Vendors were required to submit separate technical and cost proposals, *id.* § L.2., and were to provide fixed prices for software, maintenance, training, and documentation (*i.e.*, products), and fixed hourly rates for technical assistance (*i.e.*,

¹ GSA's Financial Management Systems Service Center issued the RFQ and conducted the acquisition for the Peace Corps under GSA's multiple award schedule (MAS) Information Technology Schedule 70.

services); the Peace Corps would issue task and/or delivery orders based on this price list. The RFQ further explained that task and delivery orders for products only would be issued on a fixed-price basis, while orders that combined products and services would establish a ceiling amount or maximum number of hours of work, as appropriate.

Section M of the RFQ listed management and technical, and cost as evaluation areas, with the management and technical area considered significantly more important than cost. The management and technical area contained items and factors as follows:

Management and Technical Area
Item: Management Approach
Factor: Corporate Ability
Factor: Performance Record
Item: Functional/Technical
Factor: Functional Requirements
Factor: Technical Requirements
Item: Products and Services
Factor: Implementation
Factor: Training
Factor: Software Support

Id. § M.

Within the cost area, the RFQ stated that proposals would be evaluated to determine the expected contract cost and realism. In addition, the government was to perform a price analysis for completeness, realism, reasonableness, and risk. RFQ § M.3.4.2. The evaluation was to include a risk assessment for the overall management and technical area and for each of the items listed within the management and technical area. In addition, the RFQ stated that the government would assess the technical risk associated with the vendor's schedule, cost/price, and performance. Issuance of the BPA was to be based on the proposal deemed to provide the best overall value to the government. Id. § M.2.

Three vendors, including DSG and Oracle, responded to the RFQ by the time set on June 12. A source selection evaluation board (SSEB) evaluated the technical and management area by assigning color ratings of blue (exceptional), green (acceptable), yellow (marginal), or red (unacceptable), at the area and item levels; and risk ratings of low, moderate, or high at the area, item, and factor levels. Based on that evaluation, the SSEB prepared clarification reports (CR) and deficiency reports (DR) for all vendors. The cost team separately evaluated costs to determine expected contract costs, and to assess completeness of proposals, and cost realism, reasonableness, and risk.

In addition to written proposals, vendors were requested to perform an operational capabilities demonstration to provide the Peace Corps with a better understanding of the functional and operational capabilities of the vendors' proposed software, and to verify that the offered software satisfied the RFQ's requirements. The SSEB then revised its initial evaluation reports, taking into account the demonstrations, as well as the vendors' responses to the CRs and DRs. The agency also prepared points for negotiation (PFN) for each vendor.

Following the evaluations, the agency conducted written and oral discussions, requested and received final proposal revisions (FPR), and evaluated proposals based on FPRs. Based on the results of the evaluation, it concluded that discussions had been inadequate. Accordingly, discussions were reopened with all vendors and another round of FPRs requested and evaluated. On October 18, the agency amended the RFQ to cure certain defects in the solicitation, reopened discussions with all offerors, and requested and reevaluated at third round of FPRs. On November 9, the SSEB submitted its finalized evaluation to the source selection advisory council (SSAC).

The following matrix summarizes the SSEB's overall technical evaluation results at the area and item levels:

	Oracle	DSG	Offeror A
	Color/Risk	Color/Risk	Color/Risk
Mgmt/Technical	Green/Moderate	Yellow/High	Yellow/High
Mgmt Approach	Blue/Moderate	Green/Moderate	Green/High
Funct. & Tech.	Green/Moderate	Yellow/High	Yellow/High
Prods. & Servs.	Blue/Low	Green/Moderate	Green/Moderate

AR exh. 5.a, SSEB Report to the SSAC, Nov. 9, 2000, at 3-4, 12-13, 19-20.²

A cost team separately evaluated vendors' cost proposals by considering all known and quantifiable costs for the base and option years, for a total of 10 years. For each

² All three vendors submitted substantially identical primary and alternate technical proposals which, except for slight differences not relevant here, did not affect the technical evaluation or risk ratings.

vendor, the cost team developed expected total cost of ownership (TCO), assessed costs for realism, completeness, and reasonableness, and assigned each cost proposal an overall risk rating, with the following results:

Vendor	TCO	Risk
DSG (Alternate)	\$18,173,027	Low
DSG (Primary)	18,823,089	Low
Offeror A (Primary)	25,762,505	Moderate
Oracle (Alternate)	28,164,718	Moderate
Offeror A (Alternate)	28,294,020	Moderate
Oracle (Primary)	32,286,045	Moderate

AR exh. 5.a, Cost Evaluation Report, at 8.

The SSAC reviewed the SSEB's report, including the strengths, weaknesses, risks, and color ratings assigned the proposals, and found Oracle's proposal technically superior to those of the other two vendors. Based on its review, the SSAC specifically concluded that the superior technical ratings and lower risks associated with Oracle's approach justified paying a premium for that firm's proposal, and recommended that the source selection authority (SSA) issue a BPA to Oracle. AR exh. 7, SSAC Analysis Report, Nov. 13, 2000, at 15. The SSA concurred with the SSEB's findings and the SSAC's recommendation, and issued the BPA to Oracle. Id. exh. 8, Source Selection Decision, Nov. 16, 2000. This protest followed a debriefing by GSA.

PROTESTER'S CONTENTIONS

DSG challenges the issuance of the BPA to Oracle on several grounds. First, DSG maintains that the evaluation of its proposal was unreasonable. In this regard, DSG primarily argues that the "high" risk rating assigned its technical proposal is inconsistent with the finding of the cost team that its cost proposal presented a "low" risk. With respect to the adequacy of discussions, DSG also argues that the agency effectively precluded DSG from correcting identified weaknesses in its proposal because DSG feared that making the necessary corrections would jeopardize the low risk rating assigned its cost.

DSG also argues that the agency improperly failed to provide DSG with an opportunity to comment on allegedly negative past performance information GSA obtained from one reference. The protester further argues that GSA improperly conducted multiple rounds of discussions which favored Oracle. DSG also objects to the contracting officer's (CO) role in this procurement, and alleges that he failed to adequately document the cost/technical tradeoff decision.

DISCUSSION

As a preliminary matter, the RFQ stated that the agency intended to issue a BPA against the vendor's GSA federal supply schedule contract. Accordingly, the provisions of Federal Acquisition Regulation (FAR) Subpart 8.4 apply here. Those provisions anticipate agencies reviewing vendors' federal supply schedules--in effect, their catalogs--and then placing an order directly with the schedule contractor that can provide the supply or services that represent the best value and meets the government's needs. FAR § 8.404(b)(2); Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD ¶ 161 at 3. Pursuant to FAR § 8.402, GSA has established special ordering procedures applicable where, as here, the government's requirement involves products as well as services.³ Those procedures direct the agency to prepare a statement of work describing the work to be performed and to notify vendors of the basis to be used for selecting a vendor. The procedures also state that the agency may ask vendors to submit a project plan responding to the statement of work, as well as information on the vendors' experience or past performance of similar tasks. The procedures provide that the ordering office should select the contractor that represents the best value.

Further, where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical tradeoff, it may elect, as GSA did here, to use an approach that is like a competition in a negotiated procurement. Where the agency does that and a protest is then filed, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. Specifically, the record here is clear that GSA treated vendors' responses as if it were conducting a negotiated procurement. For instance, the RFQ specifically refers to discussions and the evaluation of proposals. RFQ § L.2.2. In addition, the Proposal Evaluation Guide prepared for this acquisition provides specific procedures for the SSEB to conduct detailed evaluations, for establishing a competitive range, and for conducting discussions. AR exh. 2.a. Accordingly, while the provisions of FAR Part 15, governing contracting by negotiation, do not directly apply, Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4, we analyze DSG's contentions by the standards applied to negotiated procurements.

DSG argues that the evaluation of its technical and cost proposals was "contradictory." According to DSG, it was unreasonable for the agency to rate DSG's cost proposal as "low" risk, while at the same time assigning a "high" risk rating to its technical proposal under the functional/technical item. DSG also argues that the agency conducted inadequate discussions with the firm.

³ These procedures may be found at <<http://pub.fss.gsa.gov/schedules>>.

In its report to our Office, GSA provided a detailed response to the evaluation and discussion challenges DSG raised in its protest. In its comments, however, DSG did not rebut any aspect of the agency's explanation concerning the allegedly contradictory evaluation or alleged lack of adequate discussions. Instead, DSG requested that these issues be decided on the existing record. See 4 C.F.R. § 21.3(i) (2000). This decision addresses the specific issues discussed in DSG's comments, as well as some examples of the issues decided on the record.

Evaluation of DSG's Proposal

The evaluation of technical proposals, including the evaluation of past performance, is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Federal Envtl. Servs., Inc., B-260289, B-260490, May 24, 1995, 95-1 CPD ¶ 261 at 3. In reviewing an agency's technical evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and in accordance with the stated evaluation criteria. Id. Technical evaluators have considerable latitude in assigning ratings which reflect their subjective judgments of a proposal's relative merits. I.S. Grupe, Inc., B-278839, Mar. 20, 1998, 98-1 CPD ¶ 86 at 5. Evaluators may have different judgments as to a proposal's merits, and one evaluator's scoring is not unreasonable merely because it is based on judgments different from those of other evaluators. Arsenault Acquisition Corp.; East Mulberry, LLC, B-276959, B-276959.2, Aug. 12, 1997, 97-2 CPD ¶ 74 at 4.

With respect to the evaluation issues to be decided on the record, we have reviewed the record and GSA's detailed explanation and find nothing unreasonable or contradictory about the evaluation of DSG's technical and cost proposals. The agency explains, and the record shows, that technical and cost proposals were evaluated separately by different teams comprised of different evaluators, each of whom assigned different risk ratings taking into consideration a variety of factors. The cost team found DSG's costs were complete, reasonable, and adequate to implement its proposed solution, and concluded that DSG's proposal presented a low risk. See AR exh. 5.a, Cost Evaluation Report. By contrast, the SSEB documented numerous technical and functional risks with DSG's approach, which would likely disrupt the performance schedule, increase cost, or degrade performance, resulting in a "high" risk rating for this item. See AR exh. 5.a, SSEB Report to the SSAC, ¶ 4.3.2, Item Risk Assessment, at 21.

In view of the numerous risks and weaknesses the SSEB documented--both functional and technical--which DSG does not contest, we think that an overall risk assessment of "high" under the functional and technical evaluation item is reasonably supported. The different risk ratings assigned DSG's cost and technical proposals merely reflect the independent judgments of the cost team and the technical evaluators, which assessed different aspects of the proposals and are reasonably supported by the record. Given the different conclusions of the

evaluators, the fact that the cost and technical risk ratings differed is neither unreasonable, nor “contradictory.”

We now turn to DSG’s allegation that GSA conducted inadequate discussions with the firm. According to DSG, the agency’s discussions effectively precluded DSG from correcting the identified weaknesses because it feared that the corrections would jeopardize the reasonableness of, and low risk rating, assigned its cost proposal. The protester maintains that GSA should have either advised DSG that its cost was too low, or informed DSG of the amount GSA was willing to spend if DSG were to correct the weaknesses in its proposal.

Discussions must be meaningful, equitable, not misleading, and fair. I.T.S. Corp., B-280431, Sept. 29, 1998, 98-2 CPD ¶ 89 at 6. While agencies generally are required to conduct meaningful discussions by leading offerors into the areas of their proposals requiring amplification, this does not mean that an agency must “spoon-feed” an offeror as to each and every item that must be revised or otherwise addressed to improve a proposal. LaBarge Elecs., B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6. Based on our review of the record, we conclude that DSG’s argument is not supported.

Here, the record shows, and DSG does not deny, that during several rounds of discussions, GSA provided DSG with numerous CRs and DRs. Each separate CR or DR specifically identified the area of DSG’s proposal requiring clarification or further explanation; listed the corresponding RFQ sections; and described GSA’s specific concern and the requested action. AR exh. 6.a. In addition, prior to conducting oral discussions, the agency provided DSG with individual PFNs, each describing distinct areas in DSG’s proposal that remained unclear or required further explanation. AR exh. 6.b. In addition to the CRs, DRs, and PFNs, the agency subsequently provided DSG with the strengths and weaknesses the SSEB had identified in its proposal. Thus, to the extent that DSG argues that it was not adequately apprised of how it needed to revise its proposal, its contention is without merit. The record clearly shows that during several rounds of discussions, the agency advised DSG of areas of its proposal requiring revision, and DSG simply failed to do so. Further, there is no legal requirement for an agency to inform an offeror of the premium it is willing to spend for an improved proposal. Thus, DSG’s failure to cure weaknesses in its proposal to its detriment—because it feared that such corrections might have affected favorable ratings assigned its cost proposal—reflects DSG’s own business judgment, and was not the result of any improper action on the agency’s part.

Past Performance Evaluation

Within the management approach item, under the performance record evaluation factor, the agency was to rate two subfactors—experience and customer satisfaction. RFQ § M.3.4.1.1. This evaluation was to include an assessment of vendors’ experience for the last 3 to 5 years for software implemented at similar institutions

(i.e., federal, other public sector, or not-for-profit agencies); as well as an assessment of corporate experience providing software products, technical support services, maintenance support, and training to federal agencies and/or international organizations. Id. In addition, the agency was to assess the vendors' record of satisfying customer functional and technical needs, meeting cost, schedule, and performance requirements, and performing in a professional manner. Id.

To assist the agency in evaluating past performance, vendors were instructed to provide a list of references for the last 3 to 5 years for five software implementations for similar institutions, and a description of each project. RFQ § L.3.1.7.2.1. In addition, vendors were responsible for sending a Performance Record Questionnaire (PRQ), which was provided as an attachment to the RFQ, to be completed by their references and submitted directly to the contracting officer. Id. § L.3.1.7.2.2. The PRQ requested respondents to rate the vendors' performance (ranging from "unsatisfactory" to "exceptional") on approximately 20 items, and provide narrative comments for each item where appropriate.

The record contains completed PRQs the agency obtained from three of DSG's references—[DELETED].⁴ The completed PRQs show that except for two items where the respondent rated DSG "marginal" (concerning DSG's ability to operate at or below budget and effectiveness of training), DSG's performance was rated either "satisfactory," "very good," or "exceptional."⁵ With respect to the only two items where [DELETED] rated DSG's performance as "marginal," the agency explains that the SSEB contacted the [DELETED] respondent, and verified the accuracy of the ratings. AR at 42. Based on its consideration of all of the completed PRQs, the SSEB rated DSG's proposal under the performance record factor as green (acceptable) with moderate risk.

⁴ The agency states that it also received completed PRQs from two [DELETED] components, which were considered by the SSEB, but inadvertently destroyed at the conclusion of the evaluation. There is no suggestion in the SSEB or SSAC reports that the ratings in these two PRQs varied materially from those in the other PRQs received; in fact, the protester itself assumes that the responses on these two missing PRQ's would follow a similar pattern of ratings as those contained in the three PRQs in the record. Accordingly, we see no basis to question DSG's past performance rating based on the absence of these two PRQs from the record.

⁵ We note that the [DELETED] respondent apparently confused the rating categories by inserting the letter "E" (which would indicate unsatisfactory performance), instead of "A" (indicating exceptional performance) for several PRQ items. It is apparent from that respondent's narrative comments, however, and [DELETED] overall performance rating of DSG as "[DELETED]," that the "E" markings were intended and interpreted to mean exceptional for those items.

The protester argues that GSA should have given DSG an opportunity to comment on the two items rated marginal by the [DELETED] respondent because they were considered “significant weaknesses” in its proposal. According to the protester, had the agency given DSG an opportunity to comment on those two ratings, it could have provided information showing that the marginal ratings did not accurately reflect its performance. DSG also challenges its overall performance record rating. Although, as noted above, FAR Part 15 does not directly apply here, the provisions of the FAR and our cases provide guidance regarding the adequacy of discussions. FAR § 15.306(d)(3) provides, in pertinent part, that:

[t]he contracting officer shall . . . indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. The scope and extent of discussions are a matter of contracting officer judgment.

With respect to the two marginal ratings, DSG is essentially arguing that since its proposal received less than a perfect rating under the performance record factor, GSA should have discussed with DSG the two marginal ratings obtained from the [DELETED] respondent so as to provide DSG with an opportunity to improve its proposal under this factor.⁶ We disagree.

First, while the record shows that in its final report to the SSAC, the SSEB noted the two marginal ratings as weaknesses in DSG’s proposal, contrary to DSG’s position, they were considered neither “significant weaknesses” nor “deficiencies.” See FAR § 15.306(d)(3). As noted above, the FAR also states that the CO is to discuss “other aspects” of a proposal, such as past performance information, which, in the CO’s judgment, could be altered or explained to materially enhance the offeror’s potential for award. The record shows that the three references generally considered DSG’s past performance favorably, rating the firm’s performance as either exceptional or very good overall, and that GSA rated DSG’s proposal in this area acceptable overall, the highest rating other than “exceptional” under the adjectival rating scheme used here. Under these circumstances, it is reasonable to conclude that the two marginal ratings in FEMA’s PRQ did not constitute aspects of DSG’s proposal that could have

⁶ In support of its argument DSG relies on American Combustion Indus., Inc., B-275057.2, Mar. 5, 1997, 97-1 CPD ¶ 105, where we concluded that the protester should have been given an opportunity to respond during discussions to negative past performance reports to which it had not previously had an opportunity to explain. That conclusion was based on the regulatory requirement of FAR § 15.610(c)(6) then in effect, which was removed from the FAR by the Part 15 rewrite. The new provision is quoted above in relevant part.

been altered or explained to enhance materially DSG's potential for award, as contemplated by FAR § 15.306(d)(3), and thus that discussions on this point were not required. See ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 16; MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 at 11, citing DAE Corp., B-259866, B-259866.2, May 8, 1995, 95-2 CPD ¶ 12 at 4-5 (an agency is not required to discuss every aspect of an offeror's acceptable proposal that receives less than the maximum score).⁷

DSG also argues that the agency unreasonably rated its performance as only acceptable, pointing out that most of the responses GSA obtained from its references rated its performance either as "very good" or "exceptional." According to DSG, even assuming that the two marginal ratings obtained from [DELETED] were accurate, its proposal should have been rated better than acceptable overall--i.e., exceptional--under the performance record factor. We disagree. As even DSG recognizes, the completed PRQs from DSG's references included several items rated "satisfactory" and "very good"--i.e., lower than "exceptional" ratings--indicating that those respondents concluded that DSG's performance did not warrant a rating of "exceptional" for those items. Accordingly, based on our review of the completed PRQs in the record, we think that the SSEB reasonably rated DSG's performance record as acceptable overall, rather than as exceptional.

Cost/Technical Tradeoff Issue

DSG next argues that the SSA improperly failed to adequately document the basis for issuing the BPA to Oracle at a higher cost than DSG's.

In deciding between competing proposals, cost/technical tradeoffs may be made, the propriety of which turns not on the difference in technical scores or ratings per se, but on whether the source selection official's judgment concerning the significance of the difference was reasonable and adequately justified in light of the RFP evaluation scheme. Southwestern Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 17; DynCorp, B-245289.3,

⁷ To the extent that DSG maintains that it was not given an opportunity to explain or provide further information regarding the two marginal ratings, the record shows that during discussions with the protester, GSA provided DSG with a list of numerous weaknesses the SSEB had identified in DSG's proposal, including that "[m]arginal responses were submitted on the [PRQ]." See, e.g., AR exh. 6.c, E-mail Message from the CO to DSG, Aug. 18, 2000; and AR, exh. 6.d, Letter from Contracting Officer's Reopening Discussions with DSG, Sept. 15, 2000, attach. Although GSA did not specifically describe the nature or origin of the two marginal ratings, we think that GSA's e-mail message and subsequent letter provided sufficient notice to at least alert DSG that the evaluators considered the marginal ratings on the PRQ as weaknesses.

July 30, 1992, 93-1 CPD ¶ 69 at 8. Even where a source selection official does not specifically discuss the cost/technical tradeoff in the source selection decision itself, we will not object if the tradeoff is otherwise reasonable based upon the record before us. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12-13.

Based on our review of the SSEB's final report to the SSAC, and the SSAC's findings, we conclude that the SSA's tradeoff decision is reasonably supported. For instance, in its report, for each of the three proposals considered, the SSEB documented the specific strengths and weaknesses found under all of the evaluation items and factors. The record shows that the SSEB presented to the SSAC a detailed description of the strengths, weaknesses, risks, and rationale for the color ratings at the item and area levels for each proposal. The SSAC accepted the SSEB's findings, and, relying on those findings, conducted an in-depth comparative analysis of the proposals to make its recommendation to the SSA. Below we discuss some of the SSAC's most significant points.

The SSAC noted that at the highest level of the evaluation spectrum, the management and technical area, Oracle's proposal was rated green (acceptable), while DSG's proposal was rated yellow (marginal). The SSAC further noted that at item levels, Oracle's proposal was rated blue (exceptional) under the management approach item, while DSG's proposal was rated green (acceptable). Under the functional and technical item, Oracle's proposal was rated green (acceptable), while DSG's proposals were rated yellow (marginal). Finally, the SSAC noted that under the products and services item, Oracle's proposal was rated blue (exceptional), while DSG's proposal earned a lower rating of green (acceptable). In sum, the SSAC concluded that Oracle's proposal was rated technically superior to DSG's (and Offeror A's) in all evaluation areas and item levels.

In terms of specific strengths and weaknesses, the SSAC recognized that the SSEB identified 46 strengths and only 7 weaknesses associated with Oracle's proposal, compared with only 16 strengths and 24 weaknesses in DSG's proposal. In its final report, the SSAC discussed at length each of the significant strengths and weaknesses for each proposal considered, and included a detailed narrative description explaining the various aspects of the strengths and weaknesses which make clear why the SSAC concluded that Oracle's proposal was technically superior to either DSG's or Offeror A's proposal. Based on its exhaustive comparative analysis, the SSAC concluded that "the superior technical score, the lower risk rating, and the technical strengths identified by the [SSEB] in the Oracle proposal, justify paying a higher cost for Oracle's proposal," and recommended to the SSA that Oracle be selected for issuance of the BPA. AR exh. 7, SSAC Analysis Report, supra, at 15.

Although the SSA's tradeoff analysis between Oracle's and the two competing vendors' proposals was only minimally explained in the source selection decision itself, based on our review of the SSEB's and SSAC's detailed reports, we conclude

that the basis for his selection is reasonable and consistent with the RFQ's evaluation and award scheme. The SSA recognized that Oracle's proposal was rated technically superior with lower overall risk than either of the competing vendors' proposals. In addition, it is clear that the SSA acknowledged that although Oracle's evaluated TCO was higher than either DSG's or Offeror A's, Oracle's proposal was deemed to present the best overall value to the government. Based on our review of the SSEB's findings which rated Oracle's proposal technically superior, and the SSAC's reports underlying the SSA's selection decision, we find no evidence that the SSA's decision to issue the BPA to Oracle was unreasonable.

Supplemental Protest Issues

In a supplemental protest, DSG maintains that GSA conducted multiple rounds of discussions that improperly favored Oracle. In this regard, DSG contends that during several rounds of discussions, GSA improperly advised Oracle of deficiencies remaining in its proposal which precluded award to that firm. DSG also objects that the multiple roles of the CO as the SSA, a member of the SSEB, and a member of the cost team, compromised the selection decision.

Multiple Rounds of Discussions

DSG contends that GSA improperly conducted several rounds of discussions that favored Oracle. Based on our review of the record, we conclude that there was nothing improper or indicative of bias in the negotiation process. Below, we summarize the chronology leading up to the agency's decision to reopen discussions.

Between June 16 and 21, following the initial evaluation, GSA provided the three vendors with CRs and DRs. Oracle received a total of 37 CRs and 4 DRs; DSG received 76 CRs and no DRs; and Offeror A received a total of 84 CRs and 4 DRs. After receipt of the responses to the CRs and DRs, on or about August 18, GSA provided the three vendors PFNs listing the strengths, weaknesses, and risks the evaluators identified at the factor level, to be addressed during negotiations. Between August 21 and 23, GSA conducted negotiations with DSG, Oracle, and Offeror A, during which the vendors discussed their proposals' weaknesses and risks.

The RFQ specifically permitted vendors to take exception to the RFQ requirements, but required that each exception be related to the specific RFQ section objected to, and that each exception be fully explained and its impact supported. RFQ § L.3.1.10, at L-11. In its proposal, Oracle had taken exception to the entire RFQ, but did not provide the requisite explanation or supporting rationale. During discussions, GSA requested that Oracle identify the appropriate RFQ sections to which it took exception and furnish a narrative explaining its rationale consistent with the RFQ. In its response, on August 28, Oracle provided GSA with 40 exceptions to the RFQ, which, according to the CO, affected all RFQ sections. Renewed discussions with

Oracle on August 31 and September 5 resolved all exceptions, but for one related to RFQ § H.15 (related to software maintenance and deductions for maintenance charges). The CO states that it advised Oracle that GSA considered this remaining exception to be a deficiency in its proposal which would preclude issuance of the BPA to the firm if not deleted from its FPR. On September 5, discussions closed, and GSA requested FPRs from all three vendors.

On September 8, GSA received FPRs from all three vendors. The SSEB's evaluation of the FPRs revealed that Oracle had not removed the remaining exception regarding RFQ § H.15 from its FPR and that Oracle's proposal also contained deficiencies related to cost. In addition, the SSEB concluded that adequate discussions had not been conducted with Offeror A or Oracle. At this point in the procurement, only DSG's proposal was considered acceptable.

On September 15, GSA reopened discussions with all three vendors. During this round of discussions, GSA informed Offeror A that its proposal still contained 1 technical deficiency and 33 weaknesses. The agency also notified Oracle that its proposal contained 3 deficiencies and 6 weaknesses, and informed DSG that its proposal contained 31 weaknesses. GSA then requested, received, and reevaluated FPRs from all three vendors. Evaluation of Oracle's response to this round of discussions revealed that the firm had included language in its FPR which, according to the CO, changed the intent of § H.15, leaving GSA unable to determine whether there would be a related cost impact, and causing the evaluators to consider this uncertainty as a weakness in Oracle's proposal.

On September 27, the SSAC and the CO met to discuss the evaluation of FPRs. The CO states that discussions at that meeting revealed that there were several issues that remained unresolved. In particular, as a result of that meeting, GSA concluded that conflicts and inconsistencies existed between the RFQ and GSA's MAS 70 contracts, and that as a result of those conflicts and inconsistencies, GSA had serious concerns related to the conditions and exceptions to material terms of the RFQ contained in Oracle's and Offeror A's proposals. The agency further explains that although DSG had not specifically taken exception to any part of the RFQ, the conditions and exceptions in Offeror A's and Oracle's proposals reflected defects inherent in the RFQ, which affected all three vendors' schedule contracts. GSA further states that after examining the RFQ and the vendors' schedule contracts, it determined that RFQ § H.15 was in direct conflict with the schedule contracts, and should also be deleted from the RFQ. Consequently, GSA issued amendment No. 8 to the RFQ to remove the apparent inconsistencies.

That amendment specifically explained that its purpose was "to remove conflicts and inconsistencies between the RFQ and the GSA MAS FSC 70 Contracts" by replacing RFQ §§ D, E, F, G, H, and I, in their entirety. AR exh. 1.i, amend. 8, Oct. 18, 2000. A cover letter to that amendment explained the agency's concern, and requested that vendors reference any remaining conflicts in their FPRs. In response to amendment

No. 8, Oracle and Offeror A removed all conditions and exceptions remaining in their FPRs.

We have reviewed the record, including GSA's explanations leading up to each round of discussions, and conclude that the record does not support DSG's premise that GSA's actions improperly favored Oracle. Rather, it is clear that following the initial round of discussions, GSA reasonably concluded that adequate discussions had not been conducted with two of the three vendors, and reopening discussions was thus necessary to address the agency's remaining concerns and further maximize the competition. There is nothing improper in requesting more than one round of FPRs where a valid reason exists to do so. See HLJ Management Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375 at 7.

Further, DSG's contention that subsequent rounds of discussions favored Oracle is not supported by the record.⁸ The record shows that it was not until after the second round of discussions that GSA concluded that several issues remained unresolved, primarily related to defects in the RFQ which affected all three proposals, including DSG's. GSA further concluded that these remaining conflicts and inconsistencies caused two of the three vendors to include conditions and exceptions in their proposals, requiring the agency to amend the RFQ to remove the conflicting terms, and permit issuance of a BPA consistent with the vendors' GSA schedule contracts. Under these circumstances, it was entirely proper for GSA to reopen discussions, and permit Oracle and Offeror A to correct the deficiencies in their proposals which were primarily caused by defects in the RFQ. See, e.g., Biloxi-D'Iberville Press, B-243975.2, Sept. 27, 1991, 91-2 CPD ¶ 301 at 6; see also Carter Chevrolet Agency, Inc., B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584 at 3-4 (decision to conduct discussions was unobjectionable where agency expected offerors to take numerous exceptions to the solicitation and discussions were necessary to resolve these matters).⁹

⁸ The protester argues that since DSG had not taken any exceptions to the RFQ in its initial proposal, GSA should not have conducted further discussions. We are aware of no requirement that agencies limit discussions to one round. Rather, the extent of discussions is a matter within the discretion of the contracting agency, and we think that the agency properly used the flexibility inherent in the negotiation process to maximize the competition. CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 10 n.4.

⁹ DSG relies on our decision in Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61, to argue that GSA's subsequent discussions were improper. DSG's reliance on that decision, is misplaced. In that case, we sustained the protest because the record showed that the agency had improperly conducted unequal and misleading discussions that favored one offeror over another, contrary to FAR § 15.306(e). As already explained, that is not the case here.

Role of the Contracting Officer

DSG alleges that the CO's multiple responsibilities compromised the evaluation process. In this connection, DSG points out that the CO designated for this procurement also was the SSA, as well as a member of the SSEB and the cost team. As a result, the protester states, the CO approved the source selection plan, conducted discussions, and as the SSA, was ultimately responsible for the selection decision. According to DSG, the CO's involvement in virtually every aspect of the process created an impermissible and prejudicial situation where one individual exercised "significant control" over the entire procurement. Supplemental Comments, Feb. 9, 2001, at 5.

It is neither unusual nor improper for a CO to have multiple responsibilities throughout an acquisition. For example, FAR § 15.303(a) specifically designates the CO as the SSA, unless the agency head appoints another individual, and requires that the SSA perform certain enumerated functions such as establishing an evaluation team; approving the source selection strategy or acquisition plan; ensuring consistency among the solicitation requirements, notices to offerors, and proposal preparation instructions; ensuring that proposals are evaluated solely on the factors contained in the solicitation; considering the recommendations of advisory boards or panels; and selecting the source or sources whose proposal is the best value to the government. FAR § 15.303(b)(1)-(6). The agency states, and the record shows, that the CO simply carried out these responsibilities. While it is conceivable that a CO's active participation in multiple stages of the evaluation process could compromise that process, that clearly is not the case here. The record shows that except for exercising his administrative and oversight functions, the CO did not actively participate in the evaluations, nor provide any information to the cost team, the SSEB, or the SSAC that could have affected the evaluations. DSG's argument that by exercising his responsibilities, the CO impermissibly had such "significant control" over the procurement that it compromised his decision as the SSA, is simply not supported by the record.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: S³ LTD

File: B-287019.2; B-287019.3; B-287021.2; B-287021.3

Date: September 14, 2001

Robert A. Klimek, Esq., Nicholas H. Cobbs, Esq., and Darrell Craft, Esq., Klimek, Kolodney & Casale, for the protester.

Daniel R. Weckstein, Esq., Michael L. Sterling, Esq., Walter T. Camp, Esq., and David W. Lannetti, Esq., Vandeventer Black, for MANCON, Inc., an intervenor.

Philip E. Adams, Esq., Department of the Navy, Naval Supply Systems Command, 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 contention that an agency conducted misleading discussions by orally changing the terms of the solicitation is denied because, even if the agency made the claimed change, offerors cannot reasonably rely on an oral modification to a solicitation which is inconsistent with its written terms, absent a written amendment, or confirmation of the modification, as required by Federal Acquisition Regulation § 15.206(f).

2. Protester's assertion that an awardee's outstanding past performance rating is unreasonable as it was partially based on the responses of an agency reference who provided a photocopy of identical performance ratings and narrative responses as an answer to a request for his assessment of the awardee's performance under each of four separate contracts is denied where the record shows that, while the reference's approach was less than ideal, his answers were consistent with the answers of other references, and consistent with his responses in a telephonic interview conducted by the contract specialist, and where there is no showing that the photocopied responses were inaccurate for any of the four contracts.

DECISION

S³ LTD protests the award of two contracts to MANCON, Inc., by the Department of the Navy's Fleet and Industrial Supply Center, Jacksonville, Florida, pursuant to requests for proposals (RFP) Nos. N68836-00-R-0012 and N68836-00-R-0025, for personnel support services. S³ argues that the Navy failed to hold meaningful

discussions by improperly encouraging the company to raise its direct labor rates to the point where it was no longer the lowest-priced offeror for these contracts. S³ also argues that the Navy misevaluated both its and the awardee's past performance.

We deny the protests.

BACKGROUND

The Navy issued these solicitations to procure certain personnel support services for the Department of Defense and other federal agencies in transition as a result of being reorganized, realigned, streamlined, or closed, due to regionalization, consolidation of functions, or cost comparison studies conducted pursuant to Office of Management and Budget Circular A-76. These support services are provided by the Fitting Out and Supply Assistance Center, Norfolk, Virginia, under the Navy's Intra Fleet Supply Operations Program. Both solicitations anticipate the purchase of temporary personnel services for various professional and Service Contract Act labor categories, including accounting, information technology, administration, engineering, environmental, finance, logistics, human resources, transportation, child care, mechanical trades, custodial, food service, clerical, drafting, electronics, library services, laboratory services, social services, and hazardous material services. Agency Report (AR) at 3. These solicitations are similar, with the differences related to the geographical areas covered by each: RFP No. N68836-00-R-0012 (R-0012) has 2,541 separately priced contract line items (CLIN) covering the eastern United States and Puerto Rico; RFP No. N68836-00-R-0025 (R-0025) has 5,112 CLINs covering the western United States, Guam and Hawaii. Id.

The RFPs¹ here anticipated award of indefinite-delivery/indefinite-quantity, time and materials contracts, for a 1-year base period with two 1-year options, to the offeror whose proposal was determined most advantageous to the government, price and other factors considered. To determine the most advantageous proposal, the RFPs identified four evaluation factors—price/cost, past performance, technical, and subcontracting plan—and advised that each factor was approximately equal in importance. RFPs at 20. Only two of the factors—past performance and technical—

¹Since these RFPs are identical in terms of performance periods, evaluation factors, award criteria, and other matters not related to the geographic place of performance, this decision will describe the solicitations jointly as “the RFPs.” In addition, both RFPs use a system of pagination wherein the pages of sections A through J are numbered sequentially, while section K begins again with page 1 and continues sequentially through the end of section M. Since sections K through M are identical in the two RFPs, and since these identical provisions appear on the same pages in both solicitations, they will be referenced hereinafter as “RFPs at ____.” Any citation to the earlier portions of the solicitations will be referenced as “R-0012 at ____” or “R-0025 at ____.”

were to be given adjectival ratings; a proposal’s subcontracting plan was to be assessed as either acceptable or unacceptable, and its price was to be assessed only for reasonableness (after application of a 10-percent price evaluation preference for HUBZone offerors). Under the past performance factor, a proposal was rated either outstanding, good, average, marginal, or neutral; under the technical factor, a proposal was rated either outstanding, good, average, or marginal.

Seven offers were received in response to R-0012 (East Coast), and six offers were received in response to R-0025 (West Coast). S³ and MANCON submitted offers in response to both solicitations. In reviewing the initial offers, the agency determined that both S³ proposals lacked pricing on some labor categories, and a Professional Employee Compensation Plan, which was required by the solicitations. As a result S³ was initially excluded from the competitive range for award in both procurements. After S³ filed protests with our Office challenging its exclusion, the agency reinstated the company to the competitive range in both procurements, advised that it would request revised proposals from all offerors, and sought dismissal of the protests, which was granted. See S³ LTD, B-287019, B-287021, Jan. 9, 2001.

The record shows that the agency held discussions with S³ on three separate occasions—March 23, April 13, and April 20. The discussions held on April 13 were specifically tailored to the East Coast solicitation (R-0012), and final revised proposals for that solicitation were due April 17. Affidavit of Contract Specialist, Aug. 9, 2001, at 2. The discussions on April 20 were specifically tailored to the West Coast solicitation (R-0025), and final revised proposals were due April 24. Id.; AR at 7.

In evaluating the final revised proposals, the agency assigned the same evaluation ratings in the areas of technical and past performance to an offeror’s proposal under both solicitations, and concluded that all of the large businesses (including MANCON and S³) had proposed acceptable small business subcontracting plans for both solicitations. After reviewing these ratings, as well as the proposed prices, the agency concluded that the proposals of MANCON and S³ received the highest ratings with the lowest proposed prices under both solicitations. Accordingly, we set forth below the evaluation results of only these two offerors under both solicitations (and the prices shown do not include the 10 percent HUBZone price evaluation factor):

	MANCON	S ³
Technical Rating	Outstanding	Outstanding
Past Performance	Outstanding	Good
OVERALL RATING	Outstanding	Outstanding
Total Price (R-0012)	\$30,214,085	\$30,625,581
Total Price (R-0025)	\$11,739,353	\$12,024,293

AR, Tab 25 at 4, 8 (R-0012); AR, Tab 26, at 4, 8 (R-0025). Based on MANCON's higher-rated, lower-priced offers, the agency awarded both contracts to MANCON on May 29. These protests followed.

DISCUSSION

As indicated above, S³'s protests essentially raise three issues in two areas, price and past performance. In the area of price, S³ argues that during discussions the agency improperly encouraged it to raise its direct labor rates to the point where it was no longer the lowest-priced offeror. In the area of past performance, S³ raises a single challenge to MANCON's past performance rating, and multiple challenges to its own past performance rating.²

With respect to pricing, S³ notes that both its initial proposed prices, and interim prices, were lower than those of MANCON, leading the protester to complain generally that the agency used discussions to wrongly encourage the company to raise its direct labor rates until it was no longer in line for award. In its supplemental protest, S³ complains specifically that during negotiations the contract specialist directed the company to raise its rates for professional employees to a level comparable to the federal government's general service (GS) step 5 rate for the appropriate GS grade.³ In addition, S³ claims that the oral guidance it received regarding the use of the GS step 5 rate was contrary to guidance in the solicitation directing the use of a step 1 rate.

In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range. 10 U.S.C. § 2305(b)(4)(A)(i) (1994); Federal Acquisition Regulation (FAR) § 15.306(d)(1). Although discussions must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to "spoon-feed" an offeror as to each and every item that could be raised to improve its proposal. *Du & Assocs., Inc.*, B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7-8. An agency has not satisfied its obligation to conduct meaningful discussions if it

²In its initial and supplemental protests, S³ raises 10 separate issues. Of the total, S³ withdrew three of its issues, and folded one into other issues. The remaining six issues all fall within the areas of price and past performance, as explained above.

³The federal government's GS schedule identifies the annual salary for federal employees for each of 15 grades. Each grade has 10 pay steps, with step 1 representing the lowest salary within that grade, and step 10 representing the highest salary within that grade. In this context, S³'s allegation regarding pay is that it was improperly directed to increase its compensation rates for professionals closer to the middle of the range of what federal employees are paid to perform comparable work, rather than the bottom of the range.

misleads an offeror or conducts prejudicially unequal discussions. Biospherics, Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161 at 6.

With respect to S³'s general contention that it was improperly urged to raise its rates, our review of the record shows that during discussions, the contract specialist encouraged upward adjustments to the professional rates of almost all the offerors, including MANCON. For example, the record shows that during discussions related to R-0012, S³ was advised that the professional rates in its initial proposal for computer specialists, facilities administrators, engineers, environmental specialists, financial managers, and ILS specialists appeared low; MANCON was advised that its professional rates for environmental specialists, engineers, and ILS specialists appeared low. AR Tab 25, Post-Clearance Memorandum at 6-7. Similarly, during discussions related to R-0025, S³ and MANCON were given the same direction regarding the categories of professional employees described above, as well as advice on unique issues related to doing business in Hawaii. AR Tab 26, Post-Clearance Memorandum at 6-8.⁴ In response, both offerors claimed to have reviewed their rates carefully, and raised them in several areas. Given the similarities in the discussions here, and the nuanced responses to the agency direction from both offerors in their revised proposals, there is no evidence in this record to support a conclusion that S³ was treated unfairly. Biospherics, Inc., *supra*.

In its supplemental protest, S³ moves from its general challenge to a specific claim that during negotiations the contract specialist orally directed the use of GS step 5 rates for professionals, despite language in the RFP which, in S³'s view, mandated the use of GS step 1 rates. In support of its contention, S³ appended to its supplemental protest numerous affidavits from its employees--five of which contain claims of hearing the contract specialist direct the use of GS step 5 rates, and five of which indicate that the affiant learned from others that the contract specialist directed the use of such rates.

FAR § 15.206(a) requires that when "the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation." On the subject of whether such changes may be communicated orally, the FAR permits oral notice of changes, but requires that contracting officers formalize the oral notice with an amendment to the solicitation. FAR § 15.206(f).

Here, both solicitations incorporated a question from an offeror, and the agency answer thereto, addressing the use of GS step rates as follows:

⁴We note for the record that the agency report's description of the general content of discussions with S³ is confirmed by transcripts prepared from tape recordings of portions of the discussions, which were made by S³ (apparently without the Navy's knowledge); these transcripts were appended to S³'s comments on the agency report.

11. Which step should be used for the GS equivalent rates?

Ans: Step 1

RFPs, Amend. 0002 at 4. Despite the agency's contention that this direction applied to other groups of employees, and not professionals, S³'s filings leave no doubt that it viewed this direction as applicable to an offeror's professional rates. Supp. Protest at 2; Supp. Comments at 5-6. In fact, S³ expressly acknowledges that it viewed the direction it alleges it received during discussions--i.e., to use Step 5 rates for professional employees--as contrary to the terms of the RFP. Supp. Protest at 2-3.

Even if, as alleged, the agency orally indicated during discussions that offerors should use GS step 5 rates to set professional compensation--and the agency vigorously asserts it did not--offerors cannot reasonably rely on oral modifications to an RFP which are inconsistent with its written terms, absent a written amendment, or confirmation of the oral modification. Fluid Power Int'l, Inc., B-278479, Dec. 10, 1997, 97-2 CPD ¶ 162 at 3 n.1; Occu-Health, Inc.; Analytical Sciences, Inc., B-258598.2 et al., Feb. 9, 1995, 95-1 CPD ¶ 59 at 4. This clear principle provides fairness to all parties by ensuring that competitions are conducted under equal terms, and protects both protesters and agencies from the kind of credibility disputes raised here, as well as protecting the integrity of the procurement process overall.⁵ Since S³'s assertion that discussions were improper is premised upon oral direction inconsistent with the written terms of the RFP, we will not consider this issue further.

With respect to S³'s challenge to the past performance evaluation, we turn first to its allegation that the agency's assessment of MANCON's past performance was unreasonable. In this regard, S³ alleges that one of the MANCON's past performance references photocopied his ratings and detailed comments, and provided identical answers for each of the four contracts for which he was identified as a reference. In the area of past performance, as in any other area of proposal evaluation, our review

⁵For the record, we note that the protester argues that its affidavits, and the contrast between them and the contract specialist's denial of having directed the use of step 5 rates, requires our Office to convene a hearing in this matter. We disagree. The purpose of a hearing here would be to take testimony from the contract specialist, and perhaps from all of the S³ affiants, regarding the content of discussions, in order to determine which witness or witnesses appear most credible. For the policy reasons set forth above, we will not consider claims of alleged oral changes to the express terms of a solicitation. Thus, no hearing to explore these claims is needed, or appropriate. We also note that there is nothing in the record to support S³'s implied claim that MANCON must have received different direction during discussions. Rather, the Navy's materials (which, as noted above, are consistent with S³'s transcripts of recordings made during its own discussions) indicate that MANCON, like S³, was advised in general terms, and with respect to specific categories, that its professional rates appeared low.

consists of examining the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7.

The past performance evaluation materials related to MANCON and provided with the agency report (AR Tab 20) consist, in part, of eight separate questionnaires, completed by two individuals, covering four prior MANCON contracts. Thus, there is a completed questionnaire from both individuals addressing all four contracts. In addition, the materials include copies of handwritten notes prepared by the contract specialist memorializing telephone conversations with both of the individuals who completed questionnaires, as well as with a third Navy individual familiar with MANCON's performance. Based on our review of these materials, it appears that S³ is correct in its assertion that the answers and ratings from one of MANCON's references were photocopied and provided under separate cover sheets identifying each of the four contracts and its contract value.

Before turning to the specifics of the evaluation here, we note that providing identical photocopied questionnaire answers and comments in response to a request for information about an offeror's performance under different contracts, is a less than ideal way for agency references to provide the specific and detailed feedback needed to assess past performance during a competitive procurement. Under different circumstances, such an approach could place at risk the reasonableness of an agency's past performance assessment, and hence its procurement decisions. On the other hand, we conclude that the answers at issue here are sufficiently consistent with the individualized ratings provided by the other respondent, and with the information provided by all three individuals in their telephone conversations with the contract specialist, to merit a conclusion that the overall assessment of MANCON's past performance was reasonable.

For example, while the reference who photocopied his ratings and provided the same responses for all four contracts answered 52 times that MANCON's performance was outstanding, the reference whose replies were individualized awarded 45 outstanding ratings, and 7 ratings of good. In addition, the 7 ratings of good did not hinder this reference from rating MANCON's performance outstanding overall on all four contracts. The congruity between these ratings, and the telephonic responses of all three of the individuals interviewed by the contract specialist, leads us to conclude that the outstanding past performance rating given MANCON was, in fact, reasonable. We also note that S³ has made no showing that the information provided was incorrect. As a result, we have no basis to question the past performance rating here.

With respect to S³'s three challenges to its own past performance rating of good (versus MANCON's outstanding rating), we need not address in detail the protester's specific contentions. During the course of this protest, S³ raised a procedural challenge to the agency's inclusion of an incomplete Contractor Performance

Assessment Report (CPAR) in its past performance file; a challenge to the agency's failure to advise it during discussions of certain negative comments received from some of S³'s references; and a challenge to the agency's apparent, but not established, reliance on certain negative backup information about S³'s performance included with the agency report. We have reviewed each of these arguments, as well as the totality of the past performance materials submitted for both S³ and MANCON, and conclude that—even if we accept at face value each of S³'s contentions, and even if S³'s overall past performance rating were raised from good to outstanding as a result of these contentions—the specific ratings, comments, and concerns raised throughout the materials would not support a decision to select S³'s higher-priced offer over MANCON's offer. In this regard, we note that MANCON's outstanding rating is supported nearly universally throughout the past performance materials; in contrast, the materials paint a more complex picture of S³'s past performance—including allegations of personality issues, and performance problems during a bankruptcy, which, the evaluators concede, as S³ points out, were eventually addressed. Given these differences, we conclude that S³ cannot show a reasonable possibility that it has been prejudiced by the agency's actions, or claim that but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protests are denied.

Anthony H. Gamboa
General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Cube-All Star Services Joint Venture

File: B-291903

Date: April 30, 2003

Katherine S. Nucci, Esq., Thompson Coburn, for the protester.
Capt. Ronald D. Sullivan, Raymond M. Saunders, Esq., and Kenneth Allen, Esq.,
Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably rejected protester's proposal for failing to meet solicitation requirements regarding emergency work, and for protester's introduction into its final revised proposal of a proposed program to reduce preventative maintenance staffing that was incomplete and inconsistent with other portions of the protester's final revised proposal.
 2. Agency engaged in meaningful discussions with protester where agency conducted two rounds of written discussions and two rounds of oral discussions during which protester was reasonably led into all areas of its proposal that required correction or amplification.
-

DECISION

Cube-All Star Services Joint Venture (CASS)¹ protests the Department of the Army's rejection of CASS' proposal under request for proposals (RFP) No. DAMD17-02-R-0001 to provide base operating support services at Fort Detrick, Maryland. CASS maintains that the agency unreasonably evaluated CASS's management/technical approach as failing to meet the solicitation requirements, and that the agency failed to conduct meaningful discussions.

We deny the protest.

¹ CASS is a joint venture between the The Cube Corporation of Sterling, Virginia and All Star Services Corporation of San Diego, California. Protest at 1.

BACKGROUND

On November 13, 2001, pursuant to the provisions of Office of Management and Budget (OMB) Circular A-76, the agency issued solicitation No. DAMD17-02-R-0001, seeking proposals to perform base operating support services at Fort Detrick, Maryland.² The solicitation was issued to select a private sector proposal to compete with the agency's most efficient organization (MEO) under the A-76 cost comparison process.³ A site visit was held for potential offerors in December 2001 and, thereafter, the agency issued several RFP amendments, which primarily responded to questions from potential offerors.

The solicitation advised offerors that the agency "contemplates award of a firm fixed price contract with a minimal number of cost reimbursement CLINs [contract line item numbers]"⁴ for a 1-year base period and four 1-year option periods, and provided that source selection would be based on the technically acceptable proposal offering the lowest evaluated cost/price. Agency Report, Tabs 7, 8, RFP, at 2344, 2347. The RFP established the following non-cost/price evaluation factors-- management/technical approach,⁵ past performance/past experience, and

² The U.S. Army Garrison at Fort Detrick currently provides services and support for various tenant organizations including the Army Medical Research Institute for Infectious Diseases, the Army Medical Information Systems and Services Agency, the Army Medical Material Agency, the Army Medical Material Development Activity, and the Nation Cancer Institute. Agency Report, Tab 2, Acquisition Plan, at 0054. The solicitation contemplated performance of the following activities: maintenance and operations of facilities; logistics; hazardous materials management; military personnel services; engineering and construction services; visual information services; continuing education and training; housing management; arts, crafts and woodworking programs; and auto craft program. Agency Report, Tab 3, Performance Work Statement (PWS), at 0077.

³ The procedures for determining whether the government should perform an activity in-house, or have the activity performed by a contractor are set forth in OMB Circular A-76, and that Circular's Revised Supplemental Handbook (March 1996).

⁴ Four of the thirty-four CLINs in each year of the solicitation schedule were cost-reimbursement items. These CLINs primarily dealt with requirements to perform minor construction, individual job orders under \$25,000, and acquisition of related supplies and materials. Agency Report, Tab 5, at 2184-89.

⁵ Under the factor for evaluating management/technical approach, the solicitation established the following subfactors: management approach; staffing and key personnel; phase-in plan; and technical approach. Under some of these subfactors,
(continued...)

subcontracting--and provided that the agency would employ the following adjectival ratings: "technically acceptable,"⁶ "marginal,"⁷ and "technically unacceptable."⁸ Agency Report, Tab 7, RFP at 2347-50. Section L of the RFP required offerors to submit three non-cost/price proposal volumes, which corresponded to the three non-cost/price evaluation factors, and provided detailed instructions regarding the required content of each volume. Agency Report, Tab 6, RFP at 2331, 2334-39.

Four proposals, including CASS's, were submitted by the June 14, 2002 closing date;⁹ thereafter, each offeror was permitted to make an oral presentation to the agency's source selection evaluation board (SSEB).¹⁰ The agency states that, in evaluating proposals, each proposal "was reviewed independently in a very structured approach by each SSEB voting and nonvoting member on the corresponding committee" and that "after the individual evaluations, each committee held a consensus meeting to discuss proposal strengths and weaknesses." Agency Report, Contracting Officer's

(...continued)

the solicitation identified additional sub-subfactors. Agency Report, Tab 7, RFP, at 2347-49.

⁶ The solicitation defined a "technically acceptable" rating as applicable to "any proposal which can be awarded 'as is' and contains few, if any, minor weaknesses," elaborating that a technically acceptable proposal "meets or exceeds the government's minimum needs and the government is confident that the offeror can successfully perform the services." Agency Report, Tab 6, RFP, at 2331, 2334-39.

⁷ The solicitation defined a "marginal" rating as applicable to "any proposal that contains weaknesses that must be clarified/modified before it can be awarded," elaborating that, "[t]he contractor could possibly perform the services, but only if the weaknesses are corrected." Agency Report, Tab 7, RFP, at 2347.

⁸ The solicitation defined a "technically unacceptable" rating as applicable to "any proposal that contains major weaknesses and could only become eligible for award if it were substantially revised, and added that "[such a proposal] does not meet the government's requirements and the government has no confidence that the offeror can successfully perform the services." Agency Report, Tab 7, RFP, at 2347.

⁹ The other proposals were submitted by Griffin Services, Inc., C&E Services, Inc., and Jantec, Inc. Griffin's proposal was ultimately selected for comparison to the MEO.

¹⁰ The SSEB was divided into four committees, corresponding to the four primary evaluation factors--management/technical approach, past performance/past experience, subcontracting, and cost/price; each committee was comprised of both voting and nonvoting members. The nonvoting members were described as "subject matter experts" who had been retained by the agency under a separate contract. Agency Report, Contracting Officer's Statement, at 5.

Statement, at 6-7. The consensus meetings led to assignment of the following initial technical ratings for each of the proposals:

<u>Offeror</u>	<u>Technical Rating</u>
Griffin Services, Inc.	[deleted]
CASS	[deleted]
C&E Services, Inc.	[deleted]
Jantec, Inc.	[deleted]

Agency Report, Contracting Officer's Statement, at 7.

Since none of the proposals were rated as technically acceptable, the agency opened discussions with all four offerors, initiating these discussions by letters dated August 5, 2002.

In the August 5 letter to CASS, the agency summarized various concerns regarding CASS's proposal and provided a 24-page attachment identifying multiple specific noncost/price issues that CASS needed to address.¹¹ Agency Report, Tab 16. The agency's letter summarized the agency's concerns, stating, in part, as follows:

There [are] several reasons that your technical proposal was [deleted]. Care must be taken to ensure that when you propose a job description that the staff members you propose meet those qualifications. . . . Additionally, there are many times when it appears impossible for the listed number of staff to be capable of providing coverage at the facilities for the operating hours listed in the PWS. Your method of accomplishing these tasks with the identified staff must be explained to us in the proposal. . . . Your response may or may not need to increase the total number of staff, but we need an explanation of how you intend to staff functions during the required hours of operations and how you plan to dispatch, manage, inspect, equip, and supply staff who . . . react to maintenance and repair actions. The final concerns are the unique environment and the type of operations at Fort Detrick (i.e. BL-3 and BL-4 laboratories.^[12]) For example, job positions must

¹¹ Additionally, the Army provided a separate, 4-page attachment identifying various cost/price related issues.

¹² The National Institute of Health has established four biosafety levels (BL) for research laboratories that handle infectious and/or otherwise potentially hazardous agents. BL-3 laboratories involve activities with agents that may cause serious and potentially lethal infection; BL-4 laboratories involve activities with agents that pose
(continued...)

be specific to the tasks required, and draft plans must reflect a deeper degree of knowledge of Fort Detrick.

Agency Report, Tab 16, at 3275-76.

On August 14, the agency followed up the August 5 letter by conducting face-to-face discussions with CASS; during this meeting, CASS was afforded an opportunity to ask questions and provide comments regarding the matters addressed in the August 5 letter.¹³ Agency Report, Contracting Officer's Statement, at 8.

Revised proposals were submitted by CASS, Griffin and C&E Services on or before the September 3 due date. Thereafter, the SSEB again evaluated each proposal; the overall ratings for each proposal did not change. By letters dated October 11, the agency again identified various continuing concerns regarding each proposal. Specifically, in the October 11 letter to CASS, the agency advised CASS, among other things, of the following:

[CASS] provided some [deleted] for preventative maintenance and service orders as justification for some of the craftsperson [staffing levels]. However, the times are [deleted] and apparently do not include [deleted]. In addition, special procedural, accessing, and protective equipment requirements for repair and maintenance in USAMRIID [U.S. Army Medical Research Institute for Infectious Disease] biological safety areas could increase the [time] estimates considerably. [CASS] should provide full justification for these time estimates, and demonstrate how the [deleted] are included.

.

[CASS's] description of the reporting lines for the Quality Control, Safety, and Environmental (QCS&E) Manager was unclear. The QCS&E Manager is shown as [deleted], but the text only shows him [deleted]. [CASS] should clarify how this [deleted] ensures the autonomy of the QCS&E Manager. The PWS requirement that the Quality Manager "be accountable to upper management" is to ensure

(...continued)

the highest risk of life-threatening disease, may be transmitted via aerosol route, and for which there may be no available vaccine or therapy.

¹³ The agency conducted similar discussions with Griffin and C&E Services; Jantec withdrew from the competition following the initial evaluation of proposals. Agency Report, Contracting Officer's Statement, at 9.

that the QC Manager is able to be autonomous of the management chain for operations.

.

[CASS] should explain how properly skilled off-duty staff will be able to respond within 15 minutes to Priority 1, Emergency work, as required by the PWS TE 5.20-4.

Agency Report, Tab 24, at 4535-41.

Again, approximately 1 week after the written discussions were sent, the agency conducted face-to-face discussions with CASS. At that meeting the contracting officer notes that he specifically called CASS's attention to various agency concerns, including the concern that CASS's proposal did not adequately address the solicitation requirement to respond to emergencies within 15 minutes. The contracting officer states that, in response, the CASS negotiator acknowledged his understanding of the agency's concern, but stated that because this was an A-76 procurement, CASS intended to "roll the dice." Agency Report, Contracting Officer's Statement, at 3, 9.

Final revised proposals were submitted by the November 5 due date; thereafter, the agency's SSEB performed final proposal evaluations. Griffin's final proposal was rated technically acceptable; CASS's and C&E Services' proposal were rated technically unacceptable. Specifically, CASS's proposal was rated technically unacceptable under the primary evaluation factor for evaluating management/technical approach; more specifically, CASS's proposal was rated technically unacceptable under each of the following management/technical approach subfactors: management approach; staffing/key personnel; phase-in; and technical approach.¹⁴ Agency Report, Contracting Officer's Statement, at 11. Overall, the agency concluded that CASS's proposal "did not convey a confidence that CASS could adequately perform the requirements of the PWS." Agency Report, Contracting Officer's Statement, at 10. Based on this evaluation, the agency eliminated CASS's proposal from further consideration, advising CASS of this action on January 7, 2003. This protest followed.

¹⁴ CASS's cost/price proposal was also rated unacceptable based on various deficiencies, including inaccuracies and inconsistencies regarding CASS's proposed subcontractors' indirect rates and labor rates. CASS acknowledges the existence of certain "mistake[s]," "typographical error[s]," and "multiplication errors" on the part of its proposed subcontractors. Protest at 32, 34, 35.

DISCUSSION

CASS protests that it was unreasonable for the agency to conclude that CASS's proposal failed to meet the solicitation requirements with regard to CASS's proposed management/technical approach. CASS argues that, notwithstanding various weaknesses, the proposal should have been evaluated as minimally complying with the solicitation requirements. We disagree.

In reviewing protests challenging an agency's evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals; rather we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria, and with procurement statutes and regulations. Honolulu Marine, Inc., B-245329, Dec. 27, 1991, 91-2 CPD ¶ 586 at 3. A protester's mere disagreement with the agency's evaluation does not render it unreasonable. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454 at 5.

The record shows that CASS's proposal was rated as unacceptable for, among other things, failing to comply with the RFP requirements regarding "priority 1-emergency" work.¹⁵ Specifically, the RFP stated:

PRIORITY 1 -- EMERGENCY: Emergency work takes priority over all other work and requires immediate action, including overtime or diverting craftsmen from other jobs, if necessary, to cover the emergency. Usually work will be classified as emergency when it consists of correcting failures/problems constituting an immediate danger to life, health, mission, security or property. . . .¹⁶ Required response time for emergency work is within 15 minutes.

Agency Report, Tab 3, RFP Technical Ex. 5.20-4, at 2044.

In evaluating CASS's initial proposal, the agency found that CASS only proposed [deleted]. The agency was concerned that CASS would be unable to meet the

¹⁵ The RFP divided work orders into three categories--"priority 1-emergency," "priority 2-urgent," and "priority 3-routine"--and provided a narrative, descriptive paragraph defining each level. Agency Report, Tab 3, RFP Technical Exh. 5.20-4, at 2044-45.

¹⁶ Stated examples of emergency work included: spillage of hazardous/toxic substances, gas leaks, major utilities service failures, broken electrical components that may cause fire or shock, and broken water or steam pipes, as well as overflowing drains, clogged toilets (when only one is available for use), and accidental lock-ins of children. Agency Report, Tab 3, RFP Technical Exh. 5.20-4, at 2044.

response time for emergency requirements during the remaining time periods. Accordingly, as noted above, in its written discussion questions dated October 11, the agency requested that CASS “explain how properly skilled off-duty staff will be able to respond within 15 minutes to Priority 1 Emergency work.” Agency Report, Tab 24, at 4541. During the face-to-face discussions conducted on October 24, this matter was again, orally, brought to CASS’s attention. Agency Report, Contracting Officer’s Statement at 3, 9. The contracting officer states (and CASS does not dispute) that the CASS negotiator acknowledged an understanding of the agency’s concern, but stated that CASS would “roll the dice.” Id.

In its final proposal revisions, following the October discussions, CASS addressed this issue by again indicating it would [deleted]. However, with regard to the [deleted], CASS’s final proposal provided only the following:

[Deleted].

Agency Report, Tab 26, CASS Final Proposal Revision, at 4631.

In short, despite the agency’s repeated expressions of concern regarding this matter, CASS declined to [deleted], and offered no information or commitment regarding the proximity to Fort Detrick from which its [deleted] personnel would be responding.

In evaluating this aspect of CASS’s proposal as unacceptable, the agency concluded:

Since Frederick [where Fort Detrick is located], is a high cost of living area, most service staff live much more than 15 minutes from Ft. Detrick (i.e. Thurmont [Maryland], rural areas, West Virginia, etc). It is unreasonable to expect that they will be able to respond in 15 minutes. The normal drive time [for employees traveling] to Ft. Detrick is often in excess of 30 minutes. This does not include the time required to clear security at the front gate, obtain necessary equipment and travel to the emergency.

Agency Report, Tab 48, SSEB Final Report, at 11371.

CASS maintains that this aspect of its proposal should have been evaluated as meeting the RFP’s minimum requirements, arguing that, [deleted], Protest at 29, and elaborating that “the data furnished by the Army . . . show[s] that such emergencies historically have not occurred frequently (about one event every two weeks).”¹⁷

¹⁷ We do not take a position regarding whether emergency situations (defined by the solicitation as involving “an immediate danger to life, health, mission, security or property”) that occur “every two weeks” are properly characterized as “rare occurrence[s]”; however, the basis for CASS’s frequency calculation (“one event

(continued...)

CASS Comments, Mar. 13, 2003, at 42. Finally, CASS explains that, “[w]ithout [deleted], it [was] impossible for CASS to provide any further explanation of how on-call staff can respond to emergencies within 15 minutes.” Protest at 29.

As discussed above, CASS was well aware of the agency’s concern regarding this aspect of its proposal, yet declined to respond in a manner that would reasonably demonstrate how the RFP’s requirements regarding emergency work would be met. Further, we view the agency’s concern—that is, that without assurances that CASS’s personnel responding to emergency requirements [deleted]—to be reasonably based. Indeed, by CASS’s own admission, it was “impossible” for CASS to provide any assurance regarding its ability to meet the 15-minute response requirement because [deleted].¹⁸ CASS’s candid statement regarding the “impossibil[ity]” of responding to the 15-minute requirement simply confirms the reasonableness of the agency’s ultimate conclusion that CASS’s proposal “did not convey a confidence that CASS could adequately perform the requirements of the PWS.” Agency Report, Contracting Officer’s Statement, at 10. On this record, we find no basis to question the agency’s conclusion that CASS’s proposal failed to comply with the solicitation requirements.¹⁹

Additionally, the agency evaluated CASS’s proposal as technically unacceptable based on CASS’s proposal, appearing for the first time in its final proposal revisions,

(...continued)

every two weeks”) appears inconsistent with the data provided in the solicitation. In this regard, the solicitation advised offerors that they should expect to perform 10,434 service orders annually, and that 2 percent of these orders will involve “priority 1 - emergency” work. Agency Report, Tab 3, RFP Technical Exh. 5.20-4, at 2045. This data suggests, to us, that offerors will perform approximately 208 “priority 1 - emergency” service orders each year (2 percent of 10,434)—or, on average, approximately 4 such orders per week (208 service orders divided by 52 weeks).

¹⁸ It is clear that the solicitation requirement to respond to emergencies within 15 minutes effectively mandated that offerors propose either on-site staff or staff in close proximity to Fort Detrick. CASS did neither.

¹⁹ Throughout its pursuit of this protest, CASS has asserted that the agency evaluated CASS’s proposal and Griffin’s proposal in a disparate manner. We have reviewed all of CASS’s arguments in this regard and find no merit in them. Specifically, with regard to the 15-minute requirement discussed above, CASS expressly acknowledges that “Griffin proposed [deleted].” CASS Comments on Agency Report, Mar. 13, 2003, at 44. As CASS further acknowledges, “Griffin’s approach was obviously preferable to the evaluators.” *Id.* Based on CASS’s own statements, it is clear that the agency had a reasonable basis to distinguish between CASS’s and Griffin’s management/technical approach.

of [deleted]. The agency found CASS's proposal of [deleted] incomplete and inconsistent with other aspects of its final proposal.

CASS's proposed [deleted] was offered in response to agency concerns with its previously proposed staffing levels. Specifically, during the second round of discussions, the agency advised CASS as follows:

The overall staffing level is insufficient to perform many of the PWS requirements. The offeror was previously asked to demonstrate how it could perform all of the PWS requirements with the proposed staffing level, and did not adequately answer the question. For example, the offeror proposed to increase staffing for [deleted] by reclassifying positions (a [deleted] to a [deleted] and a [deleted] to a [deleted]). This method of addressing staffing shortages within the organization does not adequately address the request for clarification for performing this type of work with the proposed staffing levels. . . . The offeror does not explain what positions are going to perform the work requirements of those positions that were reclassified.

Agency Report, Tab 24, at 4534.

In response, the technical/management portion of CASS's final revised proposal stated:

[Deleted].

Agency Report, Tab 26, at 4579-80.

Although CASS's proposed [deleted] appeared for the first time in its final proposal revisions, CASS provided very limited information regarding its proposed implementation of this approach. Specifically, CASS proposed to retain a subcontractor to [deleted], but failed to further define the subcontractor's role, explain how involvement of this subcontractor would benefit the government, or provide additional information regarding what the [deleted] would entail. Agency Report, Tab 26, at 4579-80. Further, although CASS's proposal stated that its proposed [deleted] would "require cooperation and partnering with Government counterparts," the proposal provided no additional details. *Id.* Finally, CASS's proposal stated--without explanation or elaboration--that CASS was [deleted]. Agency Report, Tab 26, at 4580. In pursuing this protest, CASS expressly acknowledges that this [deleted] approach is inconsistent with other portions of CASS's final revised proposal. CASS Comments on Agency Report, Mar. 13, 2003, at 7. Nonetheless, CASS asserts that the agency should have conducted further communications with CASS to resolve this inconsistency. *Id.*

It is well settled that an agency has no obligation to reopen discussions to allow an offeror additional opportunities to revise its proposal when a deficiency first

becomes apparent in submitting final proposal revisions. See, e.g., Addisco Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317.

Here, CASS's proposal of [deleted] (which CASS asserts is capable of reducing costs for preventive maintenance and repairs by "up to 20%," Agency Report, Tab 26, at 4579) was presented to address the agency's conclusion that CASS's prior proposal submissions failed to propose adequate resources to perform various RFP requirements. CASS's introduction of this proposed approach in its final proposal revisions, without providing adequate supporting information, along with its unexplained proposal to [deleted] (a provision which CASS acknowledges is inconsistent with other portions of its final proposal), precluded the agency from accepting its proposal without obtaining additional information. As noted above, the agency had no obligation to reopen discussions following submission of final revised proposals in order to provide CASS with yet another opportunity to address the agency's previously identified concerns. On this record, we find no basis to question the agency's conclusion that CASS's final revised proposal was unacceptable.

In summary, based on the two examples discussed above, we find that the agency had ample bases to reject CASS's proposal as technically unacceptable.²⁰ Since the RFP advised offerors that proposal selection would be made on the basis of the technically acceptable proposal offering the lowest evaluated cost/price, the agency acted reasonably in eliminating CASS's proposal from further consideration.²¹

²⁰ We note that the agency also evaluated CASS's proposal as unacceptable for, among other things: [deleted]. Agency Report, Tab 48, SSEB Final Report, at 11368-72. In light of our discussion above, we need not address these issues.

²¹ Throughout its pursuit of this protest, CASS has argued that, because not all of the individual evaluator worksheets identified all of the technical deficiencies that are ultimately reflected in the agency's source selection decision, CASS's protest should be sustained on the basis of inadequate documentation. We disagree. It is not unusual for individual evaluator ratings to differ from one another, or to differ with the consensus ratings eventually assigned; source selection officials may reasonably disagree with the evaluation ratings and results of lower-level evaluators, Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107 at 6-8. The overriding concern for our purposes is not whether the final ratings are consistent with earlier, individual ratings, but whether they reasonably reflect the relative merits of the proposals. Brisk Waterproofing Co., Inc., B-276247, May 27, 1997, 97-1 CPD ¶ 195 at 2 n.1. Here, based on our review of the extensive agency evaluation record, including all the evaluation worksheets and the final SSEB report, as well as our own review of CASS's proposal, we conclude that the record contains more than adequate support for the agency's ultimate conclusions.

Finally, CASS protests that “the Army failed to conduct meaningful discussions.” Protest at 12. We disagree.

Although it is a requirement that, when discussions are conducted, they must be meaningful, this requirement does not mean that agencies must discuss every element of an offeror’s proposal that receives less than the maximum rating when such elements are reasonably subsumed within a more general area of the proposal that has been identified as requiring amplification or correction. Volmar Constr., Inc., B-270364, B-270364.2, Mar. 4, 1996, 96-1 CPD ¶ 139 at 4; DAE Corp., B-259866, B-259866.2, May 8, 1995, 95-2 CPD ¶ 12 at 4-5. Consistent with this principle, an agency is not required to describe how the offeror should revise its proposal to cure an existing weakness or defect; indeed, one of the objectives in proposal evaluation is to assess an offeror’s own understanding of the solicitation requirements, and its perception of the best method to meet those requirements. Accordingly, agencies need only lead offerors into the areas of their proposals that require correction or amplification. Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 4. Here, we find the discussions to have satisfied that standard.

As discussed above, the agency engaged in two rounds of written discussions, which included a total of 39 pages of detailed questions regarding multiple aspects of CASS’s proposal, along with two rounds of face-to-face discussions, during which CASS was invited to seek clarification of any matter raised by the agency. We have reviewed the extensive discussion record here, along with the agency’s final, multiple, bases for rejecting CASS’s proposal and find CASS’s assertion that the agency’s discussions were less than meaningful to be wholly without merit. More specifically, the agency clearly led CASS into each and every area of its proposal on which the agency subsequently relied as a basis for rejecting the proposal.

The protest is denied.

Anthony H. Gamboa
General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: TDS, Inc.

File: B-292674

Date: November 12, 2003

William A. Roberts, III, Esq., Philip J. Davis, Esq., Phillip H. Harrington, Esq., Timothy W. Staley, Esq., and Jonathan L. Kang, Esq., Wiley Rein & Fielding, for the protester.

Rafael A. Madan, Esq., John L. Pensinger, Esq., Linda Fallowfield, Esq., and Alan Fisher, Esq., Office of Justice Programs, Department of Justice, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposed subcontractor has an impermissible "impaired objectivity" organizational conflict of interest by virtue of another contract with the agency, is denied where record fails to show that firm will be in a position to evaluate the performance or activities of the prime contractor as part of its responsibilities under that other contract.
 2. Where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments, questions, and concerns, discussions have occurred.
 3. Protest that agency failed to engage in meaningful, equitable discussions is sustained where agency personnel, during course of at least one vendor's oral presentations, asked detailed, substantive questions relating to the vendor's quotation, yet agency failed to alert protester to any of the numerous weaknesses identified in its quotation.
-

DECISION

TDS, Inc. protests the issuance of a task order to Northrop Grumman Information Technology under request for quotations (RFQ) No. OJP-2003-Q-014, issued by the Department of Justice, Office of Justice Programs (OJP), to acquire help desk operation services. TDS maintains that one of Northrop's subcontractors has an

impermissible organizational conflict of interest and that the agency misevaluated quotations and failed to engage in meaningful discussions.

We sustain the protest.

The RFQ contemplated the issuance of a task order under the successful firm's federal supply schedule (FSS) contract, for a 1-year base period with three 1-year options, to perform "help desk" operations services in support of the agency's information technology (IT) requirements. Two primary tasks were contemplated: help desk support services (essentially help desk services for agency end-users of computing and telecommunications resources), and system administration and network engineering (the administration and management of all UNIX-based resources at the agency, and hardware and software engineering necessary to accomplish the agency's design goals for its computer network). RFQ, attachment No. 1, Statement of Objectives (SOO), at 2-4.¹

Firms were advised that quotations would be evaluated under six equally-weighted criteria: past performance, corporate experience, technical understanding, quality control, professional staff and team, and management approach. RFQ at 2-4. The submissions would be assigned adjectival ratings of either exceptional, acceptable, marginal or unacceptable. Firms were further advised that the agency would make award on a "best value" basis, considering price and the non-price criteria, with the non-price considerations deemed more important than price.

The agency received three timely quotations. After reviewing the submissions, the agency invited the firms to make oral presentations. In the course of the oral presentations, the agency posed questions to the vendors. Agency Report (AR), exh. 23. After concluding the oral presentations, the agency invited firms to submit final quotation revisions (FQR), advising them that they could submit technical revisions to their quotations in the areas mentioned by the agency during oral presentations, and also could submit revised pricing.

The agency received FQRs from all three vendors. After evaluating the submissions, the agency assigned final adjectival ratings. Northrop's quotation received adjectival ratings of [deleted] under four of the six evaluation areas, and an [deleted] rating

¹ Because the agency is using a performance-based contracting method, the RFQ does not include specifications. Instead, the agency provided prospective contractors with an SOO, and required them to submit quotations describing how they intend to meet the agency's objectives through their proposed technical and management approaches. Firms also were required to submit a service level agreement (SLA) describing the level of service to be provided, performance measures to evaluate the level of service provided, and a list of financial incentives and disincentives associated with varying levels of performance. RFQ at 5.

under the technical understanding and professional staff and team criteria; Northrop submitted a final price of [deleted]. TDS received [deleted] ratings under five of the evaluation criteria, and an [deleted] rating under the past performance criterion; it submitted a final price of [deleted].² On the basis of these evaluation results, the agency made award to Northrop as the firm submitting the quotation offering the best value to the government.

ORGANIZATIONAL CONFLICT OF INTEREST

TDS asserts that one of Northrop's subcontractors, [deleted], has an impermissible organizational conflict of interest (OCI) that should have precluded award to Northrop. The record shows that [deleted] has another contract with OJP to provide various IT services to the agency (referred to in the record as the management system contract), and TDS maintains that [deleted] role under that contract, coupled with its responsibilities under the help desk contract, creates an "impaired objectivity" OCI.

An impaired objectivity OCI exists where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of a proposal submitted to obtain another contract. Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The concern in such situations is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. Id.

[deleted] management system contract is for the provision of services relating to the agency's effort to update its computer systems and develop certain agency-wide enterprise systems. The contract calls for [deleted] to perform eight defined tasks. The first three of these tasks relate to the modification, build out, troubleshooting, integration and maintenance of one of OJP's computer systems known as the grants management system (GMS), as well as the migration of several other preexisting contemporary and legacy grants management systems, to the GMS enterprise framework. AR, exh. 17, at 2-3. The fourth and sixth tasks require [deleted] to research, document and implement an enterprise architecture for all of OJP's

² The agency's technical evaluation report reflected an adjectival rating of [deleted] for TDS under the past performance criterion. AR, exh. 10, at 2; Source Evaluation Board Award Recommendation Report, July 8, 2003, appendix No. 1, at 1. By e-mail dated July 15, 2003, the contracting officer specifically advised the chairman of the technical evaluation board that TDS should have received an [deleted], rather than an [deleted], rating for past performance. AR, exh. 10, at 5. The agency's source selection document does not reflect the revised rating for TDS in the past performance area. AR, exh. 11 at 2.

business activities and computer systems, and to implement an enterprise portal that will provide a single point of access for all of OJP's core computer systems (including, for example, the GMS). Id. at 4-5. The seventh task requires [deleted] to evaluate the existing communications infrastructure between OJP and the office of the chief information officer (OCIO), to identify any barriers to communications between OJP and OCIO, and to develop and implement an "internal communications campaign" to ensure effective two-way communication between OJP and OCIO. Id. at 5-7. The eighth task requires [deleted] to develop and execute a "change management process" to be used to essentially train agency users in the use of newly-implemented IT systems so as to optimize the use of the newly-implemented systems. Id. at 7.

The fifth task--the focus of much of TDS's OCI allegation--requires [deleted] to provide comprehensive guidance to OCIO on infrastructure refreshment, migration, security and other related projects. AR, exh. 17, at 4-5. This task requires [deleted] to provide guidance on projects that require constant monitoring and expert technical guidance, including the agency's migration of its system from a Novell-based environment to a Microsoft Windows-based environment, and the roll-out of new desktop computers configured for Microsoft networking. Id.

Under the help desk task order to be awarded under the current RFQ, the contractor is essentially responsible for providing operational support and system availability to the users of the OJP system enterprise architecture by installing and upgrading system hardware and software and by successfully migrating existing software, files and databases from the Novell-based operating environment to the Microsoft Windows-based operating environment; by providing administration and management of all UNIX-based resources in OJP including moving, adding, changing and maintaining system resources; by providing hardware and software engineering services necessary to accomplish the design goals of the agency's computer network; and by providing network and system administration support for OJP's two major systems, GMS (discussed above) and the integrated financial management information system (IFMIS). SOO at 3-7. In effect, the help desk contractor is responsible for assisting the agency in maintaining its existing system assets, providing support to system users, implementing the agency's new enterprise architecture, migrating system assets from a Novell-based environment to a Microsoft Windows-based environment and providing support for the agency's two major systems, GMS and IFMIS.

The thrust of TDS's allegation is that, because [deleted] is responsible under its management system contract for monitoring the activities of the help desk contractor in its implementation of the new system architecture and the migration from one operating environment to another, and because the firm provides advice and guidance to the agency in support of these activities, the firm has an impaired objectivity OCI. TDS maintains that [deleted] management contract duties conflict with the duties it may be called upon to perform as Northrop's subcontractor under

the help desk task order, for example, implementation of the agency's migration from a Novell-based environment to a Microsoft Windows-based environment.

We have no basis on the record before us to find that [deleted] has an impaired objectivity OCI. Contrary to TDS's position, there is nothing inherently improper in a firm's monitoring the activities of a team member such as Northrop here (or its own activities); monitoring, standing alone, does not necessarily create the potential for impaired objectivity. Rather, as noted above, an impaired objectivity conflict typically arises where a firm is evaluating its own activities because the objectivity necessary to impartially evaluate performance may be impaired by the firm's interest in the entity being evaluated. See Johnson Controls World Servs., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 11-12. While we do not exclude the possibility in a different context of monitoring activities resulting in an impaired objectivity OCI, here there is no evidence that [deleted] will be evaluating the performance of the help desk contractor, and there is nothing otherwise objectionable in the interrelationship of activities performed by [deleted] on the two contracts. Instead, the record shows that the help desk contractor's performance must at least meet the minimum standards outlined in the RFQ and that the contracting officer's technical representative will be responsible for evaluating the adequacy of the firm's performance for purposes of assessing the firm's overall performance, deciding whether or not to award option year requirements, and determining the firm's compensation under the SLA. SOO at 8-9. We find no indication in the record--and TDS has not directed our attention to any information--showing that [deleted] will have any input whatsoever into the evaluation of the help desk contractor's performance. Under these circumstances, we have no basis to find that the awardee, or its subcontractor, has an impaired objectivity OCI.

DISCUSSIONS

TDS asserts that the agency improperly failed to conduct meaningful discussions with it during the acquisition. In support of its position, TDS directs our attention to the relatively large number of weaknesses and risks identified during the agency's evaluation of its quotation; TDS maintains that the agency failed to meaningfully bring virtually any of these matters to its attention. TDS maintains that the agency was required to conduct meaningful discussions, since it opened discussions by eliciting information from the firms during the oral presentation and then providing them an opportunity to revise their quotations.

The agency responds that it properly conducted the firms' oral presentations and, in the course thereof, sought only clarifications. OJP maintains that it did not open discussions, and thus was under no legal obligation to engage in meaningful discussions and thereby bring the weaknesses and risks identified in the TDS quotation to the firm's attention.

We find, despite the agency's characterization of the exchanges, that discussions occurred here.³ The FAR anticipates "dialogue among the parties" in the course of an oral presentation, FAR § 15.102(a), and we see nothing improper in agency personnel expressing their view about vendors' quotations or proposals, in addition to listening to the vendors' presentations, during those sessions. Once the agency personnel begin speaking, rather than merely listening, in those sessions, however, that dialogue may constitute discussions. As we have long held, the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for quotations or proposals to be revised or modified. See, e.g., Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Accordingly, where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments and concerns, discussions have occurred. See FAR § 15.102(g).

That plainly is the case here. Following the oral presentations, the agency specifically advised the firms:

Technical revisions may only be made, at your selection where you feel necessary, to the questions presented in Oral Presentations, along with those specifically requested, such as the percent of discount offered from the GSA Schedule rates, Performance Evaluation Questionnaire.

AR, exh. 24, at 7. The record thus shows that the agency afforded the firms an opportunity to revise their quotations, in particular in the areas raised by agency personnel during the oral presentations, and the record further shows that the firms in fact made revisions to their submissions, both as to technical matters and as to price. AR, exh. 8, TDS Final Submission, June 19, 2003; AR, exh. 9, Northrop Final Submission, June 19, 2003. Based on these considerations, we conclude that the agency engaged in discussions.

The FAR requires at a minimum that contracting officers discuss with each firm being considered for award "deficiencies, significant weaknesses, and adverse past

³ Since the RFQ provided for the issuance of a task order against the selected vendor's FSS contract, the provisions of Federal Acquisition Regulation (FAR) subpart 8.4 (governing FSS acquisitions) apply. However, the record establishes that OJP treated the vendors' responses as if it were conducting a negotiated procurement. Under these circumstances, while the provisions of FAR part 15 (governing contracting by negotiation, including requirements concerning meaningful discussions) do not directly apply, we will analyze TDS's contentions by the standards applicable to negotiated procurements. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 3-4.

performance information to which the offeror has not yet had an opportunity to respond.” FAR § 15.306(d)(3). The FAR also encourages contracting officers to discuss other aspects of the firm’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. Id. Discussions must be meaningful, equitable, and not misleading. ACS Gov’t Solutions Group, Inc., B-282098 et al., June 2, 1999, 99-1 CPD ¶ 106 at 13-14. Discussions cannot be meaningful unless they lead a firm into those weaknesses, excesses or deficiencies in its quote or proposal that must be addressed in order for it to have a reasonable chance of being selected for contract award. Id.

We find on the record before us that DOJ failed to engage in meaningful discussions with TDS. The agency’s source selection decision document summarizes the weaknesses identified by the agency’s technical evaluators relating to the TDS quote:

[deleted]

AR, exh. 11, at 3.

Despite this rather considerable list of weaknesses identified by the agency, TDS was given only two general questions during its oral presentation, neither of which actually addressed the weaknesses noted. TDS was asked only: “What performance based standards will your operation use?” and “How do you propose to ensure that technical issues that come up are properly reported to OJP and then handled by the correct people?” AR, exh. 23. Based on the foregoing, we conclude that the agency failed to afford TDS meaningful discussions giving the firm a reasonable opportunity to address the weaknesses in its quote, and thereby giving it a reasonable chance of being selected for award.

We also find that the agency’s discussions were not equitable. ACS Gov’t Solutions Group, Inc., supra. Both of the other firms received questions that were far more detailed, and related far more specifically to the agency’s concerns about their quotes. Northrop received a list of seven questions that were tailored to its proposed technical and management approach:

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

AR, exh. 23. The third firm also received a list of seven similarly detailed questions relating to its proposed technical and management approach. *Id.* The record contains no explanation from the agency regarding why it provided TDS a substantially lower level of specificity in its communications.

In view of the foregoing, we sustain TDS's protest.⁴ We recommend that the agency reopen the acquisition, engage in meaningful discussions with all of the firms, obtain and evaluate revised quotations and make a new source selection decision. We further recommend that if, at the conclusion of these activities, the agency determines that a firm other than Northrop is properly in line for award, it should terminate the task order issued to Northrop for the convenience of the government, and make award to the eligible firm if otherwise proper. Finally, we recommend that TDS be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees, insofar as those costs were incurred in pursuit of its protest allegation relating to the adequacy of discussions. 4 C.F.R. § 21.8(d)(1). TDS's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁴ TDS's protest also raises additional arguments relating to the agency's evaluation findings and source selection decision. We dismiss these aspects of its protest as academic because we recommend that the agency reopen the acquisition, engage in meaningful discussions and receive and evaluate revised quotations. ACS Gov't Solutions Group, Inc., *supra*, at 14 n.7.