



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: Gentex Corporation--Western Operations

File: B-291793; B-291793.2; B-291793.3

Date: March 25, 2003

David Z. Bodenheimer, Esq., Frederick W. Claybrook, Jr., Esq., Amy E. Laderberg, Esq., and Karen Hastie Williams, Esq., Crowell & Moring, for the protester.
Ron R. Hutchinson, Esq., Gerard F. Doyle, Esq., and James D. Bachman, Esq., Doyle & Bachman, for the intervenor.
Clarence D. Long, III, Esq., and Patrick F. Corbin, Esq., Department of the Air Force, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Notwithstanding notice that competition was limited to firms that held prior contracts under a program definition and risk reduction contract for aircrew masks, a subcontractor was reasonably found to be eligible to compete under the terms of the subsequent solicitation for the development contract for the aircrew masks.
2. Protest that agency's inadvertent release of evaluation material resulted in an unfair competition is denied, where the record shows that the release did not provide the awardee with an unfair competitive advantage or competitively prejudice the protester.
3. Agency reasonably evaluated awardee's proposal under a solicitation for the development of aircrew masks, where the record shows that the agency fairly and reasonably considered the respective strengths and weaknesses of each proposal in accordance with the evaluation criteria and determined that the awardee's proposal was superior.
4. In a solicitation for the development of aircrew masks, agency did not hold unequal discussions regarding the affordability of one aspect of the masks, even though the agency asked the awardee, but not the protester, a specific question on this matter, where the record shows that the protester was already aware of the information provided to awardee and was permitted an equal opportunity to respond.

5. Agency reasonably assigned a weakness to the protester's proposal for failing to comply with the funding profile identified by the agency, where consideration of funding constraints was reasonably encompassed within solicitation evaluation criteria.

6. Where agency inquired whether awardee would consider variation in quantities and warranty clauses, technical transfusion did not occur, even though these clauses had been previously offered by the protester, because agency did not disclose innovative and unique approaches of the protester and the questions on these matters were neutral on their face.

7. Agency performed a reasonable cost realism analysis on the cost-reimbursement component and a reasonable price analysis on the fixed-price components of a procurement for the development of aircrew masks.

DECISION

Gentex Corporation--Western Operations protests the award of a contract to Scott Aviation¹ under request for proposals (RFP) No. F-41624-02-R-1007, issued by the Department of the Air Force for the system development, demonstration, and production of Joint Service Aircrew Masks (JSAM). Gentex challenges the awardee's eligibility for award, as well as the reasonableness of the agency's technical and cost evaluation.

We deny the protests.

BACKGROUND

The JSAM program is for the development, manufacture, and fielding of a sustainable mask system that, in conjunction with a below-the-neck clothing ensemble, will provide nuclear, chemical, and biological protection to enable aircrew to fly in a chemical or biological warfare environment. The JSAM generally consists of a hood, oral-nasal mask, and lens assembly that is supplied with filtered air through a battery-powered blower system. The JSAMs are to be produced in different variants--one for fixed-wing aircraft and one for rotary-wing aircraft.

The acquisition here involves a System Development and Demonstration (SDD) solicitation, which followed the performance of a Program Definition and Risk Reduction (PDRR) phase. The purpose of the PDRR effort was to perform engineering studies and develop prototypes for government evaluation. The SDD effort is intended to finalize product design for entry into production. A team led by

¹ Scott Aviation is a division of Scott Technologies, Inc., which is owned by Scott Technologies Holding Company, Inc., which, in turn, is owned by Tyco International.

Gentex and a team led by Science Applications International Corporation (SAIC) (which included Scott) developed prototypes under the PDRR phase, which became the basis for design development in the SDD phase.

The agency contemplated that the teams led by Gentex and SAIC performing the PDRR contracts would compete under the SDD RFP. Other potential offerors were required to give advance notice to the agency of their intent to compete, and provide certain documentation and material samples for testing by established dates. Protest, exh. 2, Commerce Business Daily Notice. The team led by SAIC had previously notified the agency that their team competing for the SDD contract would consist of the same members as the PDRR contract, but that Scott would be the prime contractor under the SDD competition. Agency Report, vol. 21, Tab G.7, PDRR Proposal Analysis Report, at 19.

The RFP, issued June 18, 2002, provided for the award of a cost-plus-award-fee contract with fixed-price incentive options for production quantities. The RFP included 179 performance specifications.² These consisted of 6 “key performance parameters”³ (which are critical to program performance and “not subject to tradeoff”), numerous “threshold requirements” (which reflect minimum capabilities) of which 23 were designated as “high priority,” and numerous “objective requirements” (which are non-mandatory desired objectives). Offerors were to propose approaches to “develop . . . JSAM systems that meet the Key Performance Parameters, . . . threshold requirements and as many of the objective requirements in the [performance specifications] as practicable within cost and schedule constraints.” RFP, Statement of Objectives ¶ 2.1.

Award was to be made to the offeror that provided the “best value” to the agency, based on an integrated assessment of the evaluation factors and subfactors. The evaluation factors were mission capability, proposal risk, past performance, and most probable life cycle cost (MPLCC). The first three factors were of equal importance, and combined were “significantly more important” than cost. However, cost was identified as a “significant consideration” in the selection process. RFP § M, at 2-3.

² The performance specifications included, among other things, requirements for chemical and biological protection, gravity protection, breathing, eye protection, integration and compatibility with existing aircrew systems, communications integration, mission equipment integration, and environmental requirements.

³ The key performance parameters involve nuclear, chemical, biological, and gravity protection requirements.

Under the mission capability factor, proposals were to be assigned a color rating of blue (exceptional),⁴ green (acceptable),⁵ yellow (marginal), or red (unacceptable), based on the “strengths, inadequacies and/or deficiencies” of each offeror’s approach. Under the proposal risk factor, proposals were given a high, low, or moderate risk rating, based on the “the potential for disruption of schedule, increased cost, degradation of performance, and the need for increased Government oversight, as well as the likelihood of unsuccessful contract performance.” Both these factors included the same four subfactors—key performance parameters, technical performance and operational utility, program risk mitigation, and integrated management. RFP § M, at 3-5.

The key performance parameters subfactors considered the technical performance demonstrated by the offeror’s PDRR prototypes and potential for meeting the parameters; “[t]he sub-factor is met when the offeror effectively and clearly demonstrates that the offeror’s proposed design approach will meet the [parameters] during formal qualification testing.” Under the technical performance and operational utility subfactors, the design’s potential to meet threshold requirements was evaluated with particular emphasis on the high priority threshold requirements. Evaluation of this subfactor included consideration of PDRR prototype performance, SDD design changes, and “an assessment of the impact of . . . threshold requirements which will not be met”; “[t]his sub-factor is met when the offeror clearly and effectively demonstrates that the proposed design(s) will exhibit acceptable performance.” Under the program risk mitigation subfactors, the agency evaluated an offeror’s approach to mitigate, “eliminate or lower” specific risks identified in the RFP; some of these identified risks relate to the performance specifications. The offeror’s overall program approach was to be evaluated under the integrated management subfactors. RFP § M, at 4-5.

The past performance factor included two subfactors—PDRR team effort and PDRR prototype quality. Proposals were given confidence ratings “based on an analysis of risks and strengths relating to the offeror’s past work record,” including the “offeror’s actual performance” of the PDRR contract. RFP § M, at 6. The PDRR past performance requirements included consideration of all team members and major subcontractors as indicators of the prime contractor’s performance capability. PDRR RFP § M, at 5.

⁴ A blue rating indicates that the proposal “[e]xceeds specified minimum performance or capability requirements in a way beneficial to the Government.” RFP § M, at 4.

⁵ A green rating indicates that the proposal “[m]eets specified minimum performance or capability requirements necessary for acceptable contract performance.” RFP § M, at 4.

The MPLCC factor included consideration of SDD, production, operations and support (O&S), and other costs. For SDD costs (i.e., work to be performed on a cost-plus-award-fee basis), the cost team was to perform a cost realism analysis in accordance with Federal Acquisition Regulation (FAR) § 15.404-1(d), to ensure that the proposed costs were realistic for the work to be performed. For production costs (i.e., fixed-price incentive options), the team was to perform a price analysis in accordance with FAR § 15.404-1(b), to ensure that the prices were fair and reasonable. RFP § M, at 7-8. O&S costs were computed by the agency based upon information contained in O&S worksheets completed by the offerors. RFP § L, at 34. The MPLCC for each proposal also included costs to account for qualification testing and technical risk. Declaration of Agency Price Analyst at 3.

The RFP also required offerors to submit funding requirements and schedules that “must be consistent with any imposed government budgetary constraints.” RFP § L, at 31. In this regard, the RFP included, “for informational purposes,” a government funding profile, which the agency updated twice during discussions to reflect additional information concerning program funding, including the loss of approximately \$3 million in fiscal year 2003. Hearing Transcript (Tr.) at 23, 37.

Gentex and Scott were the only two offerors to submit proposals by the July 19 proposal due date. Oral presentations were held during the weeks of July 29 and August 2.

Extensive discussions were conducted. As part of the discussions, on August 23, the agency electronically transmitted to the offerors initial evaluation slides identifying proposal weaknesses and inadequacies. In this transmission, the agency inadvertently sent Scott six evaluation slides that pertained to Gentex (although the slides did not identify Gentex by name). When the error was discovered, the agency contacted Scott on August 27 and “recalled” the materials. The agency also notified Gentex of the error, provided Gentex with a copy of the inadvertently disclosed slides and, at the written request of Gentex, detailed the corrective action taken. The agency received no further inquiry from Gentex and considered the matter closed. Contracting Officer’s Statement, Jan. 30, 2003, at 6. Discussions continued, during which offerors responded to numerous action items and evaluation notices. Final proposal revisions (FPR) were submitted by September 30.

The agency evaluated the FPRs as follows:

		GENTEX	SCOTT
Mission Capability / Proposal Risk			
	Key Performance Parameters	Green/Moderate Risk	Green/Moderate Risk
	Technical Performance and Operational Utility	Green/Moderate Risk	Green/Moderate Risk
	Program Risk Mitigation	Green/Moderate Risk	Green/Moderate Risk
	Integrated Management	Green/Moderate Risk	Blue/Low Risk
Past Performance			
	PDRR Team Effort	Satisfactory/Confidence ⁶	Satisfactory/Confidence
	PDRR Prototype Quality	Satisfactory/Confidence	Satisfactory/Confidence
Most Probable Life Cycle Cost			
	PDRR	[deleted]	\$ 6,967,118
	SDD	[deleted]	\$ 23,043,060
	Production	[deleted]	\$ 149,572,583
	O&S	[deleted]	\$ 160,257,379
	Qualification Testing	[deleted]	\$ 1,083,650
	Technical Risk	[deleted]	\$ 8,742,206
	Total MPLCC	[deleted]	\$ 349,665,996

Source Selection Decision at 23-24; Proposal Analysis Report at 35.

Under the key performance parameters and technical performance and operational utility subfactors, while both proposals had strengths and weaknesses and received green/moderate risk ratings, the agency noted several particular areas where Gentex’s proposal was inferior to Scott’s.⁷ For example, the agency found that Gentex proposed more significant design changes to its PDRR prototypes than Scott, including substantial changes to major components, whereas Scott’s changes were “primarily refinements.” It also noted that Gentex was combining its three PDRR prototypes into two SDD variants, so its fixed-wing design was “considerably different” from its PDRR prototype. Source Selection Decision at 12-16; see Tr. at 542; Gentex Proposal, Oral Presentation Slide No. 88. Additionally, Gentex’s battery approach was found to be based upon a more hazardous chemistry than Scott’s, which would require additional testing, certification, and government

⁶ Satisfactory/confidence means, “[b]ased on the offeror’s performance record, some doubt exists that the offeror will successfully perform the required effort.” RFP § M, at 7.

⁷ Similarly, under program risk mitigation subfactor, both proposals received a green/moderate rating, although the source selection decision opined that Scott had a better understanding of the area where both proposals were considered weak under this subfactor (i.e., anthropometry).

oversight before it could be used. Also, Gentex's breathing hose was based on a [deleted] (as opposed to the "H-manifold" proposed by Scott), which the agency found could result in a complete loss of air (i.e., hypoxia) to the aircrew member at high altitudes and could result in death if, through human error, the aircrew forgot to move the hose. Other distinctions made by the agency between the proposals included Scott's use of adjustable bayonets (i.e., hinges that attach the face mask to the hood), which the agency believed would require less maintenance than Gentex's fixed standard bayonets. Source Selection Decision at 9, 12-16.

Under the integrated management subfactor, the agency found that Scott's approach "consistently exceed[ed] what the Government envisioned," which led to its blue rating. In addition to other features (such as its proposed variation in quantities clause, warranty provision, and total package fielding approach), Scott proposed a high frequency of schedule analysis to identify problems, which the agency found significantly reduced the probability of schedule slips. In contrast, Gentex's proposal, which received a green rating under this subfactor, was found to have a "significant weakness" for potential schedule slips due, in part, to the number of technical and design changes proposed. In addition, Gentex's approach was found to significantly exceed the total funding profile, particularly in fiscal years 2003 and 2004.⁸ Id. at 19-22.

In sum, the agency determined that "[b]y building on the basic design developed for [the] PDRR, Scott Aviation possesses the groundwork for a fully acceptable final design which has a much better chance of meeting program Initial Operating Capability than the Gentex proposal." As such, the source selection authority decided that the Gentex proposal did not warrant the higher cost premium, and that Scott provided the best overall value based on the specified evaluation criteria. Id. at 26.

On November 26, award was made to Scott. These protests followed.

ANALYSIS

Scott's Eligibility to Compete

Gentex contends that Scott was ineligible to compete because it was not the prime contractor under the PDRR phase and thus did not meet the mandatory qualification requirements to participate in this SDD phase. According to Gentex, the Commerce Business Daily notice clearly advised potential offerors that if they were not "contractors" in the PDRR phase, then they had to provide certain documentation and material samples, which Scott did not do.

⁸ Scott's proposal also was found to exceed the funding profile to a far lesser degree. Source Selection Decision at 21.

As noted above, a team led by SAIC and including Scott had a PDRR contract, and SAIC is also a participant in the SDD team led by Scott. The RFP, at Section H, contemplated that contractors could deviate from the initial teaming arrangements, so long as they sought approval from the agency. RFP § H, at 29. Here, the agency was fully advised by SAIC during the PDRR phase that the team would be led by Scott when competing for the SDD contract; nothing in the PDRR contract prohibited such a switch. Agency Report, vol. 21, Tab G.7, PDRR Proposal Analysis Report, at 19. The team members remained the same. Furthermore, development of the PDRR prototype, which reflected Scott's efforts, negated the need to produce additional documentation and material samples. Accordingly, we think that Scott was not precluded from receiving award under the terms of the RFP.⁹

Gentex also contends that Scott should not have been credited with SAIC's past performance experience. We disagree. As a general rule, subcontractor and team member performance may be considered in assessing past performance. Battelle Mem'l Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 22; Phillips Nat'l, Inc., B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252 at 6 (rejecting protester's argument that only the "actual awardee" was entitled to list prior contract for purpose of past performance). The consideration of both the team members' past performance here was consistent with the RFP, which specifically required consideration of the PDRR "team effort" (which includes both Scott and SAIC) and prototype quality (which reflects the work of both Scott and SAIC). RFP § M, at 6. In addition, Scott's lack of prime contractor experience under the PDRR contract need not have resulted in a lower past performance and higher risk rating, as contended by Gentex. As Scott's proposal states, "SAIC was the logical lead for an effort that was primarily [research & development] and involved extensive integration with aircraft and [life support equipment]. . . . Scott is the logical prime contractor for the SDD and Production phases, where final development for manufacturing and production are the primary emphasis." Scott Proposal, vol. I, Executive Summary, at 1. Based on our review, we think the agency reasonably considered the PDRR team's experience in finding that Scott's past performance was satisfactory.¹⁰

⁹ In any case, the record does not evidence that Gentex was prejudiced by its professed belief that it could not make a similar change in its teaming structure. While Gentex argues that it could have modified its approach, apparently to have another team member be the prime contractor which would assertedly have resulted in a significantly lower-priced proposal, Gentex does not otherwise describe the approach where it would no longer be the competing offeror or demonstrate the impact of such a change.

¹⁰ Gentex also challenges the agency's affirmative determination of responsibility for Scott, contending that the agency failed to take into account the integrity of Scott's parent company, Tyco. According to Gentex, Scott should not have been found responsible because Tyco officials have been indicted for criminal wrongdoing and
(continued...)

Release of Source Selection Information

Gentex protests that the agency's inadvertent release to Scott of the six evaluation slides created an unfair competition. Gentex complains that the slides were broadly disseminated within Scott and its team members, and gave Scott a "huge advantage" by enabling that firm to beef up its proposal and discussion responses. It complains that the contracting officer failed to take adequate corrective action or comply with the FAR requirements concerning possible Procurement Integrity Act violations.

While an agency is responsible for ensuring that the competition is not unfair, it has wide latitude in exercising its business judgment to accomplish this purpose. FAR § 1.602-2; see, e.g., Computer Sci. Corp., B-231165, Aug. 29, 1988, 88-2 CPD ¶ 188 at 3-4 (agency reasonably exercised discretion in deciding not to exclude offeror from competition, notwithstanding an inadvertent disclosure of proprietary information).¹¹ Here, the agency determined that the disclosure had "no affect on the outcome of the source selection," so no further corrective action was required. Contracting Officer's Statement, Jan. 30, 2003, at 6.

As explained above, the agency promptly recalled the slides; it also reviewed Scott's FPR to ensure that no changes were made that reflected use of the inadvertently disclosed information. The agency also notified Gentex of the disclosure and detailed the corrective action taken. (Significantly, Gentex did not lodge an additional complaint at that time.)

(...continued)

fraud. However, under the regulations applicable to this protest, our Office does not review affirmative determinations of responsibility absent a showing of bad faith or that definitive responsibility criteria in the RFP have not been met. 4 C.F.R. § 21.5(c) (2002). Gentex has not made such a showing here. Our Office's revised bid protest regulations, which contemplate consideration of whether a "contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation," Bid Protest Regulations, 67 Fed. Reg. 79,833, 79,834-36 (2002) (to be codified at 4 C.F.R. § 21.5(c)), apply only to protests filed after January 1, 2003, and are thus not applicable to this protest.

¹¹ Gentex cites a number of cases where we affirmed an agency's decision to either cancel a solicitation or contract, or disqualify an offeror, in the face of disclosure that may have resulted in an unfair competition. See, e.g., Computer Tech. Assocs., Inc., B-288622, Nov. 7, 2001, 2001 CPD ¶ 187 at 4-7; Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 5. However, in those cases, our review was limited to whether the agency's actions were reasonable; the cited cases do not indicate that the Air Force was required to reject Scott's proposal here because of Scott's inadvertent receipt of the slides. Computer Sci. Corp., *supra*.

In any event, Gentex has not demonstrated that Scott received an unfair advantage, or that Gentex was competitively prejudiced. To the contrary, our review reveals no evidence that Scott changed its proposal based on the information contained in the released slides.¹² Although the slides disclosed a list of proposal inadequacies identified during initial evaluations, some of the issues were generically stated so as not to reveal any proprietary information, or raised concerns common to both offerors (e.g., quality assurance, system agent protection, vision, field maintenance). Our review further indicates that Scott's responses to action items, evaluation notices, and other discussion questions pertain to issues specific to Scott, and do not reflect any of the Gentex information that was revealed in the slides.¹³ See Scott Letter Re: Disclosure (Feb. 14, 2003), exhs. B-F, Scott Responses to Evaluation Questions.

Evaluation of Offerors' Response to Performance Specifications

Gentex contends that the agency improperly and unequally evaluated the offerors' responses to the performance specifications (primarily, the threshold requirements). Gentex complains that the agency disregarded specification non-compliances and

¹² Moreover, each of the individuals on the Scott team, at the request of our Office, provided detailed statements explaining the extent of their review and use of the information and confirming that the slides had been destroyed. As the individuals explained, the information "did not make sense," was "unclear" or "confusing," and "seemed out of context." E.g., Scott Team Statements at 2-4, 6-7, 10. The statements affirm that none of the Scott team members used the information to develop Scott's FPR or discussion responses, or for any other purpose.

¹³ For example, both offerors were given identical "inadequacies" for quality assurance. Each offeror was informed:

Contractor has not adequately explained the quality measures that will be taken to ensure overall system integrity will be met/maintained during assembly and during final verification prior to system leaving the contractor's facility.

Initial Evaluation Slides (Scott and Gentex). Both offerors detailed their quality control measures in responses to evaluation notices. We do not see, and Gentex has not convincingly explained, how Scott received an unfair advantage as a result. Similarly, both offerors were informed of general inadequacies concerning leak paths on which subject the agency followed up with specific questions directed to each offeror relating to their very different designs; Scott's responses were specific to its own design features, and did not appear to include modifications or changes that would indicate it benefited from the release of information on the Gentex evaluation slides.

other weaknesses in Scott's proposal, downgraded Gentex for allegedly similar weaknesses, and overlooked Gentex's proposal strengths. In its protests, Gentex points to individual performance specifications, and argues that strengths and weaknesses were unequally assessed, or makes comparisons between how various requirements were evaluated and argues unequal treatment. In so doing, Gentex complains that Scott did not meet various performance requirements, or argues that Scott should have received weaknesses for poor PDRR performance, for not offering fully tested JSAM features, and/or for being further behind Gentex in the development of these features.

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP criteria and procurement statutes and regulations. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 4.

The central issue here is the agency's evaluation of the threshold requirements, which were evaluated under the technical performance and operational utility subfactor. Under this subfactor, the agency was to consider PDRR performance, SDD design changes, and proposed solutions to meeting performance requirements in areas where requirements had not been met. Mitigation measures for some of these requirements were further considered under the proposal risk subfactor, which took into account whether the offeror's proposed mitigation approach would either "eliminate or lower" the proposal risk to an "acceptable level." RFP § M, at 5.

In its evaluation, the agency did not isolate compliance with individual threshold requirements (although it appears that all were evaluated), but, consistent with this RFP evaluation scheme, undertook a "holistic approach" when evaluating the individual threshold requirements. Tr. at 328. That is, the agency noted strengths or weaknesses of various proposal features, which it took into account when evaluating the various subfactors under the criteria of Section M. See Agency Report, vol. 12, Tabs D.5.1-D.5.4, Subfactor Evaluation Summary (Scott); vol. 13, Tabs D.6.1-D.6.4, Subfactor Evaluation Summary (Gentex). The agency also considered that there were 179 performance specifications, some of which were designated "high priority," RFP § L, at 18, and others with obviously varying degrees of importance, so not every performance specification strength (or weakness) necessarily translated into a subfactor strength (or weakness). Tr. at 91-92, 158-59 (evaluation of performance specifications was not a "bean counting exercise").

Also, given the developmental nature of this contract, the RFP did not require fully developed and tested prototypes; an "integrated assessment" of performance criteria was all that was required. See Tr. at 323 ("You would never expect a prototype coming out of PDRR to perform 100 percent. If that was the case, we could go

straight into production. There would be no need to do any additional development.”). As was expected, both offerors’ PDRR prototypes had design or performance problems. Tr. at 323. Both offerors proposed design modifications or solutions, which the agency evaluated. See, e.g., Agency Report, vol. 12, Tab D.5.2, Subfactor Evaluation Summary (Scott), at 8-9; vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 8. In some instances, these changes could have negatively affected other areas of the JSAM that perhaps tested positively during PDRR. Tr. at 328-29. In other instances, such as with Gentex, successful PDRR testing may not have accurately reflected positive performance, since its SDD design was significantly different from its PDRR prototypes. See Tr. 453, 475. Moreover, there were some areas where Gentex was ahead in development, but other areas where Gentex was behind, and neither Gentex nor Scott was unfairly evaluated as a result.

Both offerors received a green/moderate risk rating under the applicable subfactors. This meant that the agency found that their proposals met the minimum requirements of the performance specifications, but posed some proposal risk, and demonstrated that their proposed designs would exhibit acceptable technical performance. Here, not only does the record show that Scott took no exceptions to any of the threshold requirements,¹⁴ Tr. at 396, but also, as illustrated by the examples discussed below, the agency could reasonably conclude that Scott’s solution satisfied the threshold requirements in question. These examples also illustrate that the agency reasonably and even-handedly considered the particular designs, and the nature of the particular specification requirements, in fairly assessing the strengths and weaknesses and development risks of each proposal with regard to each of these threshold requirements.

The first example concerns the valsalva requirements. Gentex alleges that Scott’s valsalva approach does not comply with the performance specification that requires the design to allow for one-handed valsalva maneuvers. Performance Specification ¶ 3.4.10.9. This maneuver equalizes pressure in the ear by pinching the nose, closing the mouth, and forcefully exhaling until a “pop” is heard or felt in the ears. Neither offeror’s PDRR prototype fully complied with this specification. Agency Report, vol. 12, Tab D.5.2, Subfactor Evaluation Summary (Scott), at 20; vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 22. The agency determined, based on its technical analysis of the proposals, that both proposed solutions satisfied the valsalva requirement. Tr. at 324-25; Agency Report, vol. 12, Tab D.5.2, Subfactor Evaluation Summary (Scott), at 18, 20; vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 5. Scott’s proposed solution had not yet been tested because it proposed design changes to the lens. Tr. at 312. However, consistent with the developmental nature of this procurement, the RFP did not require testing as

¹⁴ Gentex took exception to two of the performance requirements, one of which was a high-priority threshold requirement, but later withdrew those exceptions.

conclusive proof of compliance. To the extent that Gentex alleges that Scott's "untested" solution was riskier than Gentex's, the record shows that Scott was given a weakness relating to its valsalva design changes, and Gentex was not.¹⁵ Proposal Analysis Report at 16. Based on our review, we find that the evaluation of this performance specification was reasonable and evenhanded.

Two other areas of alleged noncompliance concern requirements that the JSAM integrate with integrated helmet and display sight systems (IHADDS) and joint helmet mounted cuing systems (JHMCS). Performance Specification ¶ 3.4.9.4.2. The IHADDS and JHMCS are visual targeting systems. Here, too, both offerors' PDRR prototypes performed poorly as a result of "interface issues." Tr. at 435-36, 445; Agency Report, vol. 12, Tab D.5.2, Subfactor Evaluation Summary (Scott), at 21; vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 22-23. Both offerors proposed design changes, which the agency found were capable of meeting the requirements of the performance specifications. Agency Report, vol. 12, Tab D.5.2, Subfactor Evaluation Summary (Scott), at 4, 16; vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 19.

With regard to the IHADDS, Gentex alleged that it is further along in the testing of its solution than is Scott, so its proposal should have been found superior. However, the agency's representative testified that while Gentex made this assertion during its oral presentation, this was not supported by government data and Gentex's test data supporting this assertion has not been provided to the agency. Tr. at 463. In any case, the record shows that Scott was given a weakness relating to design changes for the IHADDS, and Gentex was not. Proposal Analysis Report at 16. Thus, we think that this evaluation was reasonable and not unequal.

With regard to the JHMCS, Gentex asserts that it will have fewer integration problems than Scott because the JHMCS was "specifically designed to integrate with" the MBU-20/P mask system, which is the basis for Gentex's JSAM.¹⁶ However,

¹⁵ Gentex also notes that it provided "alternative" techniques to the valsalva maneuver and suggests that these should have translated into a proposal strength. However, its multiple approaches were due, in part, to the different features of its JSAM variants; neither solution appeared to exceed the requirements of the performance specification. See Gentex Proposal, Oral Presentation Slide No. 190 (stating only that performance requirement is "met").

¹⁶ The MBU-20P is a currently fielded oxygen mask system, which Gentex proposed to integrate with JSAM components, through additional design changes, to ensure chemical, biological, and gravity protection. Tr. at 77-78. Gentex alleged that it deserved a strength for its MBU-20P mask technology and experience. However, as the agency recognized, Gentex proposed a significant number of proposed design changes affecting this mask technology, and the exhalation valves on the mask froze during cold trials. Contracting Officer's Statement, Jan. 30, 2003, at 16; Agency

(continued...)

as the agency notes, modifications were necessary to permit JHMCS integration, even with the MBU-20/P. Tr. at 484. Furthermore, Gentex was proposing a number of changes to the MBU-20/P, consolidating its three PDRR prototypes into two different SDD variants, and drastically changing its fixed-wing variant, which called into question the usefulness of the PDRR data and testing concerning integration. Tr. 475; Source Selection Decision at 9. Thus, in the agency's view, Gentex's approach was only a "design on paper." Contracting Officer's Statement, Feb. 14, 2003, at 5. Nonetheless, Scott was again given a weakness relating to JHMCS design changes, and Gentex was not, so the evaluation seems reasonable and not unequal. Proposal Analysis Report at 16.

Gentex also contends that Scott's proposed ground communication unit did not comply with the performance specification requiring that the JSAM provide for "intelligible voice communication." Performance Specification ¶ 3.4.4. In this regard, Gentex notes that Scott relies on existing communication units that are currently fielded by the agency and it is "unknown" whether these units comply with the requirements of the performance specification, since the units have not been tested against the JSAM requirements. Tr. at 367. Scott acknowledged this in a response to an agency discussion question. However, according to Gentex, Scott (in that same response) also "assumed" non-compliance and proposed only to undertake a cost-as-an-independent-variable trade study to "determine the optimum approach." Protester's Hearing exh. 7C, Scott Response to Action Item. Gentex argues that this solution is insufficient to satisfy the requirements of the performance specification. In contrast, Gentex argues, it offers a voicemitter,¹⁷ plus additional electromagnetic interference enhancements that exceed the requirements of the performance specification. Therefore, Gentex contends, it should have received a strength while Scott should have received a deficiency for this performance specification.

With regard to minimum compliance, we cannot say that the agency's determination that Scott's proposal satisfied the agency requirements was unreasonable, given the particular requirement and the RFP's evaluation scheme. First, since testing has not occurred, compliance is currently "unknown." Also, Scott did not take exception to this requirement. Tr. at 400-01, 403-04. Given the developmental nature of this procurement and Scott's offer to perform a study to find an optimal solution to this problem, we cannot conclude that Scott's proposal was non-compliant on its face. See Raytheon Co., B-291449, Jan. 7, 2003, 2003 CPD ¶ __ at 8, 10-11. Moreover, as

(...continued)

Report, vol. 13, Tab D.6.2, Subfactor Evaluation Summary, at 8, 23; Source Selection Decision at 9. Thus, we cannot say the agency's failure to give Gentex a strength in this area was unreasonable.

¹⁷ The voicemitter is an amplification system to permit voice transmission and is one method to meet the requirements of the performance specifications. Tr. at 366.

indicated above, strict compliance with this threshold requirement was not required, but the agency could assess whether the proposed design would exhibit acceptable performance. Although it is “unknown” whether Scott’s proposed solution would ultimately comply with the stated intelligible voice communication requirement, agency representatives testified that the existing communication equipment proposed by Scott nevertheless exhibited acceptable performance. Tr. at 360, 371.

With regard to Gentex’s communications enhancements, the agency did, in fact, recognize Gentex’s proposed “improve[ments]” in communication unit performance, Source Selection Decision at 13, but considered them “slight” with no significant bearing on the overall technical evaluation. Contracting Officer’s Statement, Feb. 14, 2003, at 3. The agency reasonably considered that there were other more significant specifications relating to JSAM performance, so “in the grand scheme of things . . . we did not see [ground communications] as a significant benefit to the government, which is what a strength would be annotated as.” Tr. at 374. Moreover, we note that Gentex proposed that consideration be given to eliminating some of these communication enhancements after award of the contract. See Protester’s Hearing exh. 7H, Gentex Oral Presentation Transcript, at 4-5 (suggesting cost-as-independent-variable tradeoff to remove electromagnetic interference enhancements). Although it appears that Gentex’s communications systems may be superior to Scott’s, we cannot say, based upon our review of the record, that the agency’s failure to award a strength was unreasonable or unfair, represented unequal treatment, or had a prejudicial impact on the evaluation.

Gentex also challenges the agency’s evaluation of the vomitus requirements. The mask must be able to clear vomit without compromising flight safety. The specification includes an “objective requirement” (desired, but not mandatory) to expel vomit without breaking the JSAM chemical and biological seal. Performance Specification ¶ 3.4.10.12.

Gentex alleges that Scott’s JSAM does not meet the minimum vomitus requirements because Scott’s procedures for expelling vomit are complex and impractical. We disagree. Scott’s procedures essentially require the user to remove the mask, empty the vomit, and put the mask back on. Protester’s Hearing exh. 10B, Scott Response to Evaluation Notice. The agency considered the complexity of the instructions and concluded that they could be performed. Tr. at 488-89. We cannot find that the agency’s judgment was unreasonable in this respect.

Gentex also alleges that it deserved a proposal strength because its JSAM keeps intact the chemical and biological seal when expelling vomit, while Scott’s JSAM does not. While it is true that under the RFP the agency “reserved the right to give positive consideration for performance in excess of threshold requirements, up to the objective requirements,” RFP § M, at 4, this was not required. Here, the agency found that even though Gentex’s JSAM did not break the chemical and biological seal when an aircrew member vomited, the vomit pooled around the neck, which

was very uncomfortable. Therefore, the agency decided a strength was not warranted. Tr. at 90-91. We do not find that the agency's determination was unreasonable.

Gentex next alleges that Scott's proposal failed to comply with donning time requirements. In this regard, the JSAM must be able to be put on (or "donned") within a certain time. Performance Specification ¶ 3.4.10.7. Here, again, neither offeror's PDRR prototype met the requirements. Tr. at 496, 498; Scott Oral Presentation Slide No. 150; Agency Report, vol. 13, Tab D.6.2, Subfactor Evaluation Summary (Gentex), at 23. Scott proposed a design improvement that permits easier and faster donning; Scott also suggested training. Tr. at 496-97; Protester's Hearing exh. 11C, Scott Response to Action Item. Although Gentex alleges that Scott's proposed solution is cumbersome and does not constitute an adequate solution, the record shows that the agency considered these issues and concluded that Scott's procedures were adequate and could be performed by the aircrew within the allotted time. Tr. at 498. We cannot find that this judgment was unreasonable.

Gentex alleges that Scott's JSAM fails to meet the requirement to use existing Department of Defense "tools and support/test equipment" because Scott's JSAM could not be tested using SMARTMAN (a system agent testing procedure). Performance Specification ¶ 3.4.14.4. While it is true that Scott's PDRR prototype had difficulties forming a seal around the SMARTMAN headform, Scott also proposed a solution of sealing with a bead of silicone, which was approved by the company that performs the SMARTMAN testing and successfully used during the PDRR phase.¹⁸ Tr. at 518-19. Scott also proposed to modify its JSAM to eliminate the problem altogether. Agency's Hearing exh. J7, Scott Response to Interim Evaluation. Nevertheless, even if Scott's solutions were insufficient, the specification only requires the use of Department of Defense test equipment "to the maximum extent practicable." Thus, we have no basis to question this aspect of the evaluation.

Gentex also challenges the agency's evaluation of the bayonets, which are the hinges that attach the mask to the helmet. The standard bayonets proposed by Gentex were fixed in place, so repeated maintenance to manually adjust the fit, as well as additional adjustments every time an aircrew member needed to transition from a chemical and biological environment to a non-chemical and biological environment, were required.¹⁹ However, its bayonets were items in current inventory and were not

¹⁸ The agency discussed similarly sealing Gentex's mask to the headform with duct tape, Tr. at 528, so it appears that offerors were not treated unequally in this regard.

¹⁹ While Gentex contends that these adjustments will no longer be necessary because the MBU-20/P oxygen mask "will be implemented as the standard oxygen mask on all aircraft," Gentex Post-Hearing Comments at 92, the agency specifically denied that the JSAMs will be standardized to the MBU-20/P or that this would eliminate the requirements for adjusting Gentex's bayonets. Tr. at 554.

assessed a weakness. Contracting Officer's Statement, Jan. 30, 2003, at 16-17; Tr. at 534-36, 559. In contrast, Scott offered adjustable bayonets that allowed easy transition between environments, since manual adjustment was not necessary, and required little or no maintenance once installed. Tr. at 535-36. These advantages, in the agency's view, qualified as a significant benefit to the government and thus warranted a strength for Scott. Source Selection Decision at 15. Given the advantages and disadvantages of the different designs, we think that the agency's relative assessment of the offerors' bayonets was reasonable and not unfair.²⁰

Gentex also questions the agency's evaluation of hypoxia risks. Here, too, both offerors proposed very different design approaches to access oxygen during flight, and the agency found that Gentex's design posed a greater risk of fatal hypoxia than Scott's. As noted above, Gentex proposed a [deleted] to access oxygen during flight (which provides gravity-caused loss of consciousness protection), whereas Scott proposed an "H-manifold." With Gentex's design, aircrew could become completely cut off from air if they failed to manually switch from ground to flight mode; with Scott, the oxygen source would only be diluted. While both could result in some level of hypoxia, the risk with Gentex was much more severe, to such a degree that the agency believed that the JSAM might not be qualified as "safe to fly," which would require redesign and cause schedule slip. Source Selection Decision at 13-15. Although Gentex argues that its pre-flight test procedures and additional training could reduce the risk, the agency considered these matters, in light of its concerns about Gentex's basic approach, and concluded that they did not eliminate the basis for this weakness. Based on our review, the agency's assessment of this weakness in Gentex's proposal was warranted.

As indicated, Gentex complains of the agency's comparative assessment of strengths and weaknesses among the various performance specifications, asserting that it amounted to unfair unequal treatment. For example, it complains that the agency gave it a weakness for proposing training to eliminate hypoxia risk, but failed to give Scott a weakness for training solutions to reduce donning time. However, hypoxia risk and donning procedures are very different requirements. Hypoxia could result in death; the donning issue would seem to entail lesser risks. The fact that the agency assessed a weakness for one and not the other, in our view, does not constitute unequal treatment. Similarly, Gentex complains that it was given a weakness for untested battery solutions, whereas Scott's untested donning

²⁰ Gentex alleges that it should have also received a strength because its standard bayonet was currently in inventory and needed no further qualification. It contrasts this with a strength that Scott received for batteries that were currently in inventory. However, as the agency explained, bayonet testing or qualification was not separately required or complex, as was the case with batteries, Tr. at 538, so having bayonets in inventory was not regarded as the same sort of significant benefit to the government as having the batteries in inventory.

procedures were not similarly criticized. Again, we find the requirements very different, as are the implications of failed testing, and the assessment of a weakness for one and not the other was reasonable and not unfair.

Another issue concerning unequal evaluation is Gentex's argument that although a weakness was found in its proposal because its proposed batteries had not been tested, the agency did not similarly downgrade Scott's proposal, even though its design was further behind in testing or development than Gentex's in some of the specific areas illustrated above. However, as indicated above, Scott was in fact assigned weaknesses in some of the cited examples—e.g., valsalva, IHADDS, and JHMCS. Moreover, Gentex was not penalized in several instances where its design was further behind in development than Scott's. For example, for almost all of the fixed-wing features, Scott was further along in development, since Gentex's fixed-wing JSAM was considerably different from any of its PDRR prototypes, yet Scott did not receive a feature-by-feature advantage in the evaluation, nor Gentex a feature-by-feature inadequacy. Also, in some instances, Gentex was given a credit for PDRR testing of a feature, even though it had never been tested with the SDD variants. See, e.g., Tr. at 546-47, 559 (standard bayonets proposed by Gentex were not used on two of three PDRR prototypes, but were found to meet the requirements of the performance specification).

Finally, Gentex alleges that certain of its initially evaluated strengths were ignored or withdrawn in areas that include, for example, Gentex's MBU-20P mask technology (see note 16, supra), battery system, bayonets, communications enhancements, and alternative low risk mitigation programs. However, upon close examination of the instances cited by Gentex, and in light of Gentex's proposal revisions and discussion responses, the record indicates that the agency reasonably determined that these Gentex proposal features did not exceed the performance specifications or provide a benefit to the government, and, thus, did not meet the definition of a strength. See Contracting Officer's Statement, Jan. 30, 2003, at 15-16, 18-19.

In sum, the agency performed an integrated assessment of performance specifications, taking into account their relative importance and considering the benefits and drawbacks of each offeror's approach. We find no evidence of unequal or unfair treatment in the record, but instead find the agency's evaluation was reasonable and consistent with the RFP's evaluation scheme.

Key Performance Parameter Evaluation

One of the performance specifications that is the subject of Gentex's protest involves a key performance parameter—that is, a threshold requirement that was critical to program performance and “not subject to tradeoff”—which was evaluated under the key performance parameter subfactor. There, Gentex alleged that Scott's proposed face seal fails to comply with the requirement in Performance Specification ¶ 3.4.2 to maintain seal integrity during the application of specified gravity forces. However,

the cited specification does not apply to the faceseal, but rather to the oral-nasal seal, which is a different feature of the JSAM.²¹ Tr. at 569, 597. The record provides no basis to find that Scott's oral-nasal seal is not compliant with this key performance parameter. Thus, this aspect of Gentex's protest is meritless.

Battery Pack Evaluation

One of the most important technical discriminators between the proposals involved the significantly different battery packs proposed by the offerors. Each JSAM includes a battery pack, which powers the blower. The blower filters and provides clean air during a chemical and biological attack. The battery pack includes both the batteries and assembly. Gentex argues that the offerors' respective battery packs were misevaluated.

Scott ultimately proposed to supply two battery packs--a lithium manganese dioxide (LiMnO₂) battery pack and an alkaline battery pack for each JSAM (both rotary and fixed-wing). Either pack could be used with a JSAM, but it was intended that the LiMnO₂ pack would be used in cold weather environments or when under chemical or biological threat, and the alkaline battery pack would be used in warm weather climates or on training missions. Protester's Hearing exh. 3G, Scott Response to Evaluation Notice, at 2. The LiMnO₂ pack proposed by Scott has already been tested and approved for use by the armed services, and it is currently in inventory. Tr. at 89, 392-93.

Gentex proposed [deleted].

The agency gave Scott a strength for its battery approach because (1) safety certification requirements for alkaline batteries are significantly reduced inasmuch as alkaline battery chemistry is less volatile than other battery approaches, (2) the non-hazardous nature of alkaline batteries results in less costly disposal, and (3) Scott's proposed LiMnO₂ pack had already been certified and existed in current inventory. Source Selection Decision at 15. Gentex, on the other hand, received a weakness because its [deleted] battery pack would require a "higher level of scrutiny during safety certification" (because of the more volatile chemistry of LiMnO₂ batteries), and would require a "significant amount of government oversight and cost" to ensure the new battery assemblies could be successfully developed and

²¹ Moreover, according to the agency, in the unlikely event that the oral-nasal seal breaks and further causes a break in the faceseal, the risk of chemical or biological invasion is actually reduced under high gravity forces, since the increased pressure inside the JSAM would push air (and thus chemical and biological agents) away from the skin, rather than allowing seepage in. Tr. at 571.

qualified.²² Id. at 12. According to the agency, which consulted with experts on battery issues during the course of the evaluation, certification for LiMnO₂ battery packs is “very complex,” whereas alkaline battery certification does not require rigorous testing and is merely a “paper study.” Tr. at 237-38.

Gentex challenges the agency’s assessment of these strengths and weaknesses for the battery packs, based upon its analysis of the performance specifications. It contends that Scott’s alkaline batteries do not meet certain threshold requirements and this renders Scott’s proposal technically unacceptable. The referenced performance specifications require that an offeror’s battery approach be capable of performing at certain temperature extremes, for certain durations, and under certain conditions. See Performance Specifications ¶¶ 3.4.11.1.1 (operating temperature), 3.4.14.1 (12-hour operating life), 3.4.11.2 (storage temperature), 3.4.14.8 (shelf life). While it is clear that the LiMnO₂ pack proposed by Scott meets each of the performance specifications at issue, the agency concedes that, at least with regard to some of these specifications, alkaline batteries may not meet the performance specifications. See Tr. at 116-17.

The agency explains that it evaluated Scott’s battery approach as consisting of both the LiMnO₂ and alkaline battery packs, since each JSAM would be accompanied by both battery packs. Since the LiMnO₂ battery at all times complies with the performance specifications, the agency determined that Scott met the requirements of the performance specifications. It noted that if Scott had proposed only alkaline batteries, then the agency might have concluded otherwise, but that was not the case here. The option to use the cheaper alkaline batteries in warm temperatures or non-threatening environments (e.g., for training), at the sole discretion of the user, was found to be an acceptable option to the agency. Tr. at 126-28, 136-39, 143.

We find the agency’s explanations reasonable and consistent with the RFP. As noted above, the RFP contemplated under the technical performance and operational utility subfactor that the agency would evaluate “threshold requirements which will not be met” and determine whether the offeror’s proposed design exhibited acceptable performance. That is the type of analysis the agency did here by considering that alkaline batteries may not be able to meet all performance specifications, but finding that Scott’s battery approach would result in acceptable performance, given that each JSAM was also accompanied by a fully compliant LiMnO₂ battery.²³ Tr. at 126-27, 136-37. We find significant that Scott’s battery

²² Gentex proposed a fallback approach to the 4-cell battery pack, but the agency found that this did not have the performance capability necessary to power the blower. Source Selection Decision at 12.

²³ Gentex contends, for the first time in its post-hearing comments, that the source selection authority was not informed of the alkaline battery noncompliances. We will not consider piecemeal protest arguments, including this new protest issue, (continued...)

approach consisted of both battery packs, not just alkaline battery packs. Thus, the agency could reasonably conclude that the battery approach met the requirements of the performance specifications.²⁴

We also find the agency reasonably gave Scott a strength for its battery approach. The fact that each JSAM was accompanied by a fully compliant battery (LiMnO₂), plus a cheaper alkaline battery to use as a cost savings measure in non-threatening environments, could reasonably be found to be a value added to the performance requirements--that is, a feature that exceeds what was required under the RFP.

The record also reasonably supports the assessment of a weakness for Gentex's battery and blower system. Gentex's proposed batteries were based on a more hazardous chemistry requiring additional certification, and its blower was a new design that would potentially cause "major impacts" in meeting system flow and integration requirements. Source Selection Decision at 8-9, 12. The agency's concerns relating to Gentex's untested and unapproved LiMnO₂ battery packs were validated by expert consultants, Tr. at 235, 238, and were the topic of repeated discussions with Gentex throughout the evaluation. See, e.g., Protester's Hearing exhs. 3D-F, Gentex Responses to Evaluation Notices. Gentex was given ample

(...continued)

which should have been raised in earlier protest filings in order to be timely. Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 4 n.4. (Gentex makes a similarly untimely argument with regard to the source selection authority's knowledge of the results of the price evaluation in its post-hearing comments.)

²⁴ Gentex also argues that alkaline batteries are noncompliant with a performance specification requiring that "[a]ny item of existing equipment which is modified for JSAM shall have performance equal to or better than the original equipment." Performance Specification ¶ 3.4. According to Gentex, because the batteries power the blower (i.e., an item of existing equipment), alkaline batteries, due to lesser performance capabilities, may compromise the blower's performance in certain conditions. It is not clear that this performance specification would apply to this situation, since batteries do not appear to constitute a "modifi[cation]" to the blower. Regardless, however, Scott's proposed LiMnO₂ battery pack is fully compliant, so this performance specification would be met.

Gentex also notes that the blower is necessary to provide chemical and biological protection since it filters hazardous air in a threatening environment. If blower performance is compromised by alkaline battery usage, Gentex argues, then the JSAM fails to meet the key performance parameter to provide adequate chemical and biological protection. Performance Specification ¶ 3.4.1. Here, too, Scott's battery approach was compliant, since each JSAM is accompanied by a LiMnO₂ battery pack that fully meets the requirements of the performance specifications.

opportunity to revise its battery approach, and indeed did so. Protester's Hearing exh. 3C, Gentex Response to Evaluation Notice (changing from lithium sulfur dioxide to LiMnO₂ batteries in response to safety concerns). Based upon our review, the agency did not miscalculate the offerors' battery approaches.

Battery Pack Discussions

Gentex also alleges that the agency held unequal discussions concerning the offerors' battery approaches. Specifically, Gentex complains that the agency issued an evaluation notice only to Scott (and not Gentex), advising that Scott's MPLCC was "unaffordable" and asking if it had considered alternative battery approaches. Protester's Hearing exh. 4C, Scott Response to Evaluation Notice.

The scope and extent of discussions is a matter of contracting officer judgment. FAR § 15.306(d)(3); Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 5. While offerors must be provided with an equal opportunity to revise proposals, discussions need not be identical; rather, discussions are to be tailored to each offeror's proposal. FAR § 15.306(d)(3); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. We find nothing improper about the scope or extent of discussions here.

After the RFP was issued, on June 18, Gentex notified the agency that the battery costs were "unrealistic" and, when used to calculate the MPLCC, would "result in a seemingly unaffordable program." Agency's Hearing exh. B20, Gentex E-Mail to Air Force (July 11, 2002). It asked the agency to review the O&S cost assumptions, which it suspected were erroneous.²⁵ Id. The agency began to investigate this issue. On July 19, offerors submitted their initial proposals, and Gentex's O&S costs appeared low (despite its earlier assertions that O&S costs would cost "billion[s]" and were "unaffordable"), while Scott's appeared high. Thus, it seemed to the agency that Gentex had addressed its affordability concerns in its O&S input, while Scott appeared unaware of these concerns. Contracting Officer's Statement, Feb. 14, 2003, at 9; Tr. at 627.

In early August, the agency issued an evaluation notice to Scott, flagging for Scott's attention the same issue that Gentex had raised in its e-mail concerning the unaffordability of the MPLCC. Tr. at 626-27. It did not issue a similar evaluation notice to Gentex because it believed that Gentex already knew about the issue, since

²⁵ The O&S costs are one element of the MPLCC. Using O&S worksheets, offerors were required to calculate O&S costs (e.g., consumables and support equipment) based on certain government-provided assumptions. Battery costs were included in these O&S costs because they are consumables. Battery costs were also part of the fixed prices for the production options, inasmuch as battery packs are included with the JSAM on delivery. Tr. at 621.

Gentex brought it to the agency's attention. Tr. at 627. At the same time, it issued an action item to Gentex, asking it to justify its battery pricing because "the price of current inventory batteries is significantly higher." Agency's Hearing exh. B7, Gentex Action Item (July 31, 2002), at 6. Gentex had further discussions with the agency concerning the "myriad of changes and assumptions going into the O&S work sheet[s]." Tr. at 54 (Testimony of Gentex Vice President). In addition, Gentex received a number of evaluation notices specifically discussing the MPLCC concerns, as well as safety and technical concerns the agency had with Gentex batteries. See, e.g., Protester's Hearing exh. 3C (agency seeking information concerning battery safety, development, and impact on life cycle costs) and exh. 3D (agency requesting information concerning impacts on cost, schedule, and performance of battery consumption).

On August 28, the agency modified its O&S assumptions, and notified both offerors of the changed assumptions. Agency's Hearing exhs. B24 and B25, Agency E-Mails Re: Battery Assumptions to Offerors (Aug. 28, 2002). Both Gentex and Scott changed their battery approaches after issuance of the new assumptions and submitted FPRs before September 19. These changed approaches are also reflected in various evaluation notice responses that preceded FPRs. See, e.g., Protester's Hearing exh. 3C (Gentex Response to Evaluation Notice) and exh. 4C (Scott Response to Evaluation Notice).

Thus, the record demonstrates that both Gentex and Scott were afforded a number of opportunities to address concerns that the agency had specific to each offeror's battery approach, in response to which both revised their approaches. With regard to cost concerns, both offerors were informed of the problems with the O&S assumptions. Regardless of whether the concerns were raised by Gentex (by e-mail), or by the agency (by evaluation notice to Scott), each offeror was provided the same information and permitted an opportunity to respond. We do not find it unreasonable, or misleading, that the agency questioned Gentex concerning its apparently low battery costs, as it appeared that Gentex's costs were significantly lower than current inventory. Agency's Hearing exh. B7, Gentex Action Item (July 31, 2002). Nor do we find it unreasonable that the agency informed Scott, but not Gentex, that its O&S costs were unaffordable, since the record indicates that Gentex was already aware of this issue and had engaged in discussions with the agency in this regard. In sum, we find the discussions were meaningful and not misleading.

Funding Profile

Gentex next contends that the agency evaluated the proposals against an unstated evaluation criterion--compliance with the agency's funding profile. It also alleges it was misled by the agency when it was advised that "Gentex did not need to do anything with the funding profile information" provided. Declaration of Gentex Vice President, Dec. 20, 2002, at 3; Tr. at 58-59, 68. Gentex argues that, under the

circumstances, it should not have been given a weakness under the integrated management subfactor for failing to comply with this profile.

A solicitation must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors and significant subfactors set forth in the solicitation. FAR § 15.304. However, while agencies are required to identify evaluation factors and significant subfactors, they are not required to identify all areas of each factor or subfactor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. MCA Research Corp., B-278268.2, Apr. 10, 1998, 98-1 CPD ¶ 129 at 8.

Here, section L of the RFP instructed offerors to take into account budgetary or funding constraints. RFP § L, at 31, 34. Also, section M specifically provided that award would be made to the offeror that would “best meet or exceed the requirements affordably.” RFP § M, at 2 (emphasis added). The integrated management subfactor, under which Gentex was assessed a weakness because of its failure to adhere to the funding profile, required consideration of the program objectives, the primary one of which includes developing the JSAMs “within cost and schedule constraints.” RFP § M, at 5; RFP, Statement of Objectives ¶ 2.1. Funding profiles were provided in the RFP “for informational purposes” and updated during subsequent written and oral discussions as new information became available.

During one of these discussions, the agency informed offerors that funding for fiscal year 2003 was being reduced by approximately \$3 million. When asked by Gentex what it should do with this information, Gentex was told that it “did not need to do anything” with it. The agency made this statement because Gentex’s initial proposal was within acceptable budgetary limits.²⁶ Tr. at 28, 41, 46. However, when Gentex submitted its FPR, it increased its costs for fiscal year 2003 by several million dollars, which was the very year in which Gentex was told that the government had lost funding. Tr. at 42, 46-47. We do not think that the agency was unreasonable for taking this into account.

We also do not think, given the information provided, that Gentex could reasonably ignore the funding profile, nor do we think that Gentex was prejudicially misled. The solicitation makes clear that affordability and cost constraints were important. The agency’s repeated efforts to update the funding information emphasized this importance. Gentex’s failure to heed the information provided does not, in our view, render the agency’s evaluation improper.

²⁶ Gentex was further told, however, that it should “propose according to your best business solution.” Tr. at 201.

Integrated Management Subfactor

Gentex also protests the agency's evaluation of Scott under the integrated management subfactor, where Scott was rated as blue/low risk.

With regard to the evaluation of this subfactor, Gentex first contends that Scott should not have received strengths for proposing variation in quantity and warranty clauses, as these were the result of technical transfusion. Noting that these clauses were in Gentex's initial proposal and not Scott's, Gentex complains that the agency's questions to Scott—"would you consider putting a variation clause in your contract?" and "[t]houghts on warranty"—constituted technical transfusion, disclosed Gentex's technical solutions, revealed aspects of Gentex's price, and unfairly favored Scott over Gentex. Agency Report, vol. 16, Tab G.1.4, Action Item (Aug. 6, 2002), at Nos. 18 and 20. We do not agree.

Technical transfusion connotes the disclosure of a "unique or ingenious" technical solution from a competitor's proposal. Simmonds Precision Prods., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 at 8; see FAR § 15.306(e) (prohibiting disclosure of "technical solution, including unique technology, innovative and unique uses of commercial items or any information that would compromise an offeror's intellectual property"). In Simmonds Precision Prods., Inc., *supra*, the protester contended that an agency's question of whether the awardee had considered alternative approaches to a deviations clause constituted technical transfusion. We found this did not constitute technical transfusion because the question appeared neutral on its face, even though the awardee's response then offered an approach similar to the protester, and did not reveal a unique or ingenious solution of the protester's. Simmonds Precision Products, Inc., *supra*, at 7-8; see Applied Mathematics, Inc., B-227930, Oct. 26, 1987, 87-2 CPD ¶ 395 at 3 (discussions concerning minor management approaches and contract terms did not constitute technical transfusion).

Similarly here, we do not find the agency's questions improper. The questions did not impart to Scott any of Gentex's "unique" or "innovative" ideas, share with Scott the terms of Gentex's clauses, or otherwise reveal any of Gentex's cost or technical data. Rather, the questions appear neutral on their face and, as stated by the contracting officer, are "typical[ly]" posed by the agency when dealing with fixed-price contracts or options. Contracting Officer's Statement, Feb. 14, 2003, at 8-9.

Furthermore, even though both offerors received strengths for offering these clauses, this does not appear to have been determinative to award. Rather, the key discriminator under the integrated management subfactor appears to have been Scott's far superior approach to management of schedule risk, as well as a host of other proposal features. In this regard, Scott proposed to perform bi-weekly analysis of the critical path schedule to quickly identify and manage schedule problems. It

also offered to perform a number of developmental tests itself (rather than require the government to perform these tests, as typically occurs), which would further reduce contract performance time and improve the schedule. Scott also offered a total package fielding approach to ensure that the customer received everything it needed to employ a single JSAM package, which would reduce fielding time and “sustainment” costs. Source Selection Decision at 19-20. These features rendered Scott’s integrated management approach superior to Gentex’s, irrespective of the variation in quantity and warranty clauses.

Gentex nevertheless contends that Scott’s proposal should have been rated a weakness under this subfactor because its redesign efforts posed schedule risks. The agency recognized, however, that both offerors posed some risk of schedule slippage as a result of redesign efforts. See Source Selection Decision at 20-21. However, the agency found Scott’s proposal to have only “isolated pockets” of risk, whereas Gentex’s were “numerous and systemic.” Contracting Officer’s Statement, Jan. 30, 2003, at 23. Given the more significant changes proposed by Gentex (including blending three PDRR prototypes into two SDD variants, and modifying major components), we cannot find these conclusions unreasonable.

Based upon our review, we think the record reasonably supports a blue/low risk rating for Scott under the integrated management subfactor.

Cost Evaluation

Gentex alleges that the agency performed a flawed and unreasonable analysis of SDD, production, and O&S costs. As noted above, these costs included both fixed-price (production options) and cost reimbursement (SDD costs) elements, which required different types of analysis by the agency.

With regard to the SDD costs, when an agency evaluates a proposal involving the award of a cost reimbursement contract, an offeror’s proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1), 15.404-1(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror’s proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. TRW, Inc., B-282162, B-282162.2, June 9, 1999, 99-2 CPD ¶ 12 at 5-6. We review an agency’s judgment to determine whether the agency’s cost realism evaluation was reasonably based. Id.

In performing its cost realism analysis of the proposed SDD costs, the cost team first reviewed each of the offeror’s SDD cost elements to ensure that they conformed to Defense Contract Audit Agency (DCAA) rates. Tr. at 727; Price Competition Memorandum at 5, 7. In this regard, the DCAA evaluated Scott’s proposed direct costs and indirect rates (including labor hours, material and equipment, general and

administrative (G&A), and overhead), and with one exception determined these costs and rates to be proper.²⁷ Agency Report, vol. 14, Tabs D.7.0 - D.8.5, DCAA Audit Reports. With regard to the offerors' proposed other direct costs, the cost team also reviewed the offerors' supporting documentation and compared the costs to outside commercial sources for reasonableness. The agency's price analyst testified that all proposed costs (except one minor cost of approximately \$25,000) were evaluated by the agency. Tr. at 725.

The cost team also obtained the input of the technical team, which reviewed the offerors' proposed SDD costs to ensure that they were realistic based on each offeror's proposed approach. Based on this review, costs were added to each offeror's proposal for necessary government qualification testing, as well as for items involving technical risk where the agency reasonably anticipated there would be costs incurred beyond those proposed. The technical risk items, for which costs were added to Scott's SDD costs, included costs to account for the agency's belief that Scott had proposed an insufficient number of mask sizes, costs to account for the agency's belief that a percentage of mask components would be subject to decontamination hardening, and costs to account for anticipated additional effort addressing Scott's blower electromagnetic interference effort. For Gentex, the technical risk items, for which costs were added, were also for decontamination hardening and for a blower electromagnetic interference effort, as well as for retooling or making a new mold for lenses. Declaration of Agency Price Analyst at 1-3; Price Competition Memorandum at 5, 8; Cost Evaluation Worksheets at 4-11.

Thus, contrary to the protester's assertions, the agency did not abdicate its duties to the DCAA. Rather, the agency performed a detailed cost realism analysis, and it utilized DCAA reports as merely one tool during evaluation.

Gentex also alleges that Tyco's debts and charges "presumably" were included in Scott's SDD costs as part of the indirect and overhead rates, which the agency failed to consider when performing its cost realism analysis. There is no evidence that unallowable costs were either accepted by the agency or included in Scott's proposal. In addition, the agency consulted with the Defense Management Contract Agency, which confirmed that Scott was not responsible for Tyco's debts, including charges relating to alleged illegal or fraudulent activity. Agency Report, vol. 20, Tab G.4, DCMA Preaward Survey, at 7. We find no reason to question this aspect of the cost evaluation based on Gentex's speculation.

As noted, Gentex also challenges the price evaluation of Scott's fixed-price production options, arguing that this price analysis was inconclusive and based on insufficient data. The manner and depth of an agency's price analysis is a matter

²⁷ DCAA recommended that Scott's G&A rate be lowered, which was accepted by the Air Force. Price Competition Memorandum at 5.

within the sound exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis. Ventura Petroleum Servs., Inc., B-281278, Jan. 21, 1999, 99-1 CPD ¶ 15 at 5.

Here, the agency first compared the offerors' fixed prices with the government estimate and with each other, as contemplated by the RFP. RFP § M, at 8. The results of the price analysis, at that point, were "inconclusive." Contracting Officer's Statement, Jan. 30, 2003, at 11. The agency thus took a number of additional steps to verify the reasonableness of the fixed prices using cost analysis techniques, including determining that the proposed efforts were sufficient to satisfy the RFP requirements, and reviewing each major cost element of the proposed fixed prices, based upon the cost data submitted by the offerors, for reasonableness and adherence to DCAA reviewed rates and factors. Price Competition Memorandum at 6, 8, Cost Evaluation Worksheets 3, 12-21. Based on this review, the agency determined that both offerors' fixed prices were fair and reasonable. Although Gentex contends that the agency should have better documented its review and sought additional information to verify price reasonableness, we think the agency's analysis was sufficiently documented and reasonable.²⁸

With regard to O&S costs, offerors completed worksheets concerning the five top cost drivers, including batteries and filters, based upon government assumptions regarding JSAM usage. RFP § L, at 57. These assumptions were modified by subsequent e-mail messages from the Air Force to the offerors. Agency's Hearing exhs. B24 and B25, Agency E-Mails Re: Battery Assumptions (Aug. 28, 2002).²⁹ Gentex argues that the agency's evaluation of Scott's O&S costs was flawed, in that the adjustments the agency made to Scott's O&S costs essentially "double-credited" Scott for assumptions that Scott assertedly had already taken into account in completing the O&S worksheets. This argument facially had some appeal because Scott submitted worksheets that purported to be based on the agency's stated assumptions, and the agency's adjustments to these worksheets appeared to incorporate those same assumptions. However, as noted by the agency, Scott's worksheets were clearly erroneous not only because the quantities were incorrect

²⁸ Gentex also protests that Scott's fixed-price production prices are unrealistic because they are approximately 35 percent below the government estimate. However, this argument provides no basis to challenge the award because this RFP had no requirement that a price realism analysis be performed to determine whether the fixed prices were too low. See CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4.

²⁹ Gentex protests that this amendment of the assumptions was not formally incorporated into an RFP amendment. However, both offerors understood that the revised assumptions applied, and Gentex has not shown that it was harmed as a result.

and did not accurately reflect Scott's proposal, but also because it was obvious that Scott had failed to use the government's assumptions in preparing the worksheets. Thus, the agency recalculated Scott's O&S costs, consistent with the assumptions provided to both offerors, in taking into account these assumptions only once. Tr. at 771-76, 780-81, 789; Declaration of Agency Price Analyst at 2. That is, the agency did not "double-credit" Scott for these assumptions. Tr. at 772-73. Based on our review, the agency's evaluation of O&S costs was reasonable and not erroneous.³⁰

Cost/Technical Tradeoff

Gentex finally contends that the agency failed to perform a proper cost/technical tradeoff. However, as concluded above, the agency reasonably determined that Gentex was technically inferior and proposed a higher cost. On these facts, a cost/technical tradeoff was not required.³¹

The protests are denied.

Anthony H. Gamboa
General Counsel

³⁰ Gentex also contends that the agency should have increased Scott's O&S costs due to its battery approach. However, the agency reasonably determined that additional costs were not required, since Scott's LiMnO₂ batteries were in current inventory, and its alkaline batteries would result in cheaper qualification and testing. Contracting Officer's Statement, Jan. 30, 2003, at 12-14.

³¹ Gentex also contends that an impermissible conflict of interest exists because the agency hired a SAIC employee as a non-governmental advisor for this procurement. However, this individual was removed as an advisor prior to the issuance of the RFP, and he never participated in any of the SDD source selection activities. The agency, therefore, eliminated any potential conflict of interest.

Gentex also protested various process errors concerning oral presentations, discussions, and evaluation notice responses. However, it abandoned these grounds of protest when it failed to respond to the agency's report addressing these protest issues. See Analex Space Sys., Inc.; PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 8.