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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: BAE Systems Norfolk Ship Repair Inc.

File: B-297879

Date: March 29, 2006

Thomas O. Mason, Esq., Robert E. Korroch, Esq., and Francis E. Purcell, Jr., Esq., Williams Mullen, for the protester.

Robert M. Tata, Esq., Carl D. Gray, Esq., and Kevin J. Cosgrove, Esq., Hunton & Williams LLP, for Earl Industries, LLC, an intervenor.

Rhonda L. Russ, Esq., Naval Sea Systems Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation for award of a cost-plus-award-fee contract required offerors to base their cost proposals on sample work items and further required offerors to use government estimates for labor hours and material costs for the sample work items unless offerors supported proposed deviations to the estimates by “clear and compelling” evidence, agency reasonably concluded that protester’s proposed deviations, supported by non-binding fixed-price quotes for the sample work items, failed to meet the “clear and compelling” evidentiary standard.

2. Agency’s assignment of same overall adjectival rating to protester’s and awardee’s proposals despite protester’s slightly higher past performance rating was reasonable where past performance was the least important technical factor and the record reflects that the agency reasonably considered the underlying substantive differences between the protester’s and the awardee’s proposals in making its technical and best value assessments.

3. Protester’s argument that its proposal should have been more highly rated under management capability factor because it received the highest possible rating under the past performance factor is unwarranted because the two factors at issue had different bases for evaluation.

DECISION

BAE Systems Norfolk Ship Repair Inc. protests the award of a contract to Earl Industries, LLC under request for proposals (RFP) No. N00024-05-R-4401, issued by

the Department of the Navy for maintenance and modernization work on Dock Landing and Amphibious Transport Dock class ships (i.e., LSD and LPD class ships) homeported in Norfolk, Virginia. BAE alleges that the agency's cost and technical evaluations of its proposal were improper, resulting in a flawed source selection decision.

We deny the protest.

The RFP, issued on March 9, 2005, contemplated the award of a cost-plus-award-fee contract for execution planning and accomplishment of repair, maintenance, and alteration requirements of LSD 41/49 and LPD 4 class ships. The RFP provided for the award of a base contract including execution planning for the first scheduled availability¹ for the USS Gunston Hall, as well as non-scheduled repair and alteration requirements between scheduled availabilities as ordered on various LSD and LPD class ships.² In addition, the RFP provided for 31 option items—the first option was for performance of the GUNSTON HALL availability, and the remaining options were for 15 additional scheduled availabilities and associated execution planning over a period of 7 years. RFP § B, Schedule of Supplies or Services and Prices.

The RFP indicated that the agency would make award to the offeror whose proposal represented the best value to the government based on a consideration of two evaluated categories: technical and cost. Overall technical merit was considered more important than cost; however, the importance of cost would increase “as the differences in overall Technical merit among competing proposals decreas[ed].” RFP at 171. Under the technical category, the RFP listed three evaluation factors in descending order of importance: (1) management capability; (2) resource capabilities; and (3) past performance. The past performance factor was further divided into four subfactors of equal importance: (1) technical; (2) schedule; (3) management; and (4) cost. RFP at 177-78. In evaluating the management capability and resource capabilities factors, the agency assigned adjectival ratings of outstanding, very good, satisfactory, marginal, and unsatisfactory. The adjectival rating scheme used to score the past performance factor and subfactors differed slightly, with the agency assigning scores of outstanding, good, satisfactory, neutral, marginal, or unsatisfactory.

¹ The agency explains that the availability work involves “relatively short, labor-intensive Chief of Naval Operations (CNO) maintenance, repair and modernization periods, generally scheduled at specific times throughout a ship's operating cycle.” Agency Report (AR) at 3 n.3.

² The solicitation indicated that the following LSD 41/49 and LPD 4 Class ships would be homeported in Norfolk, VA during all or part of the contract: (1) USS Whidbey Island; (2) USS Gunston Hall; (3) USS Fort McHenry; (4) USS Ashland; (5) USS Carter Hall; (6) USS Oak Hill; (7) USS Nashville; and (8) USS Ponce. RFP at 48.

As it relates to the protest, under the management capability factor, offerors were required to “provide a systematic approach that demonstrates a comprehensive understanding and application of management techniques, methods and procedures required to efficiently execute the requirements of this solicitation.” RFP at 172.

With regard to the evaluation of cost, the RFP advised offerors to submit proposed estimated costs based on two notional work item packages included within section L of the solicitation. As clarified by the agency in response to questions from the offerors, the notional work packages included sample work items--not to be construed as actual work items under the contract. See Request for Clarification, Ref. No. EC027, Mar. 21, 2005. One notional package consisted of 28 LSD class ship work items and the other consisted of 9 LPD class ship work items. For each work item, the RFP provided offerors with the number of direct labor hours and material costs that the government estimated would be required to perform the work. Offerors were required to use the government’s estimates in preparing their cost proposals; however, an offeror could propose a deviation, which would be accepted if supported by “clear and compelling evidence.” Specifically, the RFP stated as follows:

Offerors are to use the Government-provided manhour and material estimates for each notional package and propose these amounts. An Offeror may provide evidence to support an adjustment to these amounts by proposing and supporting revised man-hour and/or material dollar amounts per individual work item. If an Offeror provides clear and compelling evidence that an adjustment is warranted, the Government will adjust that Offeror’s man-hour and/or material dollar estimates for the individual work item(s) addressed, to the extent it is determined that the offered rationale supports such an adjustment. If support of an Offeror’s proposed adjustment to an individual work item is less than clear and compelling, the Government estimate will be used to calculate an estimated cost to the Government for that work item.

RFP at 165.

If an offeror’s proposal deviated from the estimates provided by the government, the RFP stated that the offeror’s data offered in support of the deviation should “at a minimum” include: (1) the offeror’s “[t]echnical approach for accomplishing each work item and supporting rationale or work item estimate (e.g.,: standards, historical costs on similar tasks, factors, return costs, etc)”; (2) “[p]rime and/or subcontractor labor man-hours by craft and by work item paragraph”; (3) a “copy of each vendor quote received, clearly identifying total subcontractor labor man-hours and material dollars by work item, with a description of subcontracted efforts”; and (4) “[p]rime

and/or subcontractor [cost of furnished materials] for each work item showing description, quantity, unit price and total price.” RFP at 167-68.

Based on the offerors’ cost proposals, the RFP provided that the government would perform a cost-realism analysis, considering

the Offerors’ proposed labor hours, labor rates, material costs, burden rates and other costs in light of information available to the Contracting Officer, including Government estimates for: (1) direct labor hours; (2) material costs; (3) direct labor costs; (4) overhead and G&A costs; and (5) any other costs which are likely to be incurred by the Offeror in performance of the requirements of the RFP.

RFP at 168. This analysis would be used to develop a projected cost to the government of the offeror’s actual performance of the contract.

Four offerors, including Earl and BAE,³ submitted proposals by the April 18 closing date. [Deleted], had entered into a teaming agreement in competing under the subject solicitation, which provided an allocation of scheduled work between team members, depending on which, if any, of the teaming partners received award of the contract. AR, Tab 8 at P. A Navy technical evaluation review panel (TERP) evaluated offerors’ technical proposals, and a separate Navy cost analysis panel (CAP) concurrently began evaluating the offerors’ cost proposals. Following the initiation of proposal evaluations, on May 6, the Navy amended the RFP to provide updated labor hour and material cost estimates for several of the notional work packages, opened discussions with all offerors, and requested revised proposals. Revised proposals were received on May 31, and then were evaluated by the TERP and CAP. On August 4, the RFP was again amended, additional cost issues were raised with offerors through an additional round of discussions, and the agency requested final proposal revisions. Final proposals were received on August 18 and upon completion of the technical and cost evaluations, the TERP and CAP provided their evaluations to the agency’s best value advisory council (BVAC). Results of these evaluations were as follows:

³ As explained by the agency, Norfolk Shipbuilding & Drydock Corporation submitted an initial proposal and during the course of the procurement was acquired by BAE on June 24, 2005.

Offeror	Mgmt Capability	Resource Capabilities	Past Performance	Overall Technical Rating	Final Projected Cost
A	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
BAE	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Earl	Very Good	Very Good	Good	Very Good	\$70,221,185
B	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]

AR at 7.

Upon completion of a cost/technical trade-off among the various offers, the BVAC prepared a report and presented its findings to the agency's source selection authority (SSA), recommending the selection of Earl's proposal as the best value to the government. AR, Tab 22, BVAC Report to SSA; AR, Tab 23, BVAC Presentation to SSA. After reviewing "all source selection documentation relevant to this acquisition" and concurring with the CAP's conclusion that Earl's proposal would result in the lowest cost to the government, the SSA determined that Earl's proposal represented the best value to the government. AR, Tab 24, Source Selection Decision. Upon learning of the agency's decision, and after receiving a debriefing, BAE filed its protest with our Office.

BAE alleges that the Navy improperly evaluated its cost and technical proposals. With regard to the cost evaluation, BAE contends that the Navy improperly rejected its proposed deviations from the RFP's labor hour and material cost estimates, resulting in an improper upward cost adjustment of more than [deleted]. According to BAE, its proposed deviations were supported by fixed-price subcontractor quotes, which the Navy arbitrarily rejected, in contravention of the RFP, as insufficient evidence to support BAE's proposed deviations. With regard to the Navy's technical evaluation, BAE raises two issues. First, BAE argues that the Navy acted unreasonably in assigning BAE [deleted] since BAE's past performance rating was higher than that of Earl. Second, BAE maintains that it should have received a rating of [deleted] under the management capability factor, as opposed to [deleted] since it received a rating of [deleted] under the past performance factor. As a final matter, BAE alleges that these errors resulted in an erroneous cost/technical trade-off and best value determination by the Navy.

Cost Evaluation

BAE challenges the agency's evaluation of its proposed costs for nine work items in the LSD notional work package and three work items in the LPD work package.⁴

⁴ BAE's protest challenged the Navy's evaluation of 17 work items in the LSD work package and 4 work items in the LPD notional work package. The agency addressed each work item challenged by BAE in its report. In its comments, however, BAE

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Specifically, BAE argues that the agency improperly rejected its proposed deviations from the RFP's labor hour and material cost estimates, which BAE supported with fixed-price subcontractor quotes. According to BAE, the Navy's conclusion that the deviations were not supported by clear and compelling evidence, since the subcontractor quotes were based on notional work and therefore not binding, was inconsistent with the terms of the RFP, which required offerors to base their proposals on the notional work items. Moreover, BAE contends that "a fixed-price quote is the strongest evidence of cost realism" and that its proposal therefore provided sufficient evidence to support its proposed deviations from the government's labor hour and material cost estimates. Protester's Comments at 4.

As a general matter, in reviewing protests relating to the propriety of an agency's evaluation, our Office does not reevaluate proposals; our review is limited to considering whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation scheme, as well as applicable statutes and regulations. L-3 Communications Westwood Corp., B-295126, Jan. 19, 2005, 2005 CPD ¶ 30 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Command Mgmt. Servs., Inc., B-292893.2, June 30, 2004, 2004 CPD ¶ 168 at 3. In negotiated procurements, unless specifically prohibited by the solicitation, offerors generally may propose to meet agency requirements with staffing levels and/or materials different from the government's estimates. See Crestmont Cleaning Serv. & Supply Co., Inc., B-254486 et al., Dec. 22, 1993, 93-2 CPD ¶ 336 at 4. Here, the RFP included the government's estimates for labor hours and materials costs for the sample work items and while the RFP expressly permitted offerors to deviate from the government's estimates, the RFP provided that an offeror's deviations would only be accepted if it was supported by "clear and compelling" evidence. RFP at 165. Otherwise, the government estimates would be used to calculate the estimated cost for the sample work item. Id.

The record reflects that the government's estimates were largely based upon historical costs for work items identical or similar to those contained in the notional packages. AR at 8; AR, Tab 20, Final CAP Report, at 1. These historical costs, in many instances, were derived from work BAE had previously performed for the Navy. AR at 9-25. In evaluating BAE's cost proposal, the Navy denied the large majority of BAE's proposed deviations from the labor hour and material cost estimates because they were not supported by "clear and compelling" evidence and

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discussed only nine of the LSD work items and three of the LPD work items, which it had originally challenged; thus we consider BAE to have abandoned its challenge to the remaining work items, which were not addressed in its comments. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6

adjusted BAE's proposed cost upward by [deleted] for a final projected cost to the government of [deleted]. AR, Tab 22, BVAC Report, at 7.

BAE supported many of its proposed deviations with fixed-price subcontractor quotes. The Navy, however, raised several concerns with BAE's reliance on these quotes to support its deviations. Specifically, the Navy indicated that it could not discern whether the quotes were obtained competitively or on a sole-source basis; it questioned whether the subcontractors had a clear understanding of the requirements; and it noted that the majority of subcontractor quotes failed to provide a breakdown of their labor hours by craft as required by the RFP. AR, Tab 20, Final CAP Report, at 29, 31. The agency also questioned the inherent reliability of the quotes because they were based on sample work items and were therefore not binding. AR at 20, 24. Moreover, the Navy questioned the validity of the subcontractor quotes because in several instances BAE had submitted quotes from a subcontractor [deleted]. AR, Tab 20, CAS Report, at 30. Given these concerns, the Navy rejected BAE's proposed deviations in most instances for lack of "clear and compelling" evidence.

BAE's challenge to the agency's cost evaluation focuses principally on the Navy's concerns about the reliability of the quotes stemming from the fact that they were based on sample work items and therefore not binding--BAE does not specifically address any of the other concerns raised by the agency in connection with the quotes. BAE correctly indicates that the RFP required offerors to base their proposals on the notional work packages. The Navy's assessments concerning the reliability of BAE's subcontractor quotes, however, were made in the context of weighing the reliability of the quotes for cost realism purposes. Specifically, the Navy evaluated BAE's fixed-price quotes solely in the context of determining whether, as required by the RFP, BAE had supported, by clear and compelling evidence, its deviations from government labor hour and material cost estimates. In considering the evidence supporting BAE's proposed deviations, the Navy took into account the fact that the subcontractor quotes were not binding, and concluded that this limited their value as a predictor of cost realism, since the subcontractor could, without penalty, charge higher costs, which the government would be bound to pay under any contract awarded to BAE. The fixed-price character of the quotes was thus reasonably found to be less than "clear and compelling" evidence in support BAE's lower proposed labor hours and material costs.

While the non-binding nature of the quotes submitted by BAE in support of its deviations may have stemmed from the fact that the RFP required BAE to base its cost proposal on sample work items, nothing in the RFP required BAE to support its deviations with subcontractor quotes. As noted above, the Navy's estimates were based on historical costs for the same or similar work items, which in many instances were from work performed by BAE. Since the RFP required the agency to assess the evidence supporting proposed deviations, it was reasonable for the Navy to consider the terms and the context of the evidence for the purpose of considering

its weight in evaluating cost realism. Thus, we conclude that the Navy acted reasonably and consistent with the RFP in concluding that the fixed-price quotes included with BAE's proposal for the sample work were inherently less reliable than the agency's own historical cost information for work that was similar or the same as the sample work items. Moreover, while BAE argues that its fixed-price quotes were supported with sufficient information and provided the best evidence of likely cost to the government, in our view its arguments in this regard amount to mere disagreement with the government's evaluation, which does not render it unreasonable. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 7.

Technical Evaluation

With regard to the technical evaluation, BAE argues that it should have received a higher overall technical rating than Earl [deleted] since BAE's past performance was superior to that of Earl.

The RFP provided for the evaluation of three technical factors, with past performance as the least important of the three factors. While BAE [deleted] under the first two factors, with regard to past performance, BAE received [deleted] while Earl received the second highest rating of "good." The record reflects that, in its evaluation, the Navy considered the underlying substantive differences between BAE and Earl's proposals in making its technical and best value assessments. Specifically, the Navy noted that there was little difference with regard to the technical aspects of the firms' proposals since [deleted] and both had experience with the class of ships under the solicitation. AR, Tab 22, BVAC Report at 9. With regard to Earl's lower past performance rating, the Navy noted problems with Earl's history of meeting cost reporting requirements. This, however, was not viewed as a "major issue" by the Navy since the problems related to Earl's first cost-type contract and Earl had shown incremental improvement in this area. Id. On this record, the agency's conclusion that BAE's [deleted] overall technical merit is without objection notwithstanding BAE's [deleted] under the past performance factor. Dismas Charities, Inc., B-289575.2, B-289575.3, Feb. 20, 2004, 2004 CPD ¶ 66 (despite protester's scoring advantage for past performance, agency reasonably concluded that proposals were equal under all technical factors combined, leading to award based on awardee's lower price).

As a final matter, BAE argues that its proposal should have been rated [deleted] as opposed to [deleted] under the management capability technical evaluation factor since the Navy, in evaluating BAE's proposal under this factor, "relied heavily" on BAE's past performance record, for which it was rated [deleted]. BAE's Comments at 17. While the record reflects that the Navy considered BAE's extensive history and experience with LSD and LPD class ships in its evaluation under the management capability factor, the fundamental nature of the two evaluation factors at issue was separate and distinct under the provisions of the RFP. The management

capability factor provided for evaluating offerors' management techniques, methods, and procedures for executing the requirements of the solicitation--considering how the offeror proposed to address the requirements of the RFP--while the past performance factor provided for an assessment of the contractor's performance on prior contracts--and thus was historical in nature. Given the different scope of the two factors, BAE's reliance on its past performance rating to challenge its management capability rating is misplaced and its protest in this regard is without merit.⁵

The protest is denied.

Anthony H. Gamboa
General Counsel

⁵ Because we conclude that BAE's challenges to the Navy's cost and technical evaluations are without merit, BAE's objection to the Navy's best value determination--based solely on the alleged improper cost and technical evaluations--likewise is without merit.