



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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: Computer Sciences Corporation; Unisys Corporation; Northrop Grumman Information Technology, Inc.; IBM Business Consulting Services--Federal

File: B-298494.2; B-298494.3; B-298494.4; B-298494.5; B-298494.6; B-298494.7; B-298494.8; B-298494.9; B-298494.10; B-298494.11; B-298494.12; B-298494.13; B-298494.14

Date: May 10, 2007

Carl J. Peckinpugh, Esq., and Helaine G. Elderkin, Esq., for Computer Sciences Corporation; David S. Cohen, Esq., John J. O'Brien, Esq., Laurel A. Hockey, Esq., Bryan T. Bunting, Esq., Catherine K. Kroll, Esq., and Tenley A. Carp, Esq., Cohen Mohr LLP, and E. Charles Rowan, Jr., Esq., and Charlotte D. Young, Esq., for Unisys Corporation; William W. Thompson, Jr., Esq., Michael A. Branca, Esq., Lori Ann Lange, Esq., and Diane Foose, Esq., Peckar, Abramson, Bastianelli & Kelley, LLP, and Linda T. Maramba, Esq., for Northrop Grumman Information Technology, Inc.; John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Mary Pat Gregory, Esq., and Matthew L. Haws, Esq., Smith Pachter McWhorter PLC, and Todd Hutchen, Esq., for IBM Business Consulting Services--Federal, the protesters.

Thomas P. Barletta, Esq., Daniel C. Sauls, Esq., Paul R. Hurst, Esq., Michael J. Navarre, Esq., and Ana Holmes Voss, Esq., Steptoe & Johnson LLP, and James S. Kennell, Esq., for Science Applications International Corporation; Lori A. Conlon, Esq., for Lockheed Martin Information Services, Inc.; Kevin P. Mullen, Esq., David E. Fletcher, Esq., and Tara M. Lee, Esq., Cooley Godward Kronish LLP, for Electronic Data Systems Corp.; Thomas O. Mason, Esq., Frances E. Purcell, Jr., Esq., Robert E. Korroch, Esq., and Megan E. Burns, Esq., Williams Mullen, for Booz Allen Hamilton Inc.; and Gregory S. Jacobs, Esq., Reed Smith LLP, for CACI, Inc.--Federal, the intervenors.

Robert R. Goff, Esq., Defense Information Systems Agency, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement, an agency's exchanges with offerors with respect to their proposed subcontracting plans were discussions, where the solicitation provided for the comparative assessment of the merits of the plans as part of the agency's technical evaluation, a number of the offerors' subcontracting plans were

assessed as being unacceptable, and the offerors made material revisions in their plans in response to the exchanges with the agency that made them acceptable.

DECISION

Computer Sciences Corporation (CSC); Unisys Corporation; Northrop Grumman Information Technology, Inc. (NGIT); and IBM Business Consulting Services-- Federal protest the failure of the Defense Information Systems Agency (DISA), Department of Defense (DoD), to award "Encore II" contracts to the protesters under request for proposals (RFP) No. HC1013-05-R-2003 for information technology services supporting DoD and other federal agencies. The protesters challenge the agency's technical, past performance and price evaluation, the conduct of exchanges with the offerors,¹ and source selection decision.

We sustain the protests.

The RFP provides for the award of multiple, indefinite-delivery, indefinite-quantity contracts for a 60-month base period with five 1-year options, under which the agency will award time-and-materials or labor-hour, fixed-price or cost-reimbursable task or delivery orders for

technical solutions for [DoD] in support of its migration to an integrated and interoperable Global Information Grid (GIG), as well as other Federal agencies having similar Information Technology (IT) migration and integration needs. The Encore II contracts represent an ongoing expansion of [DISA's] Defense Enterprise Information Services (DEIS) I and DEIS II contracts, and Encore follow-on contracts.

RFP amend. 12, § B.1.a. The Encore II contractors will provide services, hardware, software, and associated products to satisfy information technology activities at all

¹ The Federal Acquisition Regulation (FAR) provides for a range of "exchanges" with offerors after the receipt of proposals, including clarifications, communications, and discussions. FAR § 15.306.

operating levels in support of the functional requirements, including command and control, intelligence and mission support, and to all elements of the GIG.² Id. § C.1.3.

The RFP stated that the agency would “keep the number of [contract] awards to a reasonable amount,” which the solicitation defined to be six awards for this acquisition. Id. § B.1.d. Offerors were also informed that the total amount of all orders placed would not exceed \$12.225 billion over the life of the Encore II contracts and that each contractor was guaranteed a minimum amount of \$10,000. Id. § B.1.b.

The RFP provided for award on a “best value” basis, and stated the following evaluation factors, subfactors, and elements:

Past Performance Factor	
	Element 1: Cost Control
	Element 2: Schedule
	Element 3: Mission Requirements
	Element 4: Quality
	Element 5: Socioeconomic Goals
	Element 6: Subcontracting Management
	Element 7: Business Relations
	Element 8: Key Personnel
Technical/Management Approach Factor	
	Technical Solutions Subfactor
	Element 1: Overall Task Area Approach
	Element 2: Task 1 Interoperable Communications Services
	Element 3: Task 2 Interoperable Information Sharing Systems
	Element 4: Task 3 Operations Support
	Element 5: Task 4 Automated Processing System

² Offerors were informed that the following could not be obtained under the Encore II contracts:

point to point circuits; transmission (voice/data/video) and network management in support of the [Defense Information System Network]; and standalone hardware purchase and/or maintenance and standalone software purchase and/or maintenance.

RFP amend. 12, § C.1.3.

	Management Solutions Subfactor
	Element 1: Management and Organizational Structure
	Element 2: Quality Awards, Recognition and Certifications
	Element 3: Key Personnel
	Element 4: Electronic Commerce/Electronic Business
	Element 5: Ability to Recruit, Train, Maintain and Retain High-Quality Personnel
	Element 6: Small Business Subcontracting Plan
	Element 7: Mentor-Protégé Program
	Element 8: Invoice Processing
	Cost/Price Factor

RFP amend. 12, § M.5.2. The past performance factor was stated to be comparatively equal in weight to the technical/management approach factor, and each of these factors was more important than the cost/price factor. The subfactors and elements were stated to be comparatively equal within each factor. Offerors were informed that proposals “must meet or exceed all evaluation criteria to be eligible for award.” Id. § M.5.1.c; see also id. § M.3.f (“Any proposal that does not substantially and materially comply with all of the requirements of the solicitation will be rejected and not considered for further evaluation.”)

Detailed proposal preparation instructions were provided. With respect to the past performance factor, offerors were requested to identify “no more than four (4) recent (completed within the last 3 years: 2003-2005, or work that is on-going) contracts or task orders on which [they had] performed as either the prime contractor or subcontractor.” For each of the four prior contract or task order efforts, the offeror was to complete a past performance data sheet and to provide a past performance questionnaire to one of the customer points of contact identified in the data sheet. Id. § L.10.b. With respect to the technical solutions subfactor under the technical/management approach factor, offerors were instructed to address their understanding and approach to performing all of the Encore II tasks. With respect to the management solutions subfactor, offerors were instructed to address their management approach with regard to the eight identified elements.

With regard to the small business subcontracting plan element of the management solutions subfactor, offerors were informed that the agency would evaluate the feasibility and comprehensiveness of the offeror’s planned approach to meeting the subcontracting goals established by the RFP. Id. § L.10.c.(2)(vi). The RFP identified minimum small business subcontracting awards as a percentage of the total task order dollars; for example, offerors were expected to subcontract at least 24 percent of the total task order dollars to small business concerns; similar, albeit smaller, requirements were stated for small disadvantaged businesses, woman-owned small businesses, service-disabled veteran-owned small businesses, HUBZones, historically

black colleges and universities/minority institutions, and veteran-owned small businesses. Id.; see also id. § H.32. In addition to addressing the small business subcontracting plan element in their technical proposals, offerors were required to submit a separate subcontracting plan as part of their proposal addressing general contract information (such as section K representations and certifications). Id. §§ L.10e(4), L.11.

With respect to the cost/price factor, offerors were required to submit fixed, loaded labor rates for the life of the contract. Offerors were informed that the “proposed rates for the labor categories and other direct costs (ODCs) in section B would be evaluated with respect to their completeness and reasonableness” and that the “reasonableness of the overall price [would] be determined on the basis of adequate price competition and by comparison with the Independent Government Cost Estimate (IGCE).” Id. § M.5.2.b.(2). The RFP identified 88 labor categories for which offerors were required to propose fixed labor rates, and each labor category identified estimated labor hours. Id. § B.4., Labor Rate Table; attach. 10, Labor Hour Estimates. Offerors were permitted to propose additional labor categories to those identified in the solicitation’s labor rate table. Id. § L.10.d.(1). The RFP provided that the price evaluation would be based on the total discounted life cycle cost (DLCC) for each proposal and that the DLCC would be determined based upon the offeror’s proposed rates for the labor categories and the mark-up and profit percentages for ODCs listed in section B of the solicitation.³ In this regard, the RFP stated that “[c]ontractor-generated labor categories will not be included as part of the DLCC evaluation.” Id. § M.5.2.b.(4). The solicitation also informed offerors that the agency

may evaluate cost/price realism with respect to the ability of the Offeror to meet requirements in terms of skills required, complexity of disciplines and job difficulty, if the [agency] deems such analysis necessary. The Offeror’s Cost/Price proposal may be compared to the Technical proposals to determine the Offeror’s (1) understanding of work to be performed and (2) capability and capacity to provide the required services and accomplish the required tasks

Unrealistically low prices may indicate an inability to understand requirements and a high-risk approach to contract performance and the ability to attract and maintain a high-quality workforce.

Accordingly, the [agency] may consider the findings of such analysis

³ The total DLCC for each proposal is calculated by first computing an annual price by totaling the annual labor costs with the estimated ODCs with mark-up and profit. A discount factor (identified in the RFP) for each year is applied to the total annual price to arrive at a discounted price for each contract year; the discounted annual prices are then added to compute the proposal’s evaluated total DLCC. RFP amend. 12, § M.5.2.b.(4).

regarding an Offeror's ability to perform and the risk of its approach. Since proposed labor rates are fixed, the price evaluation shall not be adjusted as a result of any such cost/price realism analysis.

Id. § M.5.2.b(3).

In addition, the RFP informed offerors that the agency intended to make award on the basis of initial proposals and without conducting discussions. Id. § M.3.a. In this regard, the RFP provided that

[t]here will be no communications with Offerors after the time and date specified in the Contracting Officer's request for final proposal revisions, except for communications regarding an Offeror's Subcontracting Plan. Subcontracting Plan validation is not to be construed as negotiations or a reopening of negotiation[s].

Id. § L.3.c.

DISA received 16 proposals, including those of the protesters (CSC, Unisys, NGIT, and IBM) and the 6 awardees (Booz Allen Hamilton, Inc. (BAH), CACI, Inc.-Federal, Electronic Data Systems Corporation (EDS), Lockheed Martin Information Services, Inc. (LMI), Science Applications International Corporation (SAIC), and Systems Research and Application Corporation (SRA)). The proposals were evaluated by the agency's respective evaluation teams: the past performance team (PPT) evaluated offerors' past performance information; the technical/management approach team (TMAT) evaluated offerors' technical/management approach; the cost/price team evaluated offerors' price proposals, and the contracting officer evaluated the offerors' general contract information proposal. Contracting Officer's Statement at 25. With respect to the past performance and technical/management approach evaluations, the evaluators independently prepared individual, written assessments and ratings of the proposals, which were assembled into a document presenting the evaluators' individual views. See, e.g., AR, Tabs 659-74, PPT and TMAT Decision Point Documents for Offerors. Following their individual evaluations, the PPT and TMAT met to discuss and agree upon a consensus evaluation and ratings for each of the proposals. Contracting Officer's Statement at 44. Consensus evaluation reports were then prepared for each offeror and submitted to the source selection advisory council (SSAC). See AR, Tabs 832-47, Past Performance Consensus Reports, Tabs 848-63, Technical/Management Approach Consensus Reports.

The offerors' price proposals were evaluated by the agency's cost/price team, which reviewed the offers for completeness and reasonableness, by comparing the offerors'

prices to each other, developing the DLCC for each proposal, and comparing each offeror's calculated DLCC to the IGCE. Contracting Officer's Statement at 53.⁴ The protesters' and awardees' proposals received the following overall ratings:⁵

Offeror	Past Performance	Tech./Mgmt. Approach	DLCC (in billions)
SRA	Blue/Low Risk	Blue/Low Risk	\$7.51
CACI	Blue/Low Risk	Blue/Low Risk	\$7.98
BAH	Blue/Low Risk	Blue/Low Risk	\$7.99
EDS	Blue/Low Risk	Blue/Low Risk	\$8.01
LMI	Blue/Low Risk	Blue/Low Risk	\$8.37
SAIC	Blue/Low Risk	Green/Low Risk	\$8.55
NGIT	Blue/Low Risk	Green/Low Risk	\$10.09
IBM	Blue/Low Risk	Green/Low Risk	\$10.11
CSC	Blue/Low Risk	Green/Moderate Risk	\$8.69
Unisys	Blue/Low Risk	Yellow/Moderate Risk	\$9.31

AR, Tab 831, SSAC Report, at 37.

The evaluation results were presented to the agency's SSAC, which accepted the evaluators' ratings. *Id.* at 9-10, 37. The SSAC also accepted the recommendation of the contracting officer to request "clarifications" from the offerors with the 10 highest rated proposals (which did not include Unisys). *Id.* at 33-34. The agency requested additional information from the protesters (but not Unisys) and the awardees in the following areas: past performance (clarifying contact numbers for references); quality awards (confirming that submitted awards were actually those of the offeror); contract administration information (obtaining statements that offerors would comply with the contract requirements); and small business subcontracting plans (correcting nonconforming plans). *Id.*; Contracting Officer's Statement at 36, 45, 61-74.

The small business subcontracting plans of a majority of the offerors were found to be "unacceptable" by the agency for various reasons, including the proposal of less than the required small business subcontracting goals and/or the failure to identify the dollar values associated with proposed goal percentages. *See* Agency Legal Memorandum at 9; AR, Tabs 675-704, Small and Disadvantaged Business Utilization Specialist (SADBUS) and Small Business Administration Procurement Center

⁴ The proposed price of one offeror (not a party to this protest) was found to be unreasonable.

⁵ The awardees and protesters are identified in descending order from the highest non-price evaluation rating (SRA) to the lowest non-price factor rating (Unisys). The proposals of 11 offerors received higher non-price factor ratings than Unisys.

Representative (PCR) Subcontracting Plan Comments. For example, [Deleted]'s plan did not satisfy the RFP requirement that the firm subcontract at least 24 percent of total task order dollars to small business concerns,⁶ nor did it provide, as requested by the RFP, proposed subcontracting dollar values to allow the agency to assess whether the firm's proposed subcontracting would satisfy the RFP requirements. As another example, [Deleted]'s plan was found to provide for subcontracting only 9 percent of the contract work to small business concerns. See id., Tab 681, SADBUS Review of [Deleted]'s Subcontract Plan; Tab 714, Clarification Request to [Deleted], at 1.

In response to the agency's questions and requests, it received additional information from the highest rated offerors with respect to their past performance, quality awards, small business subcontracting plans, and general contract information proposals. With respect to the small business subcontracting plans, the agency found that the awardees' plans had become acceptable. Agency Legal Memorandum at 9. With respect to the quality awards, the offerors' responses resulted in increased ratings for six offerors, including three awardees, under the quality awards element of the management solutions subfactor, which resulted in a higher management solutions subfactor rating for two offerors (CSC and CACI), although these offerors' higher subfactor rating did not result in a higher technical/management factor rating. Contracting Officer's Statement at 66.

The SSAC provided a detailed briefing to the SSA that described the consensus evaluation and price evaluation conclusions of the evaluators and the SSAC. This briefing identified each offeror's evaluated strengths and weaknesses under each factor, subfactor, and element. The briefing also informed the SSA of the agency's exchanges with the offerors. See AR, Tab 788, SSA Decision Briefing, at 190. The SSAC recommended that the SSA select the proposals of BAH, CACI, EDS, LMI, SAIC, and SRA for award on the basis that "[t]hese offerors [were] capable of providing . . . superior IT products and services to meet future task order requirements in a timely and cost-effective manner." Id. at 195.

The SSA conducted a price/technical tradeoff analysis, in which she concluded that the offers of BAH, CACI, EDS, LMI, SAIC, and SRA reflected the best value to the agency. Specifically, the SSA noted that BAH, CACI, EDS, LMI, and SRA had submitted the five highest technically-rated offers with the lowest DLCCs. With respect to SAIC, the SSA found:

⁶ [Deleted]'s plan actually states that the firm's proposed subcontracting to small business concerns goal would be 24 percent of the total subcontracted work value, and not of the total contract task order dollars. See [Deleted] Subcontracting Plan, attach. A, Goals for Individual Subcontracting Plan, at 1.

SAIC was the next lowest evaluated DLCC price, and they received the same overall Technical/Management Approach rating of Green as CSC, IBM, [another offeror], and NGIT. Within the Technical/Management Approach [factor], CSC and [the other offeror] were rated Medium Risk, while NGIT and IBM were rated Low Risk. However, CSC, IBM, [the other offeror] and NGIT had evaluated DLCCs that were more than the evaluated DLCC for SAIC. In addition, IBM and NGIT have evaluated DLCCs that were higher than the IGCE. I conclude that the risk rating for CSC and [the other offeror] along with the cost differential between CSC, IBM, [the other offeror], NGIT and SAIC is significant enough to preclude award to CSC, IBM, [the other offeror] and NGIT.

AR, Tab 894x, Source Selection Decision, at 29-30. Awards were made to BAH, CACI, EDS, LMI, SAIC, and SRA, and, after debriefings, these protests followed.

CSC, Unisys, NGIT, and IBM protest that the exchanges between DISA and the offerors with the 10 highest rated proposals constituted discussions and that these discussions were not meaningful, as required by the FAR.⁷ DISA and the intervenors contend that the agency's exchanges were clarifications.

FAR § 15.306 describes a range of exchanges that may take place between an agency and an offeror during negotiated procurements. Clarifications are "limited exchanges" between the agency and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical mistakes. FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to materially enhance the proposal's potential for award or to obtain information from the offeror that is necessary to determine the proposal's acceptability. See FAR § 15.306(d)(3); Nu-Way, Inc., B-296435.5, B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 7. When an agency conducts discussions with one offeror, it must conduct discussions with all other offerors in the competitive range, FAR § 15.306(d)(1), and those discussions must be meaningful; that is, the discussions must identify deficiencies and significant weaknesses in each offeror's proposal. FAR § 15.306(d)(3); Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13-14. It is the actions of the parties that determine whether discussions have been held and not merely the characterization of the exchanges by the agency. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. In this regard, we have found that the acid test for deciding whether an agency has engaged in discussions is whether the agency has

⁷ Unisys, which did not have any exchanges with the agency, also complains that it was treated unequally. Unisys Protest at 24-25.

provided an opportunity for proposals to be revised or modified. See, e.g., Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

Here, the record shows that the majority of the small business subcontracting plans submitted by the offerors were found to be unacceptable by the agency, and that, as a result of the agency's exchanges on this subject with the 10 highest rated offerors (including the awardees), those firms revised their proposals, such that the proposals became acceptable.

DISA does not disagree that a majority of the offerors, with whom exchanges were conducted regarding their subcontracting plans, revised their plans to become acceptable. The agency contends, however, citing a number of decisions of our Office, that exchanges regarding the acceptability of a required small business subcontracting plan—even the submission of a revised plan—relate to an offeror's responsibility and therefore are not discussions. See General Dynamics-Ordnance & Tactical Sys., Inc., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 9-10; AmClyde Engineered Prods. Co., Inc., B-228271.2, June 21, 1999, 99-2 CPD ¶ 5 at 8; Kahn Instruments, B-277973, Dec. 15, 1997, 98-1 CPD ¶ 11 at 10-11; A.B Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ 106 at 3; Southeastern Center for Electrical Eng'g Educ., B-230692, July 6, 1988, 88-2 CPD ¶ 13 at 5-6.

It is true that in each of the cases cited by DISA we found that exchanges concerning an offeror's small business subcontracting plan were not discussions because those plans were only evaluated as part of the agency's responsibility determination. See, e.g., General Dynamics-Ordnance & Tactical Sys., Inc., supra, at 10 ("A request for, or providing of, information that relates to offeror responsibility, rather than proposal evaluation, does not constitute discussions and thus does not trigger the requirement to hold discussions with other competitive range offerors.") (footnote omitted). However, in each of these cases, unlike the RFP at issue here, the solicitation did not include a technical evaluation factor under which the comparative merits of offerors' small business subcontracting plans would be considered to determine which proposal represented the best value to the government and thus entitled to award. Thus, under the circumstances of each of these cases, the assessment of offerors' small business subcontracting plans could only be done as part of the agency's responsibility determination.

In contrast, the RFP here provided for a comparative assessment of the offerors' small business subcontracting plans as part of the agency's technical evaluation to determine which proposal represented the best value to the government.⁸ See RFP

⁸ Traditional responsibility factors may be comparatively evaluated in a negotiated procurement as part of agency's technical evaluation and not as a matter of the offeror's responsibility. See Medical Info. Servs., B-287824, July 10, 2001, 2001 CPD ¶ 122 at 5; Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 3. In this

(continued...)

amend. 12, § M.5.2.a.(2)(ii)(6) (“For large businesses, the Government will evaluate the feasibility and comprehensiveness of the Offeror’s planned approach to meeting the established subcontracting goals of . . .”). In accordance with this evaluation scheme, the agency’s TMAF performed a comparative evaluation of the offerors’ proposed small business subcontracting plans that were provided as part of the offerors’ technical/management approach proposals, assigning strengths and weaknesses for each proposal. See, e.g., AR, Tab 881, SSAC Evaluation Report, app. 4, Technical/Management Approach Factor Evaluation, at 103 (SRA’s proposal was evaluated as exceeding the small business subcontracting plan requirements, with a number of strengths, including that the firm had committed to exceeding the small business goal); see also id. at 189, 212 ([Deleted]’s and [Deleted]’s proposals were evaluated as exceeding the small business subcontracting plan requirements, with a number of strengths and no weaknesses). In contrast, [Deleted]’s proposed small business subcontracting plan was evaluated as failing to satisfy the solicitation requirements and a number of weaknesses were assigned, including that the proposal did not adequately address how the firm would meet small business goals. Id. at 279. The SSA, in her selection decision, specifically recognized the relative strengths and weaknesses assessed in the offerors’ proposed small business subcontracting plans. See, e.g., AR, Tab 894x, Source Selection Decision, at 15 (“[Deleted] has committed to exceeding goals for [small businesses and other small business entities identified in the RFP for which goals were identified]”), and at 20 (“CSC did not provide details on how they were going to meet or exceed small business goals”).

More akin to the circumstances of this procurement than the cases cited by DISA are our decisions in Fritz Cos., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443, aff’d, Daniel F. Young-Recon., B-246736.4, July 30, 1992, 92-2 CPD ¶ 62. The solicitation at issue in the Fritz case required the submission of small business and small disadvantaged business subcontracting plans and informed offerors that these plans could become the determining factor in the award decision if offers were found to be essentially equal. In Fritz, we found that, despite the agency’s characterization that award had been made on the basis of initial proposals, the agency had actually conducted discussions with the awardee, where the agency selected the awardee’s proposal on the basis of its superior subcontracting plan but after the awardee had been provided with an opportunity to revise its plan, which we found to be a material revision to the awardee’s proposal.

(...continued)

regard, the protesters cite numerous decisions of our Office, in which the small business subcontracting plans were assessed in the agencies’ technical evaluations and were the subject of discussions. See, e.g., Southwest Educational Dev. Lab., B-298259, July 10, 2006, 2006 CPD ¶ 105; Coastal Mar. Stevedoring, LLC, B-296627, Sept. 22, 2005, 2005 CPD ¶ 186.

DISA also contends that these exchanges do not constitute discussions because they relate only to the small business subcontracting plan that was submitted as part of the general contract information proposal and not to the plan that was submitted as part of the technical/management approach proposal. DISA and the intervenors argue that the solicitation informed offerors that the small business subcontracting plans submitted with the firms' general contract information proposals would not be considered in the agency's technical evaluation, and that the RFP informed offerors that the agency would not conduct discussions with regard to the small business subcontracting plans. See RFP amend. 12, § L.3.c. DISA also states in this regard that offerors' revisions to their small business subcontracting plans were not provided to the agency's TMAP and therefore did not affect the firms' technical/management approach factor evaluations. See Agency Legal Memorandum at 15.

We do not agree that the solicitation provided that offerors' small business subcontracting plans (and more specifically their promises to satisfy or exceed the small business subcontracting goals) would not be evaluated by the agency in its consideration of the firms' proposals under the technical/management approach factor. Rather, as noted above, the RFP specifically stated that the firms' promises to satisfy the solicitation's mandatory subcontracting goals would be considered under this factor.⁹ See RFP amend. 12, § M.5.2.a.(2)(ii)(6). In fact, these promises were specifically considered by the TMAP, the SSAC, and the SSA in their consideration of the relative merits of the firms' technical/management approach proposals. See, e.g., AR, Tab 894x, Source Selection Decision, at 15, where the SSA

⁹ Accepting the agency's argument distinguishing between the subcontracting plans submitted in the offerors' technical/management proposals and general contracting information proposals would mean that offerors could submit different and inconsistent plans. For example, an offeror could promise to exceed the subcontracting goals in its technical/management proposal and receive evaluation credit for doing so, yet propose goals that were merely acceptable in its plan submitted in its general contracting information proposals. (The plan submitted with the offerors' general contracting information proposals were incorporated by the agency into the contracts awarded under the solicitation.) Or as presented here, an offeror's small business subcontracting plan could be determined to be acceptable in the agency's technical evaluation, but the firm's plan in the general contract information proposal could be found unacceptable because the plan failed to satisfy the RFP's mandatory goals. Such an inconsistency in an offeror's subcontracting plan could not reasonably be ignored by the agency in its evaluation of proposals. See TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 at 11 (agency improperly failed to resolve through negotiations its evaluated negative concerns with the awardee's technical proposal, caused by its apparent inconsistency with the cost proposal).

recognized that SAIC had committed to exceeding the small business subcontracting goals.

We also find no merit to the agency's and intervenors' argument that the RFP's statement that the agency did not intend to conduct discussions with offerors with respect to their small business subcontracting plans resolves whether the actual exchanges provided were discussions or clarifications. As noted above, we look at the actions of the parties to determine whether discussions have been held, and thus neither an agency's characterization of its exchanges nor its stated intention not to conduct discussions is determinative of whether the exchanges are in fact discussions or clarifications. See Gulf Copper Ship Repair, Inc., *supra*; Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 at 11; see also Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ __ at 5 (exchanges at an offeror's oral presentation that allowed the offeror to materially revise its price proposal were discussions, despite the solicitation's statement that oral presentations would not constitute discussions). In this regard, we see no meaningful difference between the agency's stated intent not to conduct discussions with offerors with respect to their subcontracting plans and the more generally stated intention to make award on the basis of initial proposals. See RFP amend. 12, §§ L.3.c., M.3.a. Under either solicitation section, it is the nature and substance of the agency's exchanges and actions that determine whether the exchanges constitute discussions or clarifications.

Finally, we do not find dispositive that the agency chose to not share the offerors' responses concerning their small business subcontracting plans with the TMA. The fact remains that a majority of the 10 highest rated offerors had submitted subcontracting plans that were determined to be unacceptable and that these firms were provided with an opportunity to revise these plans (including proposing new subcontracting goals or providing additional information to establish that the firms would satisfy or exceed these goals). Following these actions, the firms' plans were determined to be acceptable, and this information was shared with both the SSAC and the SSA, who presumably considered the TMA's, the SADBUS's/PCR's and contracting officer's assessment of the firms' subcontracting plans, and the results of the firms' discussion responses.¹⁰

In conclusion, we find that the agency's exchanges with the offerors, which allowed a majority of the highest rated offerors to revise their proposals in a material way, were not clarifications but were discussions. As noted above, when an agency

¹⁰ Although the record does not document exactly what was provided to the SSA with respect to the exchanges with the offerors, the record does evidence that the SSA was informed by the SSAC of the areas (including the small business subcontracting plans) that were the subject of the exchanges. See AR, Tab 788, SSA Decision Briefing, at 190.

conducts discussions with one offeror, it must conduct discussions with all other offerors whose proposals are in the competitive range, and those discussions must be meaningful; that is, the discussions must identify deficiencies and significant weaknesses in each offeror's proposal. See Spherix, Inc., supra, at 13-14. Here, the record establishes that the protesters were prejudiced, because, although the agency conducted discussions with CSC, NGIT, and IBM concerning their subcontracting plans, the discussions with the protesters were not meaningful, given that there were a number of significant weaknesses identified in each of the protesters' proposals, and considered by the SSA in her selection decision, which the protesters were never given an opportunity to address, but which could have been altered or explained to materially enhance the proposals' potential for award. See, e.g., AR, Tab 894x, Source Selection Decision, at 19-21, 24, and 27-28 (identifying numerous weaknesses in the protesters' proposals).

Because we sustain the protests on the basis of the agency's failure to afford the protesters meaningful discussions, we do not address the protesters' challenges to the agency's evaluation and source selection decision, given our recommendation below that the agency open the competition to conduct discussions with offerors whose proposals are found to be in the competitive range. However, as the agency proceeds with its corrective action, it may want to be mindful of the other issues raised by protesters, including the significant concerns raised by the protesters with respect to the agency's past performance evaluation, which found no discriminators in the evaluation of the protesters' and awardees' proposals, and with respect to price realism, given that the record does not evidence that a price realism analysis was performed.

The protests are sustained.

We recommend that the agency establish a competitive range and conduct meaningful discussions with offerors whose proposals are found to be within the competitive range, obtain and evaluate revised proposals, and make a new source selection decision. We also recommend that the agency reimburse the protesters for their reasonable costs of filing and pursuing the protests. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2007). The protesters' certified claims for costs, detailing time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel