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Decision

Matter of: PCCP Constructors, JV; Bechtel Infrastructure Corporation

File: B-405036; B-405036.2; B-405036.3; B-405036.4; B-405036.5; B-405036.6

Date: August 4, 2011

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Thomas P. Humphrey, Esq., Amy Laderberg O'Sullivan, Esq., Puja Satiani, Esq., Jonathan M. Baker, Esq., Sarah B. Gleich, Esq., and David Z. Bodenheimer, Esq., Crowell & Moring, for CBY Design Builders, the intervenor.

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DIGEST

1. Agency unreasonably evaluated awardee's proposal for compliance with foundation design requirements to account for lateral loads, in a manner inconsistent with the terms of the solicitation.
2. Offerors may have been misled by a procuring agency, where the solicitation established a build-to-budget concept that informed offerors to use the full amount of budget identified in the solicitation in developing their technical approach, where despite questions and discussions concerning this concept offerors were not informed that they could propose less than the budgeted amount, no offeror but the awardee proposed less than the full budget amount, and the awardee was credited by the agency for offering a lower price.
3. An agency's investigation of the awardee's alleged unequal access to information organizational conflict of interest was unreasonable, where the agency concluded that the awardee's hiring of a high-level government employee from the office responsible for the project being procured created a potential conflict, but limited its review to what responsibility and role the government employee had in the

procurement prior to his retirement without any consideration of the employee's access to non-public, source selection information, and where the record establishes the employee's continued daily contact with members of the source selection team and access to inside information concerning the agency's build-to-budget concept.

DECISION

PCCP Constructors, Joint Venture, of Fort Worth, Texas, and Bechtel Infrastructure Corporation, of Frederick, Maryland, protest the award of a design-build contract to CBY Design Builders,¹ of New Orleans, Louisiana, under request for proposals (RFP) No. W912P8-09-R-0013, issued by the Department of the Army, U.S. Army Corps of Engineers, for permanent canal closures and pumps ("permanent pumps") along three outfall canals at or near Lake Pontchartrain, Louisiana. The protesters challenge the agency's evaluation of their own and the awardee's technical proposals, and contend that CBY has an organizational conflict of interest (OCI), which the agency did not reasonably investigate or mitigate.

We sustain the protests.

BACKGROUND

The greater New Orleans metropolitan area sits in the tidal lowlands of Lake Pontchartrain, a tidal basin about 640 square miles in area that connects with the Gulf of Mexico through Lake Borgne and the Mississippi Sound. Lake Pontchartrain and Vicinity Hurricane Protection Project, GAO-05-1050T, Sept. 28, 2005, at 2. The greatest natural threat to New Orleans continues to be from hurricane-induced storm surges, waves, and rainfall. During hurricanes and tropical storms, three outfall canals, located at 17th Street, Orleans Avenue, and London Avenue (depicted below), drain water from portions of New Orleans northward into Lake Pontchartrain. The city's Sewerage and Water Board uses drainage pump stations (DPS) to pump rainwater from New Orleans into the canals. U.S. Army Corps of Engineers' Procurement of Pumping Systems for the New Orleans Drainage Canals, GAO-07-908R, encl., Providing Pumping Capacity, at 7. These outfall canals are critical elements of the city's flood control system.² Levees line the sides of the canals, and floodwalls are situated on the top of each levee.

¹ CBY is a joint venture consisting of managing partner CDM, along with Brasfield & Gorrie, and W.G. Yates and Sons Construction. Agency Report (AR), Tab 7, CBY's Technical Proposal, vol. I, at 1.1-1.

² http://www.mvn.usace.army.mil/hps2/hps_outfall_canals.asp.



www.mvn.usace.army.mil/hps2/hps_outfall_canals.asp.

In 2005, Hurricane Katrina caused breaches at the 17th Street and London Avenue canals when water and waves pushing against the outside (water side) of the floodwalls shifted the walls, essentially splitting each levee into two pieces. Because material on the protected side of the levee was unable to withstand the pressure from the forces opposite the floodwall, the floodwall gave way, allowing water to spill into the protected areas. Thereafter, the Corps repaired and improved the walls in all three canals, and built so-called “interim closure structures” at the mouths of the three outfall canals prior to the start of the 2006 hurricane season. These temporary gated structures are intended to stay open during normal, non-tropical conditions, and to close when a storm surge threatens to exceed the maximum operating water level of a canal. When the interim structures are closed, water is pumped from the canals around the closed gates and into Lake Pontchartrain. The closed gates prevent a storm surge from entering the canals and entering the city. After a surge recedes, the Corps reopens the gates and normal (non-pumped) drainage resumes. The contract to be awarded under this solicitation is intended to replace the interim structures with permanent canal closures and pumps. Id.

The RFP and the Evaluation Results

The solicitation was developed over a period of 2 years with the involvement of multiple key stakeholders (such as local and state governments). Contracting Officer’s (CO) Statement at 1. The RFP was issued on April 30, 2010, and sought proposals for the award of a fixed-price, design-build contract for all architectural, engineering, permit support, procurement, construction, testing, project management, quality control, commissioning, and other related services to plan, design and construct a system to protect the three outfall canals from a storm surge from Lake Pontchartrain, while not impeding the ability of the area’s internal drainage system to function. See RFP amend. 5, at 18; Statement of Work (SOW),

at 108. The solicitation was amended 12 times, in part to respond to questions from offerors.

The RFP provided for a two-phased procurement. Under phase I, offerors' proposals were evaluated under experience, technical approach, and past performance factors, without consideration of cost. Based on the results, the Corps selected five firms, including PCCP, Bechtel, and CBY, to compete in phase II of the procurement.

A detailed SOW informed offerors of the functional and performance requirements for the project. RFP amend. 5, SOW, at 108-216. The permanent pumps were required to be able to operate independently of all utilities and include communication facilities that would permit them to operate cooperatively with existing drainage pumping stations and other central operations facilities. In this regard, the SOW specified operating capacities and maximum canal flow for the three canals as follows: 17th Street, 12,500 cubic feet per second (cfs); Orleans Avenue, 2,700 cfs; and London Avenue, 9,000 cfs. See id. 108, 119-21. The SOW also specified safe water elevation and low water elevation levels.³ See id. at 118-19.

For phase II, the RFP provided for award on a best value basis under the following evaluation factors and subfactors:

Technical Approach	
	Subfactor 1: Pump Station Operation
	Subfactor 2: Operation & Maintenance
	Subfactor 3: Project Execution Approach
	Subfactor 4: Aesthetics
	Subfactor 5: Adaptability
Management Capability	
	Subfactor 1: Design and Construction Management
	Subfactor 2: Key Personnel and Organization
Socio-economic Small Business Participation Plan	
Past Performance (carried over from Phase I)	
Price	

RFP amend. 5, at 67-69. Offerors were informed that the technical approach factor was the most important non-price factor, and that its subfactors were listed in descending order of importance. The RFP stated that the non-price factors, combined, were significantly more important than price. Id. at 67.

³ Safe water elevation was defined to be the maximum allowable canal water surface elevation at any point along the canal, and low water elevation was defined to be the minimum allowable water surface elevation at any point along the canal. RFP amend. 5, SOW, at 118.

With respect to price, offerors were informed that price would be evaluated for reasonableness. Id. at 69. In addition, offerors were informed that the RFP was “developed to model the best value technique known as ‘Build to Budget.’” See RFP amend. 5, Questions and Answers, at 514. Offerors were advised that the government’s contract budget for the design and construction of the project was \$650 million (an amount which was increased to \$700 million by amendment 8), and that any offers exceeding this amount would be eliminated without further consideration. RFP, Preamble, at 6. The RFP further stated that:

the Government desires to maximize the best value obtainable for that amount. Therefore, Offerors should strive to propose the best technical/management solution within that budget amount. Technical/management approaches that seek to trade off performance in favor of costs below the contract budget amount are not desired and will not be rewarded.

Id.

The build-to-budget concept was the subject of questions and discussion throughout the procurement. Amendment 5 to the RFP, which was provided to the phase II offerors, repeated the preamble from the initial solicitation and, in response to offerors’ questions, provided the following explanation:

In this competition, the Government has stipulated the budgeted amount available. In this competition, we expect our solutions to utilize the full budget available and not focus on providing a low bid design. Attempts to offer lower priced technical solutions may be determined non-competitive and result in elimination accordingly. [The Design Build Institute of America] recognizes that Government acquisitions must use price as a factor. However, the Government has stated that our non-cost factors are significantly more important than price in this competition.

RFP amend. 5, Questions and Answers, at 514 (emphasis added).⁴

⁴ In another question, an offeror paraphrased the build-to-budget language as asking offerors to maximize capability, rather than trading capability for a lower price, stating that

the RFP provides a means for an offeror whose reasonable estimate of costs is less than the stated budget amount—the offeror simply includes betterments and increases its estimate of costs until it equals the stated budget amount.

(continued...)

Detailed instructions for the preparation of proposals were provided for each evaluation factor and subfactor. In this regard, offerors were instructed to provide their proposals in four volumes: technical, socio-economic, price, and supporting documentation (attachment A). The RFP identified page limitations for the technical approach volume, but not the supporting documentation volume. See, e.g., RFP amend. 5, at 50 (where responses to the pump station operation subfactor were limited to 30 pages, but offerors were advised that they could reference drawings and technical data in the supporting documentation volume, which had no page limitation).

With respect to the pump station operation subfactor, offerors were instructed to, among other things, demonstrate that their approach for each canal provides continuous evacuation of water to maintain the water level between the low water level and safe water level at all times while efficiently meeting required current operating conditions. Id. at 50. Similarly, with respect to this subfactor, offerors were instructed to provide adequate design provisions to account for structural design loads, and to describe their “[f]oundation and basis of major structural component design(s), including design provisions for minimizing and accommodating settlement.” Id.

With respect to the supporting documentation volume, offerors were instructed to provide design information for each permanent canal closure and pump and any additional information needed to illustrate their proposed scope and approach.⁵ Id. at 62. The RFP provided that this information would “be used as supporting documentation during the evaluation, as referenced by the proposal.” Id.

The agency received proposals from all five phase II offerors, which were evaluated by the agency’s source selection evaluation board (SSEB). The SSEB was comprised of a different team for each evaluation factor. The seven-member technical evaluation team was chaired by a mechanical engineer from the agency’s hydraulic

(...continued)

See RFP amend. 10, Questions and Answers, at 4. The Corps’s response to the question, in its entirety, was that “[t]he Offeror’s proposal must comply with the RFP requirements.” Id.

⁵ The RFP’s instructions for this volume required drawings “to an appropriate level to . . . clearly convey the intended approach and proposed scope of work,” and the instructions provided additional details for different types of drawings. Offerors were informed that their structural drawings should include foundation plans, including details for piles and piers; plans and sections for major structures, slabs and walls; and transition sections from the permanent pumps facilities to levees and floodwalls. RFP amend. 5, at 62.

design center and included hydraulics, mechanical, electrical, structural and geotechnical engineers. See Hearing Transcript (Tr.) at 171-72. The SSEB assigned marginal ratings to each of the initial phase II proposals under the technical approach factor.⁶ The board stated that its largest concerns involved the ability of the offerors' proposed solutions to maintain safe water elevations in the outfall canals. See AR, Tab 8, SSEB Summary Evaluation Report, at 11. With regard to price, only CBY proposed a price less than \$700 million; the other four offerors' initial proposals were priced at \$700 million.

At the conclusion of the initial evaluation, the contracting officer decided to conduct discussions with all five offerors. CO's Statement at 5. Thereafter, the offerors were given an opportunity to make 2-hour oral presentations of the material in their initial proposals, and to respond to a list of the concerns that the Corps identified in its initial evaluation results. Written discussion questions were then provided, and offerors were permitted to request additional clarification from the contracting officer.⁷ Following discussions, the offerors submitted final proposal revisions (FPR).

Bechtel's, CBY's, and PCCP's FPRs were evaluated as follows:

	CBY	Bechtel	PCCP
Technical Approach	Good	Good	Marginal
Management Capability	Good	Acceptable	Acceptable
Socio-Economic	Outstanding	Outstanding	Outstanding
Past Performance	Low Risk	Low Risk	Low Risk
Price	\$675 million	\$700 million	\$700 million

AR, Tab 8, SSEB Summary Evaluation Report, at 12.

The SSEB's findings were briefed to the source selection advisory council (SSAC), which concurred with the board's report and issued a memorandum identifying discriminating characteristics in the offers for each factor or subfactor. As relevant

⁶ The RFP identified adjectival ratings for the technical approach, management capability, and socio-economic factors. See RFP amend. 5, at 70-72. For the technical approach and management capability factors, proposals could be evaluated as excellent, good, acceptable, marginal, and unacceptable. A good rating reflected an approach that was expected to meet all requirements and objectives, while a marginal rating reflected an approach that may not be capable of meeting all requirements and objectives. Id. at 70.

⁷ The source selection record shows that Bechtel, PCCP, and CBY all requested clarifications regarding both price and technical findings. The content of those requests is not documented in the record, however.

here, with respect to the most important technical subfactor, pump station operation, the SSAC noted that CBY had offered a “more efficient approach to [deleted] than either Bechtel’s or PCCP’s pumping approaches.” The SSAC also noted that “PCCP’s proposal exceeds safe water elevation in the London Avenue canal in certain circumstances,” and therefore “it is considered the weakest in this sub-factor.” AR, Tab 13, SSAC Report, at 2. The briefing does not mention the build-to-budget concept, but refers to the \$700 million as “the price ceiling established in the RFP.” Id. at 1, 7.

The source selection authority (SSA) selected CBY for award, based on her conclusion that CBY’s proposal “provided the Government with the greatest overall technical value, while also offering an advantage in price and [deleted].” AR, Tab 15, SSA Decl., at 2. In her source selection decision, the SSA summarizes the strengths and weaknesses of the competing proposals, followed by a summary of the strengths of CBY’s proposal under the technical approach subfactors. After listing the technical strengths, she states that “[t]here is a price premium of approximately \$25M in the offers from PCCP JV and Bechtel in comparison to CBY.” Referring again to strengths and weaknesses in the protesters’ proposals, the SSA concludes that the evaluated strengths of PCCP and Bechtel “do not support a \$25M premium.” AR, Tab 11, Source Selection Decision, at 25.

The contract was awarded to CBY. Following debriefings, PCCP and Bechtel protested to our Office. The performance of the contract has been stayed, pending resolution of this protest.

During the course of the procurement, the agency’s Chief of Program Execution of the Hurricane Protection Office (HPO) advised the Colonel, who was the head of the HPO, that he would be retiring from government service and was seeking outside employment. At the time of his retirement from the Corps on August 31, 2010, the Chief held the most senior civilian position at the HPO. In that position, he had full authority for management decisions related to major elements of the hurricane protection program and projects, including the permanent pumps project. Less than one month later, on September 20, 2010, the former Chief of Program Execution of the HPO began his employment with CDM, the managing partner of the CBY joint venture, the awardee here. In response to this information, the CO decided that CBY had a potential OCI and prepared a written determination and findings (D&F). This D&F generally concluded that CBY did not have an actual, unequal access to information OCI. AR, Tab 15, OCI D&F.

During the course of this protest, the CO prepared a second D&F, addressing whether CBY’s hiring of the Chief presented an actual OCI or violated procurement integrity provisions of the Office of Federal Procurement Policy Act. This D&F also concluded that CBY did not have an actual OCI. AR, Tab 15, Procurement Integrity D&F.

We will discuss these events in greater detail below.

DISCUSSION

PCCP and Bechtel broadly challenge the agency's selection of CBY's proposal for award, and the evaluation of their own proposals. We have considered all of the protesters' arguments in resolving these protests, although we specifically address only the primary arguments necessary to resolve these disputes. As explained below, we find unreasonable the agency's evaluation of CBY's proposal with respect to the RFP's foundation requirements and CBY's potential unequal access to information OCI. We also find that offerors were misled with respect to the build-to-budget concept and how price would be considered in this procurement.

Evaluation of CBY's Proposal

Bechtel argues that the agency's evaluation of CBY's proposal under the pump station operation subfactor was unreasonable. Bechtel contends that the agency's evaluators did not properly review the drawings and technical explanations included in CBY's proposal, and failed to understand that the foundation drawings and details CBY referenced in its supporting documentation volume do not support CBY's claim that its approach will satisfy the solicitation's crucial lateral deflection requirements. In this regard, Bechtel characterizes this issue as "whether the proposed structure will hold back the water--or, in technical terms, withstand the amount of lateral loading necessary to satisfy the deflection requirements." Bechtel's Post-Hearing Comments at 1. As set forth more fully below, resolution of this dispute required a hearing, expert testimony, and a detailed review of the solicitation's requirements.

The RFP here established general standards that offerors were required to meet, specifically referencing the Corps's Hurricane and Storm Damage Risk Reduction System Design Guidelines (the "Hurricane Guidelines"). RFP amend. 5, SOW, at 19, 37. The RFP instructed offerors to address each evaluation factor "in sufficient detail to permit a complete and comprehensive evaluation." RFP amend. 5, at 49. As relevant here, the RFP instructed offerors to provide adequate design provisions to account for structural design loads, and at a minimum to describe their "[f]oundation and basis of major structural component design(s), including design provisions for minimizing and accommodating settlement." *Id.* at 50. The RFP provided, in relevant part, that proposals would be evaluated under the pump station operation subfactor as follows:

[T]he proposal will be evaluated with respect to the ability of the Offeror's solution to provide the following for each outfall canal:

- a. storm surge barrier protection . . . with specific consideration of:

* * * * *

(3) Adequate design provisions to account for structural design loads.

* * * * *

b. Continuous evacuation of water from the canals . . . with specific consideration of:

* * * * *

(6) Adequacy of design provisions to account for structural design loads.

Id. at 67.

CBY proposed using a pile-supported foundation for both its gate structures and its pumping station.⁸ See CBY's Initial Proposal, Technical Approach Volume, at 1.1-8 (referencing structural drawings included in its supporting documentation volume). Bechtel contends that various aspects of CBY's proposed foundation concept should have been assessed as unacceptable by the Corps, such as the depth to which its piles are embedded; the manner in which the piles connect with the structures; and other issues affecting its ability to withstand lateral loading (*i.e.*, pressure from the sides).⁹ Bechtel argues that the Corps simply accepted CBY's blanket statements of

⁸ As explained at the hearing, the piles at issue here are large pieces of pipe driven through soft, shallow soils into very deep, firmer soils, and are attached to a foundation to support a structure (such as a floodwall, a pumping station, or a gate structure). Tr. at 97-98.

⁹ For example, Bechtel's technical consultant testified that one of the most important elements in holding back lateral loads for a pile-supported foundation is the connection between the pile and the foundation. Tr. at 97. He explained that the connection could be "fixed" or "pinned." In very simple terms, one of the differences between these two types of connection is the depth to which the piles are embedded in the foundation of the structure that they are meant to support. The consultant testified that CBY's structural drawings showed that its design was based on [deleted]. He stated that, with [deleted] reacts to a lateral load very differently; he testified that "the industry rule of thumb is that [deleted] at the same amount of deflection." Tr. at 729. Under the solicitation, offerors were permitted to base their designs on either of these types of connections, so long as they met the requirements. The consultant supported his views with references to the requirements of the Hurricane Guidelines, as well as CBY's supporting documentation volume. The Guidelines provide specific measures for compliance, such as requiring a depth of embedment relative to the diameter of the pile. This testimony has not been rebutted by the agency or CBY.

compliance with little or no independent evaluation of the supporting materials in CBY's supporting documentation volume.

Because there was no contemporaneous documentation of the agency's review of CBY's proposed foundation, as well as other issues, our Office convened a hearing to complete the record. After being told to provide witnesses who could address the technical issues raised in the protests, the Corps provided the chairperson of the technical evaluation team, who was a mechanical engineer,¹⁰ while Bechtel provided its technical consultant, who was a civil engineer with experience in construction consulting and forensic engineering. Tr. at 466-67, 718. Both of these witnesses agreed that a reasonable review of proposals in this procurement involved looking first at the technical approach volume to get a sense of an offeror's basic concept, and then reviewing the details in the supporting documentation volume to discern how the design would work.¹¹ See Tr. at 475-76, 607 (testimony of the evaluation team chair); see also Tr. at 722 (testimony of Bechtel's consultant).

The chair of the technical evaluation team testified that the ability of the permanent pumps facilities to withstand lateral loads was a crucial part of what the Corps is buying. He also acknowledged that if the foundation of either the pumping station or the floodwalls failed to withstand the required amount of lateral loading, the structure could fail, and New Orleans could be inundated with water, as it was during Hurricane Katrina. Tr. at 598. When asked how important the foundation would be in this project, he testified that it was "very important." Tr. at 635.

Notwithstanding these statements, the chair of the evaluation team testified that the ability of CBY's proposed structures to withstand the lateral loading mandated by the design guidelines was not evaluated, and that he had not thought about the adequacy of CBY's proposed approach to constructing foundations until learning of Bechtel's protest. Tr. at 609. In this regard, the chair testified that this issue was not

¹⁰ The chairperson testified repeatedly that, as a mechanical engineer and not a structural engineer, he had no real understanding of (or ability to testify about) issues raised in Bechtel's protest concerning the adequacy of CBY's proposal with respect to the foundation design. See Tr. at 597-98, 600, 634-35, 646, 651, 655.

¹¹ In later testimony, the chairperson stated that the technical evaluation team only reviewed referenced information in the supporting documentation volume when the evaluators had already concluded that an offeror's proposal had a strength or weakness. See Tr. at 622-25, 628. Not only is this not consistent with the RFP, but there is nothing in the contemporaneous record showing that this is how the technical evaluation team used the supporting documentation volume information. Furthermore, the agency has not explained how the evaluators could reasonably determine that particular features of an offerors' approach were strengths or weaknesses without reviewing the supporting detail for those features.

something that had to be addressed in the proposal, because “it’s design-build. That’s a whole piece down line that would be checked as a performance review.” Id. When asked how long the technical evaluation team discussed CBY’s foundation approach, the evaluation team chair replied,

A. I don’t remember it being very long. It was more, ‘does it look reasonable.’

Q. Five-minute discussion maybe?

A. Maybe, and I’m not sure if it was that long.

Tr. at 618.

The evaluation team chair also testified that the board did not evaluate the foundation information in CBY’s supporting documentation volume, even though the documentation was referenced by CBY in its technical volume. See Tr. at 609, 620-21. Instead, the evaluation team chair asserted that the design-build concept meant that a general assurance of compliance with requirements was sufficient at this stage, because more precise design information would be required after the award had been made. E.g., Tr. at 471-72, 584, 629.

In our view, the testimony here describes an evaluation approach that is inconsistent with the RFP, which expressly required that offerors explain their technical approach.¹² See e.g., RFP amend. 5, at 50-53. The RFP also stated that supporting documentation volume information “will be used as supporting documentation during the evaluation, as referenced by the proposal.” Id. at 62.

While we recognize that the design-build procurement approach used by the Corps here anticipates that a project’s design will be finalized after award, the evaluation must be consistent with the terms of the solicitation. An agency is obligated to

¹² We recognize that the RFP, when identifying the four proposal volumes to be provided, stated with respect to the supporting documentation volume “(Not Evaluated)”. RFP amend. 5, at 48. The RFP expressly provided, however, in a number of places that offerors could reference the supporting documentation volume to respond to the RFP’s requirement that offerors explain their technical approach. See, e.g., id. at 51. The RFP also stated that supporting documentation volume information “will be used as supporting documentation during the evaluation, as referenced by the proposal.” Id. at 62. We conclude, reading the solicitation as a whole, that the only reasonable interpretation of the solicitation is that the agency did not need to separately evaluate the supporting documentation volume, except to the extent that relevant portions of that volume were referenced in the offeror’s technical approach volume.

conduct an evaluation consistent with the evaluation scheme set forth in the RFP. Federal Acquisition Regulation (FAR) § 15.305(a); Serco, Inc., B-298266, Aug. 9, 2006, 2006 CPD ¶ 120 at 8.

In summary, Bechtel has provided detailed argument, supported by the statement and testimony of its technical consultant, explaining why CBY's proposed design for the foundation will not satisfy the solicitation requirements. Although the agency's post-hearing comments state that CBY's proposed foundation design was not deficient, see Agency's Post-Hearing Comments at 12-13, the record shows that CBY's proposed foundation design was not meaningfully evaluated by the agency. See, e.g., Tr. at 618.

We conclude that the agency's evaluation was unreasonable and inconsistent with the terms of the RFP. The testimony of the chair of the evaluation team, and the agency's arguments generally, suggest that the evaluation approach was influenced more by a generalized belief about what is required in the evaluation under a design-build procurement than by the actual terms of the RFP. The solicitation's evaluation scheme, set forth above, clearly required the agency to evaluate the adequacy of the offerors' design provisions to account for structural design loads. The record here shows that the Corps did not.¹³

Build-to-Budget

Both Bechtel and PCCP complain that CBY was allowed to propose less than the stated build-to-budget amount, despite the agency's instructions that offerors should use the full amount of the stated budget. PCCP's Protest at 32; Bechtel's Protest at 13-14. Both protesters argue that offerors were not permitted to propose a price lower than \$700 million. Alternatively, both argue that the clear instructions on price meant the agency could not give evaluation credit to offerors proposing less than \$700 million—as was done here. In this regard, the protesters note the RFP language that informed offerors: (1) that the agency “desires to maximize the best value obtainable for [\$700 million],” see RFP amend. 5, Preamble, at 6; (2) that “technical/management approaches that seek to trade off performance in favor of costs below the contract budget amount are not desired and will not be rewarded,” id.; (3) that “offerors should strive to propose the best technical/management solution within that budget amount,” id.; and (4) that in this competition, the Corps

¹³ Bechtel's consultant also explained, in un rebutted testimony, that changing from CBY's approach of using a [deleted] would require a [deleted], which in turn would require a[deleted], increasing the[deleted], which would require additional [deleted]; in short, the entire construction scheme would be affected, with complex changes likely to affect the project's critical path, with concomitant scheduling risk and costs. Tr. at 724-26.

“expect[s] our solutions to utilize the full budget available and not focus on providing a low bid design.” *Id.*, Questions & Answers, at 514.

In response, the Corps argues that the “best value” language in the RFP should have been sufficient to notify offerors that they would be permitted to propose less than the budgeted amount. *See, e.g.*, Legal Memorandum, B-405036.2, at 6. In contrast to the protesters’ argument that the build-to-budget language constrained the flexibility offerors would have in a typical best-value procurement to trade off price against non-price features, the Corps argues that the build-to-budget language in the RFP “simply reinforces the relative importance that the Government placed on the offerors’ technical solutions relative to their proposed prices.” *Id.* Further, the Corps argues that the protesters’ interpretation of the solicitation would require the agency to make a source selection decision without consideration of price, in violation of the Competition in Contracting Act of 1984 (CICA). *Id.* at 5.

It is fundamental that offerors should be advised of the basis on which their proposals will be evaluated. *C3, Inc.*, B-241983, B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279 at 3. CICA requires that contracting agencies set forth in a solicitation all significant evaluation factors and their relative importance. 10 U.S.C. § 2305(a)(2)(A)(i), (ii) (2006). This standard is not satisfied where offerors are misled as to the manner in which price will be considered in the evaluation.

Here, the record shows that four of the five phase II offerors initially proposed identical prices—*i.e.*, the \$700 million budget figure set out in the RFP. This result, despite the general language in the solicitation informing offerors that award would be made on a best-value basis, appears to be tied to the above-quoted language in the RFP advising offerors that the agency expected them to use the full budgeted amount of \$700 million for their projects.

Given the results of the competition—where all of the offerors but CBY submitted initial proposals for exactly \$700 million—we think it should have been apparent to the Corps that only CBY understood that it was allowed to propose a price below the stated budget amount. In addition, we note that the Corps conducted discussions with the offerors, and never advised them that offers below the build-to-budget amount would be favorably considered.¹⁴ In fact, the Corps has not rebutted Bechtel’s allegation that during discussions, the contracting officer initially informed Bechtel that a lower price would be favorably received, but then, after a recess,

¹⁴ Upon receipt of FPRs, again—as with initial offers—only CBY proposed less than \$700 million. Also again, Bechtel and PCCP proposed identical \$700 million amounts. The other two offerors changed their initial \$700 million prices to \$700,000,002 and \$766,952,258 in their FPRs; as a result, these offers were rejected. AR, Tab 8, SSEB Summary Evaluation Report, at 12.

expressly retracted that statement, advising Bechtel that the prior statement was made in error. See Bechtel's Protest at 13; Bechtel's Comments at 22.

The Corps contends that, even if offerors were misled, this could not result in competitive prejudice to the protesters, because CBY's proposal was rated technically higher than the protesters'. This argument fails for two reasons. First, as discussed above, we have found unreasonable the evaluation of CBY's proposal under the technical approach factor. Second, both Bechtel and PCCP argue that they would have allocated resources differently and submitted different proposals, had they understood that the agency would allow prices lower than \$700 million. See Bechtel's Protest at 24; id. at Exh. 3, Declaration of Bechtel's Operations Mgr., at 2; Bechtel's Comments at 24; PCCP's Comments at 37; PCCP's Reply to Agency's Request for Dismissal, Exh. 1, Declaration of PCCP's Proposal Manager, at 2.

In sum, we find that offerors were misled as to how price would be considered in this procurement and recommend that the agency amend the solicitation to clarify this matter.¹⁵

OCI Allegations

PCCP and Bechtel protest that CBY has an impermissible OCI that the Corps failed to reasonably investigate or mitigate. Specifically, the protesters argue that CBY's employment of the agency's Chief of Program Execution of the Hurricane Protection Office (HPO)—the office within the Corps responsible for this project and procurement—provided the awardee with an unfair competitive advantage that was based upon an unequal access to information OCI. The protesters complain that the CO's investigation of this potential OCI explored only the Chief's responsibility for this procurement prior to leaving the Corps, and did not consider the Chief's access to source selection sensitive information.

In answer, the Corps contends that the hiring of the Corps's Chief of Program Execution for the HPO by CBY's managing partner did not provide CBY with competitively useful, non-public information; the Corps also defends the CO's review of the situation, and his conclusions. See Supp. Legal Memorandum at 9, citing AR, Tab 15, OCI Determination & Findings (D&F). The agency contends that our review of the CO's determination is limited to determining whether the CO reasonably concluded that no actual OCI existed. Id. at 10.

At the time of his retirement from the Corps on August 31, 2010, the Chief of Program Execution held the most senior civilian position at the HPO. In this role, the Chief had full authority for management decisions related to major elements of

¹⁵ We express no opinion with respect to the wisdom of the build-to-budget approach generally, or its use here.

the hurricane protection program and projects, including the permanent pumps project. See AR, Tab 16, October 13, 2009 Post-Employment Ethics Guidance Letter. Less than a month later, on September 20, the Chief began working as a project manager for CDM, which was the managing partner of the CBY joint venture, the awardee here. At some point thereafter, his title changed from project manager to strategic accounts manager. At the time the Chief left government service and was hired by CDM, offerors were preparing their phase II initial proposals.

After the Chief had left the Corps and was working for CDM, and after the Corps had evaluated the final proposal revisions submitted under the permanent pumps procurement, the CO began an investigation to determine whether an OCI existed. CO's Statement at 5. The CO prepared a Determination and Findings (D&F) of the potential OCI, which focused on the Chief of Program Execution's responsibilities and activities with respect to this procurement. In the OCI D&F, the CO stated that as a result of his investigation and interviews, he found that the Chief retired prior the submission of phase II proposals and that the "structure and ground rules for phase II continued to evolve and changed substantially" after his retirement.¹⁶ The CO concluded that the Chief "effectively removed himself from any involvement in this procurement beginning approximately June 2010." AR, Tab 15, OCI D&F, at 2, 4.

During the course of this protest, the CO revisited his review and expanded it to include consideration of a possible violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act.¹⁷ In the Procurement Integrity D&F, the CO provided more detail supporting his conclusion that the Chief was effectively removed from participation in this procurement prior to the phase II competition. In this regard, the CO noted that the Chief stated that he reached an agreement with the Colonel heading the HPO, in June, 2009, that the Chief would have no further responsibility for acquisition activities, in order to minimize restrictions on the Chief's search for post-government employment. AR, Tab 15, Procurement Integrity D&F, at 4.

Before we begin our review, we note that the FAR requires that contracting officials avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what

¹⁶ However, the build-to-budget requirement did not change.

¹⁷ The procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423(a) (2006), prohibit any present or former official of the United States, with respect to a federal agency procurement, from "knowingly" disclosing contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates.

extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs, Inc., B-254397 et al., July 27, 1995, 95-2 CPD 129 at 12. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. FAR §§ 9.504, 9.505; CACI, Inc.-Fed., B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 at 9.

The FAR recognizes that conflicts may arise in factual situations not expressly described in the relevant FAR sections, and advises contracting officers to examine each situation individually and to exercise “common sense, good judgment, and sound discretion” in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. The regulation identifies situations in which an OCI may arise, including, as relevant here, where a firm competing for a government contract has “[p]roprietary information (that was obtained from a Government official without proper authorization)” or “source selection information . . . that is relevant to the contract but was not made available to all competitors, and such information would assist the contractor in obtaining the contract.” FAR § 9.505(b).

In reviewing bid protests that challenge an agency’s conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the “arbitrary and capricious” standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt, Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). To demonstrate that an agency’s OCI determination is arbitrary or capricious, a protester must identify “hard facts” that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Turner Constr. Co., Inc. v. United States, No. 2010-5146, slip. op. at 17-18 (Fed. Cir. July 14, 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that “the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.” Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer’s OCI determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the CO’s investigation and, where an agency has given meaningful consideration to whether an OCI exists, will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See CACI, Inc.-Fed., *supra*, at 9; CIGNA Gov’t Servs., LLC, B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

As set forth more fully below, we find that the CO did not conduct a reasonable investigation to determine whether CBY’s employment of the agency’s former Chief of Program Execution provided the firm with access to non-public, selection

sensitive information that gave CBY an unfair competitive advantage. The record shows that the CO's investigation was narrowly focused upon what role the former government employee had in the conduct of the procurement before his retirement (and even then did not consider pertinent information), and did not explore the Chief's access to proprietary or source selection information and whether this information provided an unfair competitive advantage to CBY.

The Chief's Role for the Corps and His Continued Involvement in the Procurement

As indicated above, at the time of his retirement from the Corps, the Chief held the most senior civilian position at the HPO, and in that position he had full authority for management decisions related to major elements of the hurricane protection program and projects, including the permanent pumps project. See AR, Tab 16, Post-Employment Ethics Guidance Letter, Oct. 13, 2009. The HPO was responsible for the permanent pumps project, and the Permanent Pumps Station branch reported directly to the Chief. See AR, Tab 15, Procurement Integrity D&F, attach. 4, HPO Organizational Chart. The HPO activities the Chief directed included construction management, levees, floodwalls and armoring, existing pump stations, permanent pump stations, and the Inner Harbor Navigation Canal, among others. See AR, Tab 32a, Post-Employment Ethics Opinion, July 22, 2010, at 1-2. The Corps's ethics counselor found that the Chief had participated personally and substantially in nearly all matters within HPO, specifically naming the permanent pumps project. Id. at 2. The Chief participated in the Corps's preparation of the Acquisition Strategy for the permanent pumps. AR, Tab 15, attach. 8, Acquisition Plan, at 48. The Chief was listed as an advisor to the SSEB for both phases of the procurement (although he denies having acted in that capacity).¹⁸ The Director of Task Force Hope, or overall manager of the \$14 billion hurricane protection system program, who was the SSA for this procurement, asked the Chief to intervene with the senior project manager for this procurement to have a different contracting officer assigned to the job. Tr. at 1091. The person whom the Chief approached in this regard, who was working as a deputy in the district at that time, was then moved to the HPO to become the chief of one of the HPO's contracting groups, and CO for this procurement in April 2010. Id.

The record does not support the agency's OCI conclusion that the Chief had removed himself from the procurement in June of 2010. See AR, Tab 15, OCI D&F, at 2. Instead, the record shows that until he retired, the Chief continued to work in close proximity and communication with the agency's project manager for the permanent pumps project, who reported to the Chief throughout his employment with the Corps. Tr. at 1043. The project manager testified, for example, that he had conversations with the Chief in hallways or in his office, Tr. 77, discussing such

¹⁸ The final, revised version of the Source Selection Plan issued in May 2010 still lists the Chief as an advisor to the SSEB for phases I and II. PCCP Supp. Protest, Tab 38.

matters as the costs and the risks of the project, the RFP, how build-to-budget was received by industry, performance requirements, updates, and, in general, discussed the project with the Chief frequently. See Tr. at 76-78. The project manager further testified that there was never a formal declaration, even to him, that the Chief had recused himself from the project.¹⁹ Tr. at 944.

Other evidence supports the Chief's continued involvement in the procurement prior to his retirement. For example, Bechtel provided a sworn declaration of its Operations Manager, who stated that he and another Bechtel employee met with the agency's Chief and the Colonel in charge of the HPO on July 6, 2010, after Phase II had begun, and discussed with them the build-to-budget concept. See Bechtel Supp. Protest, exh. 2, Decl. of Bechtel Operations Manager, June 6, 2011. The Corps has offered no rebuttal to this sworn statement.

In addition, we find the assertion that there was an agreement between the Chief and the Colonel in 2009, under which the Chief allegedly agreed to have no further responsibility for acquisition activities beginning approximately a year prior to his retirement, deserving of little probative weight. This agreement (which was mentioned for the first time in a post-protest D&F) is not contemporaneously documented, and it does not appear that other government personnel were aware of its existence.²⁰ In this regard, although the Chief asserted that he had made sure that the permanent pumps project manager (who was also the head of the project delivery team, source selection advisory council member, and Permanent Pump Station Branch chief) and the rest of his staff knew of the agreement with the Colonel, Tr. at 1057, the project manager testified that he was unaware of the agreement until after the protests were filed. Tr. at 972. Similarly, the contracting officer was not told of the agreement until after the protests were filed, see AR, Tab 15, Procurement Integrity D&F, at 5, although he would have been expected to learn of such an agreement as a result of his investigation of CBY's potential OCI. Moreover, it was revealed at the hearing that the Colonel did not independently recall the agreement with sufficient clarity to be willing to sign a declaration

¹⁹ Indeed, the only evidence that the Chief's discussions with Corps employees were restricted is a declaration from the SSA, attesting to the fact that she had told the Chief "that he was to no longer be involved in the source selection process for the [permanent pumps] solicitation." AR, Tab 15, SSA Decl., at 1. This supports the view that the agency relied on the Chief to limit his own activities; it does not show that his access was restricted or that procurement staff were instructed not to reveal information to him.

²⁰ In any event, the agency describes the agreement as only relieving the Chief of responsibility for procurement functions, AR, Tab 15, Chief/Colonel Agreement; the agency does not assert that it places any restriction on the Chief's access to non-public, competitively sensitive information.

(prepared in connection with this protest) about his recollection of it, until after a copy of the declaration was provided to the Chief to “make sure [the Chief] didn’t see any problems with it before [the Colonel] signed it.” Tr. at 1125-30.

Despite the Chief’s continued close contact within the office responsible for this procurement, the D&Fs (and the record generally) do not show any investigation into whether any boundaries or restrictions were placed on the Chief’s access to non-public, competitively sensitive information. In this connection, the Corps argues in its post-hearing comments that “[e]ven absent a proactive firewall excluding [the Chief] from the acquisition, all members of the selection team told the CO that they had never discussed the acquisition with [the Chief],” citing the OCI D&F as support for this assertion. See Agency’s Post-Hearing Comments at 49. We give little weight to this assertion, however, given that the OCI D&F, in contrast to the Corps’s post-protest assertions, states only that the CO inquired whether members of the selection team had discussions about the phase II evaluation with the Chief “following his departure from federal service.” See AR, Tab 15, OCI D&F, at 4. This does not account for the Chief’s access to non-public, selection sensitive information prior to his retirement.

The Chief’s Access to Non-Public, Selection Sensitive Information and Provision of Such Information to CBY

The Corps and CBY contend that the protesters cannot show that the Chief provided non-public, competitively useful information to CBY. However, Bechtel and PCCP point to the Corps’s interpretation of the RFP’s build-to-budget approach, and CBY’s apparently unique knowledge that offerors were permitted to propose less than the \$700 million ceiling for this contract. The record shows that the Corps began considering the build-to-budget approach for this procurement as early as February 2009, when, according to the Corps, the Chief still had responsibility for the project. Also, the record shows that the Chief was a required attendee at a February 1, 2010, permanent pumps build-to-budget briefing, in which this approach, and the decision to use it, were explained to the Colonel, and at which briefing the Chief was given slides showing feedback on this issue from one-on-one meetings held with prospective competitors.²¹ See AR, Tab 15, Procurement Integrity D&F, attach. 7, Feb. 1, 2010 E-mail Confirming the Chief’s Required Attendance; Tab 30, Decl. of Project Manager, at 1. A briefing slide from that meeting expressly provides, “Require offerors to submit proposals at or below the budgeted amount,” a phrase that was not included on slides from briefings to industry and did not appear in the

²¹ Although the project manager submitted a declaration in the agency report stating that this meeting was among those that the Chief attended, he later stated at the hearing that he could not recall the Chief’s presence specifically. See AR, Tab 30, Decl. of Project Manager, at 1; Tr. at 952.

RFP. See PCCP's Supp. Protest, exh. 34, Build-to-Budget Briefing, at 2 (emphasis added).

The record also shows that on July 22, 2010, while the Chief was still working at the Corps--after phase II of the procurement had begun--the Chief received an e-mail from the agency's permanent pumps project manager, marked "high importance," concerning the build-to-budget provision and setting forth a proposed clarification to the RFP. See Hearing exh. 6 at 6. Following the proposed clarification, the e-mail asks whether "this solves the issue." The e-mail, initially sent from the contracting officer to the consultant who introduced the build-to-budget concept and the project manager, was forwarded directly to the Chief by the project manager. There is no explanation in the record of why the Chief was continuing to receive procurement information regarding the build-to-budget issue.²²

The record further shows that the Chief, after accepting employment with CBY, responded to CBY's request for advice about whether the firm should take an "opportunity to come in below \$700 million." Tr. at 1113. The Chief testified that he advised CBY that, "if you could increase your value for the program, increase it . . . [i]f not, you know, it says within the number. It doesn't say you've got to hit \$700 million. So don't just add money to add money." Tr. at 1114. In short, he advised CBY that, notwithstanding the RFP's express direction not to offer a lower price, CBY could offer a lower price. As noted above, CBY was the only offeror to propose less than \$700 million.

Agency's Failure to Investigate Chief's Role at CBY and CBY's Access to Non-Public, Selection Sensitive Information

The record does not show that the CO reasonably investigated the Chief's role and activities with CBY and whether CBY had access to non-public, selection sensitive information through the Chief. Rather, the CO merely stated in his D&Fs that the Chief's name did not appear in any of CBY's proposal documents and that nothing in CBY's proposal indicated that the awardee had received superior knowledge from the Chief. See AR, Tab 15, OCI D&F, at 2, 5; see also Procurement Integrity D&F, at 9. No support for these conclusory statements is provided in the D&Fs, or elsewhere in the record. Although the OCI D&F was dated March 24, 2011--approximately 6 months after the Chief started working for CBY's managing joint venture partner--it is written as if the Chief had not yet been hired by CDM. The contracting officer did not contact the Chief for a first-hand account of his activities after he retired from the Corps or to learn what role he played at CDM. The record shows, in contrast to the CO's conclusions, that, following employment by CBY's managing joint venture partner, the Chief participated in "red team" reviews on

²² Amendment 5 to the RFP was issued approximately 3 weeks later and contained language very similar to the text from this e-mail.

CBY's phase II proposal and FPR²³, see Tr. at 43, and as explained above, the Chief counseled CBY that it could offer less than the build-to-budget amount identified in the RFP.

We note that the OCI D&F concludes that “some mitigation of the potential for an appearance of a conflict occurred when [the Chief] was counseled, when he withdrew from advising the SSO, and when Corps employees were instructed to refrain from discussions with [the Chief] about the project.” OCI D&F at 4. We do not believe that the CO could reasonably view the cited events as reliable evidence of mitigation. For example, we understand the “counseling” to refer to a post-employment ethics opinion the Chief received from the Corps after he was offered employment by CBY's managing partner. AR, Tab 32a, Post-Employment Ethics Opinion, July 22, 2010; Tr. at 1095. The Ethics Opinion was issued based on information the Chief provided, including a job description. AR, Tab 32a. After reciting the facts, the opinion concludes that the Chief participated personally and substantially in nearly all matters within HPO, and includes the permanent pump station projects among the three specific areas in which he personally and substantially participated. *Id.* at 2. With respect to the Chief's prospective employer, the opinion states, “[y]ou advise that CDM does not currently have any contracts on any projects under HPO's area of responsibility,” *id.* at 3, without any apparent consideration of CDM's role in CBY. The opinion directed the Chief to “immediately seek an updated opinion” if his duties with CDM changed or were different from those described in the opinion. The Chief testified that he assumed the ethics counselor would verify the documents he had signed, and that, once he went to work for CDM, he “saw no reason” to ever tell the ethics counselor that he was working on the permanent pumps project. Tr. at 1247-48. With respect to his withdrawal from advising the SSO, and instructions to Corps employees not to discuss the project with the Chief, we find no contemporaneous documentation—or other meaningful evidence in the record—to support that these events took place.

In sum, we find that hard facts exist to suggest the existence of a potential, if not actual, OCI that the Corps failed to reasonably evaluate and avoid, neutralize, or mitigate. In this regard, the Corps did not reasonably investigate the extent to which the Chief had access to non-public, source selection information and whether this information provided a competitive advantage to CBY. Specifically, the agency failed to reasonably consider the Chief's access to build-to-budget information that appears to have provided CBY with a competitive advantage in this procurement. In our view, the agency's failure to reasonably investigate the OCI taints the integrity of the procurement process. We therefore sustain PCCP's and Bechtel's protests of this issue.

²³ The term “red team review” in this context generally refers to a review that occurs during the final stages of proposal preparation, with the purpose of validating the proposal's effectiveness.

PCCP's Evaluation Challenges

PCCP protests that the Corps improperly evaluated offerors' technical proposals with respect to the requirement for water flow of 9,000 cfs through the London Avenue canal permanent pump structure with gates open and without exceeding the safe water elevation level.²⁴ PCCP contends that CBY offered a design that would only allow approximately [deleted] cfs through the open gates of its London Avenue canal permanent pumps without exceeding the safe water elevation level, and that it nevertheless received a "good" rating under the technical approach factor. PCCP argues that the Corps failed to understand or investigate the issues PCCP raised in its FPR on this point, and that, as a consequence, the agency's evaluation of all of the proposals under this subfactor was unreasonable and inconsistent with the RFP's evaluation terms.

As noted above, the Corps assigned marginal ratings to all of the offerors' initial proposals under the pump station operation subfactor, because of the SSEB's concern with the ability of any of the offerors' proposed solutions to maintain safe water elevation in the canals. See AR, Tab 8, SSEB Summary Evaluation Report, at 11. The Corps conducted discussions with the offerors on this point, stating to each:

Demonstrate that your solution will continuously evacuate the maximum flows through the gated discharge outlet as stated in the RFP for the current condition by providing the following in your final proposal revision: Provide a water surface profile plotted with the [low water elevation] and [safe water elevation] from the lake to the upstream end of the canal for the highest lake level. The highest lake level is the level when the gates are to close (to be computed for your design), that does not exceed the safe water elevation at any point along the canal for a **constant** discharge of . . . 9,000 cfs at London Ave, with all existing structures and without the ICS [interim closure structures].

See AR, Tab 28a, Discussion Letter to PCCP, at 2-3; Tab 28b, Discussion Letter to CBY, at 2; Tab 28c, Discussion Letter to Bechtel, at 2-3 (emphasis in original).

²⁴ In addition, PCCP raises two other areas of the technical evaluation, pump performance testing and the adaptability of the site design for future expansion. Although we have fully reviewed all of these challenges, we do not discuss every argument here.

The record shows that the RFP required that offerors perform one-dimensional, unsteady numerical hydraulic modeling to demonstrate that each permanent pump design and associated canal could operate at the capacities and within the safe water elevation and low water elevation levels described in the SOW. See RFP amend. 5, SOW, at 133. To perform this modeling, offerors used the agency's Hydrologic Engineering Centers River Analysis System, or "HEC-RAS" software, to generate water surface profile plots (diagrams) to demonstrate compliance with the SOW requirements. See www.hec.usace.army.mil/software/hecras/. In this regard, the Corps provided offerors with "geometry files," which provided a depiction of the physical conditions specific to each canal, which offerors were to use in performing their modeling. Tr. at 169, 219.

PCCP states that in responding to the Corps's discussion question, it found, using the data provided by the Corps, that the London Avenue canal would not allow 9,000 cfs of water to flow under any reasonably practicable lake level condition, even assuming no ICS and no permanent pump in place, in a gravity-only scenario without exceeding the safe water elevation level. PCCP's Protest at 22. In its FPR, PCCP sought to explain (and prove) to the Corps its conclusion that, because of the existing geometry, the London Avenue canal "cannot pass the required flow in a free-flowing, gravity situation," and would require pumping assistance to do so. See PCCP's FPR at 1-22. PCCP proposed to close its gates and start the pumps in a non-tropical storm condition when flow rates were between 7,500 and 9,000 cfs, and provided the requested plots, produced from HEC-RAS modeling, to demonstrate that it could achieve safe water elevation requirements at maximum flows through a combination of gravity and pumped flows. PCCP's Protest at 24.

When the Corps evaluated PCCP's FPR, the evaluation team rated it as marginal under the pump station operation subfactor, causing the rating under the technical approach factor to also be marginal. AR, Tab 8, SSEB Summary Evaluation Report, at 15. In contrast, the Corps assigned good ratings to Bechtel's and CBY's FPRs under the technical approach factor, where both of these offerors indicated that they would comply with the water flow and safe water elevation levels for all canals. Id. at 12.

The crux of PCCP's arguments is that the Corps, having been informed in PCCP's FPR that the conveyance capacity of the London Avenue canal itself precluded any proposal from satisfying the RFP requirement for a 9,000 cfs water flow for this canal while maintaining a safe water elevation, was required to perform its own modeling to confirm whether the other offerors' promised compliance with this solicitation requirement could be achieved. Much has been disputed in the record by the parties, and their respective engineering consultants and witnesses, regarding, for example, the geometry files, the parameters of the modeling, and how the water flow is measured and at what point it is to be measured in the canals. We do not resolve these significant disputes, because we find that PCCP's arguments do not establish a clear basis to find that the agency's evaluation of its or the other offerors' proposals

with respect to this requirement was unreasonable or in violation of procurement law or regulation.

As amended, the solicitation did not require offerors to provide their modeling, or detailed calculations, for this requirement but instead to provide only plots (diagrams) representing the performance of their design.²⁵ See RFP amend. 5, at 64. Bechtel and CBY provided plots showing that their proposed design for the canals would satisfy the water flow and safe water elevation requirements. The Corps based its evaluation on the offerors' plots for the canals, as required by the RFP, and did not perform any modeling during its evaluation of proposals. See Tr. at 164. Although PCCP contends that, having been told by an offeror that their requirement was not achievable, the Corps was required to perform its own modeling, the protester cites to no solicitation provision or other authority requiring the agency to do so.

Despite our conclusion that the agency did not unreasonably evaluate the proposals with respect to this requirement, the record shows that the Corps, in response to the protest, performed its own modeling of CBY's design with respect to the water flow and safe water elevation requirements for the London Avenue canal. Tr. at 298-99. The agency's own modeling raises significant questions as to whether CBY's design, or any other offeror's design, will comply with this requirement. Specifically, the agency's hydraulics engineer testified that based upon his post-protest modeling, CBY's design for the London Avenue canal would have a flow of only approximately [deleted] cfs while maintaining the safe water elevation level. See Tr. at 300-03, 310. Given our decision sustaining the protests on other grounds and recommending corrective action, we think that the Corps may wish to reconsider and clarify this requirement for the London Avenue canal.

RECOMMENDATION

We recommend that the Corps reasonably investigate CBY's potential OCI, and that the Corps, if it concludes that CBY has an impermissible OCI, consider whether this conflict can be mitigated. We also recommend that the Corps amend the solicitation with respect to the build-to-budget concept to clarify for offerors that the agency would consider lower-priced offers, conduct discussions with respect to the technical and price issues raised in these protests if necessary, accept and evaluate revised proposals, and make a new source selection decision consistent with this decision. If an offeror other than CBY is selected for award, the Corps should terminate CBY's contract and make award to that other offeror. We also recommend that PCCP and Bechtel be reimbursed the reasonable costs of filing and pursuing the

²⁵ Originally, the RFP did require offerors to provide detailed calculations from their models, see RFP at 29, but this requirement was removed from the solicitation by amendment 5.

protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Each protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel