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## Decision

**Matter of:** Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC

**File:** B-407948, B-407948.2, B-407948.3, B-407948.4, B-407948.5, B-407948.6, B-407948.7, B-407948.8

**Date:** April 29, 2013

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### DIGEST

1. Protesters' assertions that terms of solicitation failed to comply with Federal Acquisition Regulation requirements for cost reimbursement contracts are not timely filed.
2. Agency's source selection decision failed to reasonably reflect the solicitation's stated evaluation criteria where solicitation stated that the agency would evaluate the feasibility and size of offerors' proposed cost savings, but agency failed to make meaningful assessments regarding the majority of offerors' proposed savings, and the source selection decision was based on the unsupported presumption that all cost savings proposed by every offeror were feasible.
3. Agency's past performance evaluation properly reflected the totality of awardee's past performance, and awardee's past performance was reasonably rated as

satisfactory despite the fact that portions of awardee's performance under prior contracts were unsatisfactory.

4. Agency's source selection authority reasonably considered his personal knowledge in evaluating awardee's proposal under the corporate experience evaluation factor.

5. Where the solicitation provides that awardee will have both design authority and construction management responsibility for the construction of a new facility--but the solicitation did not require offerors to propose a construction subcontractor, and the facility's design is not substantially complete--it was reasonable for the agency to conclude that it need not, prior to the award of this contract, address organizational conflicts of interest that could later arise if the awardee subcontracts the construction requirements to **[redacted]** company.

6. Prior to award, the agency reasonably considered protester's Procurement Integrity Act allegations and reasonably concluded that the integrity of this procurement had not been compromised.

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## **DECISION**

Nuclear Production Partners LLC (NPP), of Lynchburg, Virginia, and Integrated Nuclear Production Solutions LLC (INPS), of Oak Ridge, Tennessee, protest the Department of Energy (DOE), National Nuclear Security Administration's (NNSA) award of a contract to Consolidated Nuclear Security LLC (CNS), of Reston, Virginia,<sup>1</sup> pursuant to request for proposals (RFP) No. DE-SOL-0001458 to perform services associated with maintaining and securing the nation's nuclear weapons.<sup>2</sup> NPP and INPS challenge various aspects of the agency's evaluation process, including assertions that the agency failed to comply with the Federal Acquisition Regulation's (FAR) requirements for cost realism analysis; failed to evaluate cost savings in a manner consistent with the terms of the solicitation; failed to evaluate

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<sup>1</sup> NPP is a limited liability corporation (LLC) comprised of resources from: Babcock & Wilcox Technical Services Group, Inc.; URS Energy & Construction, Inc.; Northrop Grumman Technical Services, Inc.; and Honeywell International, Inc. INPS is an LLC comprised of resources from: Jacobs Engineering Group, Inc. and Fluor Federal Services, Inc. CNS is an LLC comprised of resources from: Bechtel National, Inc.; Lockheed Martin Services, Inc.; ATK Launch Systems, Inc.; and SOC, LLC. Agency Report (AR), Tab G.1, Source Selection Decision, at 3.

<sup>2</sup> In 2000, Congress established the NNSA as a "separately organized agency" within the DOE pursuant to Title 32 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512, 953 (1999). NNSA is responsible for the management and security of the nation's nuclear weapons, non-proliferation, and naval propulsion programs. AR, Tab A.6, RFP, at 131.

other portions of the offerors' technical/management proposals; failed to properly consider an alleged conflict of interest; and failed to properly consider an alleged Procurement Integrity Act violation.

We sustain the protests in part and deny them in part.

## BACKGROUND

In December 2011, the NNSA published the solicitation at issue, seeking proposals for award of a single cost-reimbursement contract to consolidate the management and operation (M&O) of NNSA's Y-12 National Security Complex (Y-12) and NNSA's Pantex Plant (Pantex), with an option to subsequently phase in NNSA's Savannah River Tritium Operations (SRTO).<sup>3</sup>

In addition to consolidating the M&O functions, the solicitation provides that the contractor will be responsible for the design and construction of a new uranium processing facility (UPF) at Y-12.<sup>4</sup> At the press conference conducted by NNSA following contract award, the source selection authority (SSA) stated that the total

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<sup>3</sup> Y-12 consists of over 350 buildings located on approximately 800 acres within the Oak Ridge Reservation at Oak Ridge, Tennessee. The primary missions at Y-12 include production of weapons components and parts; stockpile evaluation, maintenance, and surveillance; component dismantlement; and nuclear materials management, storage and disposition. Pantex consists of 638 buildings located on approximately 10,500 acres at the Pantex Plant near Amarillo, Texas. The primary missions at Pantex include the assembly/disassembly of nuclear weapons; high explosives manufacturing and operations; and interim storage of special nuclear material. SRTO consists of 32 buildings located on approximately 29 acres within the Savannah River Site near Aiken, South Carolina. The primary missions at SRTO include managing the tritium supply, providing tritium and non-tritium loaded reservoirs, and extracting tritium from irradiated tritium-producing burnable absorber rods. RFP at 132; Contracting Officer's Statement of Fact and Agency's Memorandum of Law (COSF/MOL) for NPP Protest, Mar. 5, 2013, at 2.

<sup>4</sup> The solicitation stated: "The UPF project is the solution to meeting NNSA's mission need for Enriched Uranium (EU) processing--by consolidating Y-12's EU processing and manufacturing into a modern, high-security facility while eliminating the high cost and risk of maintaining Y-12's aging infrastructure." RFP at 168. With regard to the UPF project, the contractor's responsibilities will include "all construction management elements associated with the construction, start-up, and turnover to operations of the facilities and process for UPF." Id.

estimated contract value, if all options are exercised,<sup>5</sup> is \$22.8 billion. NPP Protest, Jan. 17, 2013, exh. 5, at 3.

Consistent with the differing functions to be performed, the solicitation was divided into two contract line item numbers (CLINs). CLIN 0001 contained the requirements for M&O services, including merger of operations, at the NNSA sites. CLIN 0002 contained the requirements for construction management and other activities related to construction of the UPF facility. The solicitation provided proposal preparation instructions regarding the requirements for each CLIN, established technical/management and cost evaluation factors for each CLIN, and stated that, in performing the evaluation, CLIN 0001 requirements were more important than CLIN 0002 requirements.<sup>6</sup> RFP at 332-33.

With regard to evaluation of the CLIN 0001 requirements, the solicitation established the following technical/management evaluation factors: (A) management approach and cost savings; (B) key personnel and oral presentations; (C) past performance; and (D) corporate experience.<sup>7</sup> RFP at 332. With regard to the evaluated cost for CLIN 0001, the solicitation provided for a “Total Available Fee,”<sup>8</sup> stating that such fee “will be used as the evaluated cost for purposes of the best value determination.”<sup>9</sup> RFP at 336.

With regard to evaluation of the CLIN 0002 requirements, the solicitation established the following technical/management evaluation factors: (A) past performance; (B) project management approach; (C) key personnel and oral

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<sup>5</sup> The contract has a 4-month transition period, a 5-year base period, two 2-year option periods, and a final 1-year option period. RFP at 20.

<sup>6</sup> Section M of the solicitation advised offerors that award would be made on a “best value” basis, and stated: “This acquisition will be conducted using the policies and procedures in FAR Part 15 and DEAR [Department of Energy Acquisition Regulation] Part 915.” RFP at 331.

<sup>7</sup> The solicitation stated that factors A and B for CLIN 0001 were of equal importance and, when combined, were significantly more important than factors C and D. RFP at 333.

<sup>8</sup> Total available fee was defined to be the sum of an offeror’s proposed fixed fee and its proposed performance incentive fee. RFP at 285, 336.

<sup>9</sup> Although not included in the evaluation of cost, the solicitation also provided for the offerors to receive a “Cost Savings Incentive Fee,” which we discuss in more detail below. RFP at 10.

presentations; and (D) corporate experience.<sup>10</sup> RFP at 334. With regard to the evaluated cost for CLIN 0002, the solicitation provided for a “Maximum Available UPF Fee,”<sup>11</sup> stating that such fee “will be used as the evaluated cost for purposes of the best value determination.” RFP at 338.

Notwithstanding the solicitation’s limitation of evaluated cost to offerors’ fees, the agency states, “One of the principal purposes of this consolidation [of M&O operations] is to realize cost savings.”<sup>12</sup> COSF/MOL for NPP Protest at 3; COSF/MOL for INPS Protest at 2. Consistent with this agency statement, each offeror was required to propose identifiable cost savings associated with its particular approach to performing the CLIN 0001 M&O requirements, and the solicitation provided that offerors’ proposed cost savings would be evaluated under the CLIN 0001 evaluation factor, management approach/cost savings.<sup>13</sup> Specifically, section M of the solicitation stated:

The Government will evaluate and assess the feasibility and quality of the offeror’s proposed management approach, including cost savings approach, while maintaining effective security and mission deliverables, utilizing the information provided for this Criterion in Section L, L-14(a), Criterion A, Management Approach and Cost Savings.<sup>14</sup> **The Government will also evaluate and assess the feasibility and the size of the proposed cumulative savings to the Government** which is equal to the cumulative cost reduction proposal

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<sup>10</sup> The solicitation stated that factors A and B for CLIN 0002 were of equal importance and, when combined, were significantly more important than factors C and D. RFP at 334.

<sup>11</sup> The solicitation defined an offeror’s maximum available UPF fee as the offeror’s proposed fee percentage applied to “the Government’s notional cost for UPF of \$5.6B[illion].” RFP at 286, 338.

<sup>12</sup> Prior to issuing the RFP, the agency contracted with a consultant to develop what the agency describes as “an all-inclusive historical estimate of \$895,000,000 (\$895M) for estimated cost savings over ten years.” COSF/MOL for NPP Protest at 3. Copies of this estimate of cost savings from this consolidation effort were made available to the offerors. Id.

<sup>13</sup> As noted above, management approach/cost savings was one of the two most important CLIN 0001 evaluation factors, and CLIN 0001 was more important than CLIN 0002.

<sup>14</sup> Section L, L-14(a) of the solicitation required each offeror to describe its particular approach to performing various aspects of the solicitation requirements. RFP at 275.

savings minus the contractor's total share in savings over the entire period of performance of the Contract. [<sup>15</sup>]

RFP at 334 (emphasis added).

On or before the March 13, 2012 closing date, initial proposals were submitted by three offerors: CNS, NPP, and INPS. Each offeror proposed significant levels of cost savings that each asserted would be generated by its particular approach to performing the consolidated M&O requirements.<sup>16</sup> Specifically, NPP proposed cost savings of approximately [redacted] billion flowing from the consolidation; CNS proposed cost savings of approximately \$3.27 billion; and INPS proposed cost savings of approximately [redacted] billion.<sup>17</sup> AR, Tabs E.10 at 6, E.11 at 6, E.12 at 6, CSAC Reports; Tab E.1, Final SEB Report, at 18-19. Thereafter, the agency's cost savings advisory committee (CSAC) performed an evaluation and assessment as to the feasibility and size of each offeror's cost savings initiatives.<sup>18</sup>

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<sup>15</sup> As noted above, the solicitation provided for a "Cost Savings Incentive Fee." Specifically, offerors could propose a share ratio applicable to their proposed cost savings (up to a maximum of 40 percent for two years) and, to the extent of that proposed ratio, share in the savings achieved. RFP at 10, 63-68.

<sup>16</sup> Each offeror proposed various cost saving initiatives. Specifically, CNS proposed [redacted] initiatives (including sub-initiatives), NPP proposed [redacted] initiatives (including sub-initiatives), and INPS proposed [redacted] initiatives (with [redacted] sub-initiatives). AR, Tab E.9, CSAC Spreadsheet; Hearing Transcript (Tr.) at 873-75. The majority of proposed cost savings resulted from workforce reductions. NNSA Post-Hearing Brief at 14.

<sup>17</sup> By way of comparison, each offeror's proposed cost savings were several times greater than its evaluated fees--and evaluated fees were the only cost elements considered in the agency's best value determination. Specifically, while CNS proposed cost savings of \$3.27 billion, its evaluated fees were only \$725.7 million. While NPP proposed cost savings of [redacted] billion, its evaluated fees were only [redacted] million. While INPS proposed cost savings of [redacted] billion, its evaluated fees were only [redacted] million. AR, Tabs E.10 at 6, E.11 at 6, E.12 at 6, CSAC Reports; Tab E.1, Final SEB Report, at 18-19, 21; Tab G.1, Source Selection Decision, at 7.

<sup>18</sup> The agency states that the CSAC "was established to specifically review the proposed cost savings initiatives," NNSA Post-Hearing Brief, Apr. 2, 2013, at 16, further stating that the CSAC "consisted of financial management specialists (accountants), persons familiar with operations at Y-12 and Pantex, and a consultant with substantial background in merger activities." COFL/MOL for NPP Protest at 19. The source evaluation board (SEB) chair referred to the CSAC members as "the experts." Hearing Transcript (Tr.) at 1079-80.

Specifically, the CSAC evaluated the reasonableness of each proposed cost savings initiative, and assigned the associated savings to one of the four following categories: reasonable,<sup>19</sup> partially reasonable,<sup>20</sup> not reasonable,<sup>21</sup> or cannot determine.<sup>22</sup> Based on the CSAC’s assessment of each proposed initiative,<sup>23</sup> the CSAC calculated the total amount and percentage of each offeror’s proposed cost savings for each of the four categories. For example, with regard to CNS’s \$3.27 billion of proposed cost savings, the CSAC concluded as follows:

	<b>Reasonable</b>	<b>Partially Reasonable</b>	<b>Not Reasonable</b>	<b>Cannot Determine</b>	<b>Total</b>
<b>Amount</b>	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
<b>Percentage</b>	[redacted]	[redacted]	[redacted]	[redacted]	100%

AR, Tab E.11 at 6.

<sup>19</sup> The CSAC defined a “reasonable” cost savings initiative, stating in part: “The overall initiative is clearly documented and the process of identifying and realizing the savings appears reasonable.” AR, Tab E.11, CSAC Final Report for CNS, at 5.

<sup>20</sup> The CSAC defined a “partially reasonable” cost savings initiative, stating in part: “The initiative is at least reasonably well documented and the process of identifying and realizing savings appears partially reasonable; however some (but not a substantial amount of) uncertainty may still exist.” AR, Tab E.11, CSAC Final Report for CNS, at 6.

<sup>21</sup> The CSAC defined a “not reasonable” cost savings initiative, stating in part: “The initiative is reasonably well documented, but the process of identifying and realizing savings does not appear at least partially reasonable, and/or the initiative has previously been completed at site and is thus no longer applicable.” AR, Tab E.11, CSAC Final Report for CNS, at 6.

<sup>22</sup> The CSAC defined a “cannot determine” cost savings initiative, stating in part: “The initiative is not well documented and the process of identifying and realizing savings is not clear.” AR, Tab E.11, CSAC Final Report for CNS, at 6.

<sup>23</sup> In evaluating the cost savings initiatives, the CSAC prepared a substantial amount of supporting documentation, including spreadsheets on which it summarized each proposed initiative, identified the specific amount and type of savings associated with each initiative, made a reasonableness assessment for each initiative, and provided a narrative explanation regarding the basis for the assessment. AR, Tab E.9, Cost Savings Summary.

As shown above, the largest portion of CNS's proposed cost savings (approximately **[redacted]** billion, making up **[redacted]** percent) was evaluated as being "partially reasonable."<sup>24</sup> However, at the hearing our Office conducted in connection with these protests,<sup>25</sup> the CSAC chair testified that the committee was unable to quantify, in any way, the portion of any offeror's "partially reasonable" cost savings that were reasonable. Tr. at 903-05, 947-60; see also Tr. at 1127. Specifically, the CSAC chair testified that the committee could not even determine whether "more than half, or less than half" of any offeror's "partially reasonable" cost savings were reasonable. Tr. at 958-60.

The basis for the CSAC's inability to meaningfully assess the size and feasibility of the majority of the proposed cost savings appears to be documented in the CSAC's own evaluation spreadsheets. AR, Tab E.9. Specifically, for more than **[redacted]** of CNS's **[redacted]** cost saving initiatives, the CSAC spreadsheets contained narratives that are similar or identical to the following:

Overall initiative is NOT<sup>[26]</sup> clearly documented. . . . Based on the language in the initiative, we are not able to determine reasonableness of FTE reductions.<sup>[27]</sup> The language in this initiative reads like soft savings.<sup>[28]</sup>

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<sup>24</sup> This was also true for NPP's and INPS's proposed cost savings. Specifically, the CSAC ultimately evaluated as "partially reasonable" approximately **[redacted]** billion (**[redacted]** percent) of NPP's proposed cost savings and approximately **[redacted]** billion (**[redacted]** percent) of INPS's proposed cost savings. AR, Tab E.12 at 6, Tab E.10B at 6.

<sup>25</sup> In resolving this protest, GAO conducted a 4-day hearing, during which testimony was provided by the agency's SSA, the SEB chair, the CSAC chair, the contracting officer, the head of the contracting activity, and an investigator who responded to NPP's Procurement Integrity Act allegations.

<sup>26</sup> Capitalization in original.

<sup>27</sup> Most of the narratives regarding lack of documentation and/or the CSAC's inability to determine reasonableness refer to proposed reduction of full time equivalent (FTE) personnel; a few refer to other types of cost savings. For example, the CSAC also stated "we are unable to determine if [CNS's] reduction in **[redacted]** costs are reasonable." See AR, Tab E.9, Cost Savings Summary, at Line 72.

<sup>28</sup> The solicitation expressly excluded certain types of proposed cost savings from consideration, stating: "Proposed savings that will not be considered creditable by the Contracting Officer will include . . . soft savings." RFP at 70-71. The solicitation further defined "soft savings" as:

(continued...)

AR, Tab E.9, Cost Savings Summary, at Line 46. See also Lines 48, 50-52, 54, 57-60, 64, 66-73, 75, 84-85, 87-89, 92-95, 97, 100, 102-05.

Following evaluation of initial proposals, the agency conducted two rounds of discussions with the offerors.<sup>29</sup> Although the record shows that significant portions of the proposed cost savings were “NOT clearly documented” or may reflect “soft savings,” the agency did not seek additional information from the offerors regarding those concerns.<sup>30</sup> At the hearing, the SEB chair testified that the agency did not seek additional information regarding the offerors’ inadequate documentation because the unsupported savings initiatives represented “a large portion of the savings” and the SEB “did not believe we could get the information.”<sup>31</sup> Tr. at 1118-20.

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(...continued)

(i) savings that cannot be demonstrated to reduce the bottom line operating costs. . .

(ii) savings that are intangible and consequently difficult to measure . . .  
or

(iii) cost avoidances that cannot be demonstrated to lower cost of products/services based on a comparison against baseline . . . .

RFP at 70.

<sup>29</sup> The second round of discussions followed the agency’s amendment of the solicitation to include protective force services, which had not previously been included in the statement of work. The solicitation was amended following a security breach at the Y-12 facility that occurred in July 2012.

<sup>30</sup> The CSAC worksheets also reflected concern that several of the initiatives might require implementation costs. During discussions, the agency did seek information regarding implementation costs. AR, Tab E.12, Proposal Revision Summary, at 1-3, 6-7.

<sup>31</sup> Specifically, during the hearing, the following exchange took place:

GAO: You didn’t think it was possible to get more documentation for the cost initiatives . . . for which there was insufficient documentation? You didn’t believe it was possible, so you didn’t ask. Is that correct?

SEB Chair: I did not think that they could give us the information that would reasonably change . . . our view. Especially on all the initiatives in there. There may have been one or two, but we would have to go back and ask for all 161 initiatives from these offerors.

Tr. at 1120.

The CSAC prepared final reports for each offeror’s proposed cost savings and provided those reports to the SEB. AR, Tabs E.10A, E.10B, E.11, E.12. At the GAO hearing, the SEB chair acknowledged that the SEB did not conduct any additional documented analysis of the offerors’ proposed cost savings, and further acknowledged that the SEB did not disagree with the CSAC’s classifications of cost savings. Tr. at 1079-80, 1092. Despite accepting the CSAC’s classifications, the SEB, nonetheless, designated as feasible all of the offerors’ proposed savings that had been identified as either “partially reasonable” or “cannot determine”—excluding only the portion of cost savings the CSAC had evaluated as “not reasonable.” AR, Tab E.1, Final SEB Report, at 18-19; COSF/MOL for NPP Protest at 20-21; COSF/MOL for INPS Protest at 16.

In addition to its conclusions regarding the feasibility of the offerors’ proposed cost savings, the SEB assigned the following adjectival ratings to the offerors’ proposals:<sup>32</sup>

<b>CLIN 0001</b>	<b>NPP</b>	<b>CNS</b>	<b>INPS</b>
<b>Mgmt. App./Cost Savings</b>	Excellent	Excellent	Good
<b>Key Personnel/Orals</b>	Excellent	Excellent	Excellent
<b>Past Performance</b>	Satisfactory	Satisfactory	Excellent
<b>Corp. Experience</b>	Excellent	Good	Good

<b>CLIN 0002</b>	<b>NPP</b>	<b>CNS</b>	<b>INPS</b>
<b>Past Performance</b>	Satisfactory	Satisfactory	Good
<b>Project Mgmt. App.</b>	Excellent	Good	Good
<b>Key Personnel/Orals</b>	Excellent	Good	Good
<b>Corp. Experience</b>	Excellent	Excellent	Excellent

AR, Tab E.1, Final SEB Report, at 15.

As shown above, the SEB rated NPP’s proposal higher than CNS’s proposal under three of the evaluation factors, and did not rate NPP’s proposal lower than CNS’s under any factor.

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<sup>32</sup> In evaluating proposals under the technical/management evaluation factors, the agency identified strengths, significant strengths, weaknesses, significant weaknesses, and deficiencies in each offeror’s proposal. Based on these assessments the agency assigned adjectival ratings of excellent, good, satisfactory, and less than satisfactory for each evaluation factor. AR, Tab B, Source Selection Plan, at 10-11.

Based on its evaluation, the SEB prepared a final report, dated November 20, 2012, and provided that report to the initial SSA for this procurement.<sup>33</sup> The subsequent SSA states that, following his appointment on December 12, he reviewed the SEB report and performed his own assessment of the proposals. AR, Tab G.1, Source Selection Decision, at 7. Based on his own assessment, the SSA made various changes to the SEB's evaluation.

First, contrary to the conclusions of both the CSAC and the SEB, the SSA considered all of the cost savings proposed by every offeror to be feasible--including cost savings that had been categorized as "not reasonable." COSF/MOL for NPP Protest at 21; COSF/MOL for INPS Protest at 16; Tr. at 356. At the hearing, the SSA acknowledged that he did not perform any independent cost savings analysis, and further testified that he was unaware that various portions of the proposed cost savings had been evaluated by the CSAC (the agency's own "financial management specialists") as "not reasonable," "partially reasonable," or "cannot determine."<sup>34</sup> Tr. at 350, 386-87.

Next, the SSA made changes to the adjectival ratings that had been assigned by the SEB, increasing CNS's ratings under each of the three criteria where NPP's proposal had received higher ratings. Specifically, the SSA raised CNS's rating from good to excellent under the CLIN 0001 evaluation factor, corporate experience; raised CNS's rating from good to excellent under the CLIN 0002 evaluation factor, project management approach; and raised CNS's rating from good to excellent under the CLIN 0002 evaluation factor, key personnel and orals. Following the SSA's changes, NPP's and CNS's proposals were both rated excellent under all of the evaluation factors except for past performance.<sup>35</sup>

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<sup>33</sup> On July 5, 2011, NNSA's Administrator appointed Neile Miller, NNSA's Principle Deputy Administrator, as SSA; Miller served in that position for nearly a year and a half, until December 12, 2012. On that date--eight days before the source selection decision was executed--NNSA's Administrator appointed Michael Lempke, NNSA's Associate Principle Deputy Administrator, to replace Miller as the SSA. AR, Tab G.4, Memorandum from NNSA Administrator to Lempke, Dec. 12, 2012. Lempke signed the source selection decision on December 20.

<sup>34</sup> The SSA testified that he did not review the CSAC reports. Tr. at 200.

<sup>35</sup> The agency downgraded both CNS's and NPP's proposals under the past performance evaluation factor because of the July 2012 security breach at Y-12, noted above, which was attributed to both partners of the M&O contractor for the Y-12 facility at that time--a partnership comprised of Babcock & Wilcox Company and Bechtel National, Inc. As noted above, Babcock & Wilcox is a member of the NPP team and Bechtel is a member of the CNS team. COSF/MOL for NPP Protest at 3, 7.

In conjunction with his reevaluation, the SSA concluded that CNS's proposal should be credited with various significant strengths that had not previously been identified by the SEB. Specifically, under the CLIN 0001 evaluation factor, management approach/cost savings, the SSA assigned CNS's proposal a significant strength for its organizational structure, noting that CNS's [redacted]. AR, Tab G.1, Source Selection Decision, at 8-17; COSF/MOL for NPP Protest at 10. Under another CLIN 0001 evaluation factor, corporate experience, the SSA assigned CNS's proposal a significant strength for its corporate experience in connection with the consolidation of two other DOE facilities. Under the CLIN 0002 evaluation factor, project management approach, the SSA assigned CNS's proposal [redacted]. Id. The SSA made no changes to the SEB's evaluation of either NPP's or INPS's proposals.

After making the changes to the SEB's evaluation, the SSA selected CNS for award, identifying various "discriminators" that he viewed as favoring CNS. On January 8, NNSA issued a press release, announcing the award to CNS and asserting that the award "will save \$3.27 billion in taxpayer dollars over the next decade." NPP Protest, Jan. 17, 2013, exh. 38, NNSA Press Release. These protests followed.

## DISCUSSION

NPP and/or INPS protest that the agency failed to comply with the FAR's requirements for cost realism analysis; failed to evaluate cost savings in a manner consistent with the terms of the solicitation; failed to evaluate other portions of the offerors' technical/management proposals; failed to properly consider an alleged conflict of interest; and failed to properly consider an alleged Procurement Integrity Act violation. As discussed below, we sustain the protests on the basis that the agency failed to evaluate proposed cost savings in a manner consistent with the solicitation's stated evaluation factors. We do not find any other independent basis for sustaining the protests.

### Cost Realism

First, the protesters assert that the agency was required to perform a cost realism analysis pursuant to the provisions of FAR § 15.305(a)(1)<sup>36</sup> and § 15.404(d)(2).<sup>37</sup>

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<sup>36</sup> FAR § 15.305(a)(1) states: "When contracting on a cost-reimbursement basis, evaluations shall include a cost realism analysis to determine what the Government should realistically expect to pay for the proposed effort, the offeror's understanding of the work, and the offeror's ability to perform the contract."

<sup>37</sup> FAR § 15.404(d)(2) states: "Cost realism analyses shall be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror."

These assertions are not timely raised.

In response to the assertions regarding the FAR cost realism requirements, the agency maintains that the solicitation expressly advised offerors that only offerors' fees would be "used as the evaluated cost for purposes of the best value determination." RFP at 336, 338. Accordingly, the agency maintains that the solicitation advised offerors, prior to submitting their proposals, that the agency would not perform a cost realism analysis and, therefore, their protests regarding the applicability of the FAR cost realism provisions above constitute challenges to the terms of the solicitation. The agency notes that GAO's Bid Protest Regulations require that protests based on alleged solicitation improprieties must be filed prior to submission of proposals. 4 C.F.R. § 21.2(a)(2) (2013). Accordingly, the agency maintains that, to the extent these post-award protests are based on the agency's failure to comply with the above-referenced FAR provisions, they are untimely.

Notwithstanding its timeliness assertion, the agency also maintains that, although the contract at issue is a cost-reimbursement contract,<sup>38</sup> it "is not a cost-reimbursement contract as the term is used for purposes of a cost realism analysis." COSF/MOL for NPP Protest at 29. In this regard, the agency asserts that "the costs of M&O contracts are determined by Congress, which each year appropriates on a line item basis the budgets for M&O sites." NNSA Legal Memorandum Regarding Cost Realism, Apr. 2, 2013, at 3. The agency further maintains that, because Congress "sets the spending ceiling for DOE/NNSA's M&O-operated sites in its annual budget," which creates a situation that differs from other cases involving cost-reimbursement contracts, "the spending ceiling is not based on evaluated contractor proposals." COSF/MOL for NPP protest at 29. The agency adds that "the contractor is expected to fully expend all funds allocated" and, further states, "[t]here is an expectation that the amount of work that an M&O contract[or] could be performing always will exceed the budgeted amount." Id.

We agree with the agency that the terms of this solicitation reasonably put offerors on notice that the agency would not perform a cost realism analysis addressing the total cost of performing this contract. Rather, the RFP provided that evaluated fees "will be used as the evaluated cost for purposes of the best value determination."<sup>39</sup> RFP at 336. Accordingly, we agree that the protesters' assertions regarding the applicability of FAR § 15.305 and § 15.404(d)(2)(a)(1) constitute challenges to the terms of the solicitation, which they were required to raise prior to submitting their

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<sup>38</sup> The solicitation states: "The Government contemplates award of a performance-based management and operation cost reimbursement contract." RFP at 266.

<sup>39</sup> As noted above, the solicitation provided that proposed cost savings would be evaluated under the technical/management evaluation factors.

proposals. 4 C.F.R. § 21.2(a)(2). Therefore, our decision here will not consider the protests to the extent they rely on the cited FAR provisions.<sup>40</sup>

### Cost Savings Evaluation

Next, NPP and INPS protest that the agency's evaluation of the offerors' proposed cost savings failed to comply with the provisions of the solicitation. More specifically, the protesters assert that the agency's source selection decision ignored section M of the solicitation wherein the agency committed to assess the feasibility and size of the each offeror's proposed cost savings. We agree.

It is a fundamental procurement principle that agencies must evaluate proposals consistent with the terms of a solicitation and, while evaluation of offerors' proposals is generally a matter within the procuring agency's discretion, our Office will question an agency's evaluation where it is unreasonable, inconsistent with the solicitation's stated evaluation criteria, or undocumented. Excelis Systems Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 at 5; Public Commc'ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 17. Contracting officials do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another without informing offerors of the changed plan. Kumasi Ltd./Kukawa Ltd. et al., B-247975.7 et al., May 3, 1993, 93-1 CPD ¶ 352 at 7. Further, while source selection officials may reasonably disagree with the evaluation ratings and results of lower-level evaluations, they are nonetheless bound by the fundamental requirements that their independent judgments be reasonable, consistent with the stated evaluation factors, and adequately documented. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 16; AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 8-9.

Here, in evaluating offerors' proposals under one of the most heavily weighted evaluation factors, management approach/cost savings,<sup>41</sup> the solicitation expressly stated that the agency: (1) would evaluate the feasibility and quality of an offeror's management/cost savings approach, and (2) would "also evaluate and assess the feasibility and the size of the proposed cumulative savings to the Government." RFP at 334. The record establishes that the SSA's source selection decision failed

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<sup>40</sup> Nothing in this decision should be construed as reflecting this Office's concurrence with the agency's assertion that the cost reimbursement contract contemplated by this, or any similar, solicitation is exempt from the FAR's cost realism requirements.

<sup>41</sup> As noted above, the solicitation provided that management approach/cost savings was one of the two most important evaluation factors for CLIN 0001, and that CLIN 0001 was more important than CLIN 0002.

to reflect any meaningful assessment of the feasibility and size of proposed cost savings.

As discussed above, although he performed no independent cost savings analysis, the SSA elected to consider feasible every cost savings dollar proposed by every offeror--effectively ignoring the documented contrary conclusions of the agency's own financial management specialists. COSF/MOL for NPP Protest at 21; COSF/MOL for INPS Protest at 16; Tr. at 356. Specifically, in addition to considering "feasible" portions of the offerors' cost savings that the CSAC had specifically determined to be "not reasonable," the SSA did not consider the CSAC's documented conclusion that a significant portion of the awardee's proposed cost savings were "NOT clearly documented," appeared to constitute "soft savings," or were otherwise unsupported.<sup>42</sup> See AR, Tab E.9, Cost Savings Summary. Further, notwithstanding the CSAC's documented concerns regarding inadequate support, the agency declined to seek additional information from the offerors during discussions.

In reviewing this matter, we have considered, and rejected, various agency arguments and rationalizations purporting to justify the agency's actions. By way of overview, the agency asserts that (1) the solicitation did not require quantification of feasible cost savings; (2) requests for additional information from the offerors were not warranted; (3) the solicitation's "gateway" provision eliminated the requirement to consider the feasibility and size of proposed cost savings; and (4) the protesters were not prejudiced by the agency's actions. We discuss each of these assertions below.

First, the agency maintains that the SSA appropriately determined that all of the cost savings proposed by all of the offerors were feasible because the solicitation "never contemplated that the agency would attempt to quantify--to the point where a specific dollar amount was identified for each offeror--the proposed cost savings to be achieved." NNSA Post-Hearing Brief, Apr. 2, 2013, at 5.

We agree that the solicitation did not require the agency to calculate a "specific dollar amount" of feasible cost savings for each offeror. However, by providing that the agency would "evaluate and assess the feasibility and the size of the proposed cost savings," the agency was required, at a minimum, to make a reasonable assessment of the relative magnitude of feasible cost savings proposed by each offeror. That obligation was not met by the SSA's blanket conclusion that all proposed cost savings by every offeror were feasible, nor by the SEB's conclusion that all proposed cost savings, except those the CSAC had specifically determined to be unreasonable, were feasible. While we agree that something less than

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<sup>42</sup> As noted above, the SSA did not review the CSAC reports. Tr. at 200.

calculation of a “specific dollar amount” was required, the unsupported assumptions by both the SEB and the SSA were inadequate and unreasonable.

Next, with regard to its failure to seek additional information from the offerors during discussions, the agency maintains that its inaction was appropriate because “we would have [had] to go back and ask for [information for ] all 161 initiatives” and, in any event, the agency “did not think [the offerors] could give us the information.” Tr. at 1120.

Regarding the amount of additional information at issue, the agency has provided no explanation as to why it believes it would have had to seek additional information for all 161 initiatives--since the CSAC clearly identified a portion of those initiatives as being reasonable and supported. With regard to the agency’s contention that the offerors would be unable to provide additional supporting information, we think the agency’s contention is illogical. On the one hand, the agency maintains that the cost savings are feasible while, on the other hand, it contends that the very offerors who proposed those “feasible” cost savings will be unable to provide further explanation and support for them. Finally, the agency’s assertion regarding the unavailability of supporting cost savings information appears to be inconsistent with the record here. As noted above, the majority of the offerors’ proposed cost savings relate to workforce reductions. NNSA Post-Hearing Brief at 14. In this regard, the SSA’s source selection decision specifically states that, “under the M&O model . . . personnel/HR costs are specific, hard numbers that are base-lined and traceable.” AR, Tab G.1, Source Selection Decision, at 11. On the record before us, we find unpersuasive the agency’s position that requests for additional information from the offerors were unwarranted.

Next, the agency maintains that the solicitation’s “gateway” provision effectively excused the agency from performing a meaningful pre-award analysis of the offerors’ proposed cost savings. NNSA Post-Hearing Brief at 17, 20; see RFP at 21. Under this provision, in order to be eligible for exercise of a contract option, the awardee must have achieved, by the end of the third year, at least 80 percent of the cost savings that it proposes to achieve by that time.<sup>43</sup> The agency maintains that the SSA reasonably concluded that all offerors’ proposed cost savings were feasible because the offerors knew that the contract will not be extended beyond the 5-year base period if the awardee fails to achieve a significant portion of the savings proposed.<sup>44</sup> Accordingly, the agency maintains that the solicitation’s

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<sup>43</sup> During the transition period, the awardee will submit a merger transformation plan that includes a timeline for projected cost savings. RFP at 21, 68-73.

<sup>44</sup> At the GAO hearing, the SEB chair acknowledged that, in light of the solicitation’s “gateway” provision, the agency’s determination that less than 80 percent of any offeror’s proposed cost savings were feasible “would have been a significant issue.” Tr. at 1155. In responding to a follow-up question as to whether such a

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“gateway” provision established a safeguard against the offerors’ proposals of unrealistic cost savings. We disagree.

Even if the agency enforces the solicitation’s “gateway” provision,<sup>45</sup> the safeguard on which the agency relies has no effect until the end of the five-year base period, when the agency may decline to exercise a contract option. At that point, the agency will have spent a significant portion of the \$22.8 billion estimated value of this contract. The purpose for performing the required cost savings evaluation before award is to provide some level of confidence that the source selection decision reflects the savings that are most likely to be achieved. Accordingly, the agency’s reliance on the solicitation’s “gateway” provision, which takes effect only after five years of contract performance, does not absolve the agency of the requirement to meaningfully assess the feasibility and size of the proposed cost savings prior to award.

Finally, the agency asserts that there is no prejudice to the protesters because they were all treated equally. Among other things, the agency contends that NPP actually benefitted from the agency’s approach because it was **[redacted]**. See AR, Tabs E.11 at 6, E.12 at 6.

On the record here, there is no reasonable basis to determine whether little, much, or most of each offeror’s proposed cost savings are, in fact, feasible. For example, the record provides virtually no basis for determining that more than **[redacted]** percent of the awardee’s proposed cost savings are feasible.<sup>46</sup> On the record here, we have no basis to determine whether a meaningful analysis, based on additional information, would have established that significantly higher portions of the protesters’ cost savings were feasible. Accordingly, we reject the agency’s assertion that there is no potential prejudice to the protesters.

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determination would have rendered a proposal unacceptable, the SEB chair responded, “we certainly wouldn’t want to set the contractor up for failure.” Tr. at 155-56.

<sup>45</sup> It has been reported that NNSA recently waived similar contract provisions. See, e.g., Douglas P. Guarino, *NNSA Defends Contract Extensions But Congressional Scrutiny Expected*, Government Executive, Mar. 12, 2013, at [www.govexec.com/contracting/2013/03](http://www.govexec.com/contracting/2013/03).

<sup>46</sup> The CSAC evaluated **[redacted]** percent of CNS’s proposed savings as reasonable. AR, Tab E.11 at 6. The CSAC similarly evaluated **[redacted]** percent of INPS’s proposed savings and **[redacted]** percent of NPP’s proposed savings as reasonable. AR, Tab E.12 at 6, Tab E.10B at 6. Neither the SEB nor the SSA performed any further documented analysis that justified increasing those amounts.

In conclusion, we sustain the protests based on the agency's failure to reasonably evaluate the feasibility and size of the offerors' proposed cost savings, as required by the terms of the solicitation.

#### Other Challenges to the Evaluation of Technical/Management Proposals

In addition to challenging the agency's evaluation of cost savings pursuant to the management approach/cost savings evaluation factor, the protesters challenge other aspects of the agency's evaluation of the technical/management proposals. Among other things, the protesters challenge the agency's evaluation with regard to past performance, corporate experience and key personnel/oral presentations. As discussed below, we do not find any independent basis to sustain the protests as a result of these additional allegations.<sup>47</sup>

For example, with regard to past performance, INPS asserts that the agency's rating of CNS's proposal as "satisfactory" was unreasonable due to "the egregious security breach that occurred on Bechtel's watch at the Y-12 complex during the summer of 2012."<sup>48</sup> INPS Comments on Agency Report, Mar. 18, 2013, at 9. In challenging the agency's evaluation of CNS's past performance, INPS also references Bechtel's allegedly poor performance on contracts at the Hanford Waste Treatment Plant and Los Alamos National Laboratory. INPS Protest, Jan. 25, 2013, at 16-19. Overall, INPS asserts that, upon consideration of this past performance information, "CNS should have been eliminated from further consideration for award."<sup>49</sup> Id.

As a general matter, evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for that

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<sup>47</sup> In light of our conclusion that the agency failed to meaningfully evaluate the offerors' proposed cost savings under the management approach/cost savings evaluation factor, along with our recommendation below that the agency seek additional information and reevaluate proposals under that factor, we believe the basis for the agency's evaluation under that factor may change. Accordingly, we do not further consider the protesters' allegations challenging the agency's evaluation under the management approach/costs savings evaluation factor.

<sup>48</sup> As noted above, Bechtel was a team member of the Y-12 M&O contractor at the time of the security breach, and is a CNS team member in this procurement.

<sup>49</sup> NPP's protest also initially challenged the agency's evaluation of CNS's past performance. Following receipt of the agency report, which established that the past performance evaluations of both NPP and CNS were negatively affected due to their respective team members' involvement in the July 2012 security breach, NPP withdrew that portion of its protest.

of the agency. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3; OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. In assessing past performance, it is proper for the agency's evaluation to reflect the totality of an offeror's prior contract performance, and an agency may reasonably assign a satisfactory rating to an offeror despite the fact that portions of its prior performance have been unsatisfactory. See, e.g., Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 20-24.

Here, the agency's contemporaneous evaluation record shows that, in evaluating CNS's past performance, the agency considered information regarding 24 prior contracts that were relevant to the CLIN 0001 requirements, and 14 prior contracts relevant to the CLIN 0002 requirements. AR, Tab E.3, Final SEB Report attach. C, at 37-39, 53-54. In performing its evaluation, the SEB downgraded CNS's past performance based on various weaknesses reflected in the CNS team members' performance of some of those contracts, including those identified in INPS's protest. Nonetheless, the SEB summarized the totality of CNS's past performance information relevant to the CLIN 0001 M&O requirements, stating:

[T]he past performance record for CNS indicates that they received a majority of good to outstanding ratings across all questions for protecting and maintaining security of high hazard materials including **[redacted]**.

Id. at 37.

With regard to the July 2012 security breach, the SEB further stated: "Government Officials have noted significant improvements in security [at Y-12] since the July 28, 2012 incident." Id.

Similarly, the agency summarized the totality of CNS's past performance information relevant to the CLIN 0002 construction-related requirements, stating:

CNS generally received good ratings in response to the PPQs [past performance questionnaires]. Written comments by clients on PPQs indicated they were highly satisfied with the results of the work and interactions with CNS team members.

Id. at 52.

Based on our review of the record here, we find no basis to question the agency's evaluation of CNS's past performance. The record clearly shows that the agency performed a comprehensive review of relevant past performance information, properly considered and downgraded CNS with regard to negative past performance, but found CNS's overall past performance to be satisfactory. INPS's

protest challenging the evaluation reflects mere disagreement with the agency's judgment and provides no basis for sustaining the protest.

By way of another example, NPP and INPS challenge the SSA's reliance on his personal knowledge in evaluating CNS's proposal under the CLIN 0001 evaluation factor, corporate experience. As noted above, the SSA raised CNS's rating from good to excellent under that factor based on the SSA's knowledge of Bechtel's involvement with DOE/NNSA's prior consolidation of the Bettis Atomic Power Laboratory (BAPL) and the Knolls Atomic Power Laboratories (KAPL). At the GAO hearing, the SSA testified that the BAPL/KAPL consolidation was the only other time NNSA has consolidated the operations of two M&O contractors, that he was "the federal site office manager charged with overseeing the consolidation," and that, as such, he "had a unique vantage point." Tr. at 539-40. In performing his independent evaluation, the SSA concluded that Bechtel's experience as "the sole contractor" responsible for the BAPL/KAPL consolidation constituted a significant strength under the corporate experience evaluation factor. AR, Tab G.1, Source Selection Decision, at 13. The protesters assert that it was improper for the SSA to rely on his personal knowledge of CNS's prior experience. We disagree.

Our Office has recognized that, in evaluating an offeror's past performance, an agency not only may, but must, consider certain information that is "simply too close at hand" to ignore. See International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. For example, we have held that, in evaluating past performance, an agency must consider an offeror's performance of a similar contract about which the contracting officer or agency evaluators had personal knowledge. See, e.g., GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14; G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 4-6.

We see no logical basis for requiring an agency to consider "close at hand" information when evaluating an offeror's past performance, but precluding it from similarly considering such information in evaluating an offeror's corporate experience, as the protesters urge here.<sup>50</sup> Based on the record presented, we find no basis to question the substance of the SSA's assessment that Bechtel's unique experience with the prior consolidation of two M&O contracts was a positive aspect of CNS's corporate experience. Accordingly, the protesters' assertions that the SSA improperly evaluated CNS's proposal with regard to that matter is denied.

Finally, the protesters challenge various other aspects of the agency's evaluation of the offerors' proposals under the technical/management evaluation factors,

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<sup>50</sup> We recognize that the specific terms of a given solicitation could properly limit such consideration. Here, protester has identified no such limiting terms, and we have found none.

including the relative qualifications of key personnel, the offerors' respective corporate structures, and the offerors' approaches to risk shifting.

The evaluation of an offeror's technical proposal is a matter within the agency's broad discretion and our Office will not substitute our judgment for that of the agency but, rather, will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

Here, we have considered all of the protesters' additional challenges to the agency's evaluation under the technical/management evaluation factors and, considering the agency's broad discretion, we find no additional bases for sustaining the protests.

#### Conflict of Interest

Next, NPP asserts that the contracting officer failed to properly consider a potential organizational conflict of interest (OCI) based on CNS's proposal to subcontract the construction of the UPF facility to **[redacted]**.<sup>51</sup> The agency maintains that consideration of that issue prior to award would have been premature because the RFP did not require offerors to propose a construction approach, the UPF design is not yet complete,<sup>52</sup> and the agency has yet to determine how it will procure construction of the UPF facility. We reject NPP's assertion that the agency was required to address and resolve the alleged potential OCI prior to selecting CNS for award.

Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a); 9.505. However, our Office has expressly concluded that OCIs that may arise under subsequent awards are properly analyzed at the time of those subsequent actions. Axiom Res. Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 6-7; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5,

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<sup>51</sup> During discussions, CNS described **[redacted]**. AR, Tab F.12, CNS Response to Discussions, at 3.

<sup>52</sup> The solicitation advised offerors that design of the UPF facility was 60 percent complete. RFP at 286; see also Tr. at 618.

Nov. 28, 2006, 2006 CPD ¶ 185 at 17-18; see also QinetiQ North America, Inc., B-405008, B-405008.2, July 27, 2011, 2011 CPD ¶ 154 at 7-12.

Here, the solicitation advised offerors that the awardee will be responsible for design of the UPF facility under CLIN 0001, and that it will have construction management responsibility under CLIN 0002. RFP at 168. The RFP did not require offerors to propose a particular approach to performing the construction of the UPF facility. Nonetheless, CNS's proposal stated that--subject to NNSA's subsequent approval--it intends to subcontract construction of the UPF **[redacted]**.

The agency maintains that its evaluation of CNS's proposal was not contingent on this particular approach, noting that construction of the UPF may subsequently be accomplished through either a prime contract between NNSA and a construction contractor, or by the M&O contractor's award of a subcontract.<sup>53</sup> The agency states that it will not be prepared to make a decision regarding that matter until design of the UPF is complete. COSF/MOL for NPP Protest at 53. Accordingly, the agency maintains that it could not reasonably consider a potential OCI flowing from any particular construction approach prior to award.

Here, the record supports the agency's assertions that consideration of the potential OCI prior to award was premature. First, CNS's proposal explicitly and repeatedly states that any proposed subcontract for the UPF construction is subject to NNSA's subsequent approval. AR, Tab D.1, CNS Proposal, at 199, 217, 218, 227, 229, 234, 244. In responding to the agency during discussions, CNS reiterated its understanding in that regard, stating:

**[redacted]**.

AR, Tab F.12, CNS Response to Discussions, at 9, 11.

Further, in notifying CNS of its selection decision, the agency stated that the award "is not intended to reflect the approval of any particular proposed subcontractor, or prime contract structure, for construction of [the] UPF," adding that "DOE/NNSA has not made a determination on the manner in which the construction in this contract will be carried out." AR, Tab F.16, Award Letter, at 2.

Here, we conclude that there are various uncertainties to be resolved prior to the agency's proper determination regarding an approach to performing the construction requirements. Consistent with those uncertainties, the agency has not

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<sup>53</sup> Pursuant to the terms of the solicitation, the contractor will be required to submit an acquisition plan, for the contracting officer's concurrence, prior to awarding project contracts or subcontracts. See RFP at 194; DOE Order 413.3B, Program and Project Management for Acquisition of Capital Assets.

committed itself to any particular approach. On this record, we reject NPP's assertion that, prior to award, the agency was required to address and resolve potential OCIs that may arise based on the agency's subsequent determination regarding how to procure construction of the UPF facility. NPP's protest regarding this matter is denied.

#### Procurement Integrity Act

Finally, NPP asserts that the agency failed to reasonably investigate NPP's allegations that CNS may have violated the Procurement Integrity Act (PIA). The record here is to the contrary.

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101–2107 (2011), known as the PIA, provide, among other things, that “[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(b). The FAR requires that if a possible violation of the PIA could impact the pending award or selection of the contractor, then the head of the contracting activity (HCA) must review the information and take appropriate action, which may include: (1) advising the contracting officer to proceed with the procurement; (2) beginning an investigation; (3) referring information to appropriate criminal investigative agencies; (4) concluding that a violation occurred; or (5) recommending that the agency head determine that a violation has occurred and voiding or rescinding the contract. FAR § 3.104-7.

Here, the record indicates that, in March 2012, prior to the solicitation closing date, an employee of Babcock & Wilcox Technical Services Group, Inc. (B&W) met with CNS representatives to discuss potential employment by a CNS team member. Thereafter, the B&W employee submitted his resignation to B&W,<sup>54</sup> and CNS proposed him as one of its key personnel. Following the employee's departure from B&W employment, B&W performed a forensic analysis on his computer and determined that the former employee had downloaded a significant number of documents and deleted various files.<sup>55</sup> NPP Protest, exh. 24, Investigation Update,

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<sup>54</sup> Upon receipt of the employee's resignation, B&W took actions to terminate the employee for cause.

<sup>55</sup> B&W has initiated legal action against its former employee in the State of Virginia court system, seeking damages for the employee's alleged breach of contract, breach of fiduciary duty, and violation of the Virginia Trade Secrets Act. NPP Protest, Jan. 17, 2013, exh. 31, Complaint in Circuit Court for the City of Lynchburg. To the extent NPP's protest seeks our Office's substantive review regarding the actions of its former employee, those matters reflect a dispute between private parties, currently being litigated in a court of competent jurisdiction, which we will

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at 1. The record further indicates that, through its forensic analysis, B&W was able to recover and review “[a]ll deleted files,” and that its forensic investigators prepared a report that “contained activity records showing all files copied by [the employee] to USB removable media, sent to a printer, and copied to a CD/DVD.” Id.

By letter to NNSA’s contracting officer dated March 26, 2012, NPP asserted that CNS may have violated the PIA. More specifically, B&W stated that, after tendering his resignation, the former employee had downloaded approximately 1,500 files onto a portable flash drive. AR, Tab H.1, Notice of Possible PIA Violation, at 1. B&W concluded that it “cannot state that there has been a Procurement Integrity Act violation,” but was reporting the matter as a “possible violation.” Id. at 2-3.

The contracting officer forwarded NPP’s allegation to NNSA’s HCA, who requested that NNSA’s Office of Internal Affairs conduct an investigation. In conducting that investigation, NNSA reviewed the documentation and electronic files provided by NPP, interviewed multiple NPP/B&W personnel, including NPP’s proposal manager, B&W’s information technology (IT) manager, B&W’s compliance and ethics manager, B&W’s human resources manager, and B&W’s chief operating officer. Tr. at 67-71, 74, 78. During the investigation, B&W personnel acknowledged that the former employee had not been involved in preparing NPP’s proposal, and that virtually all of the downloaded documents involved the employee’s work on a program that NPP acknowledges is unrelated to the protested procurement. Id. at 79-80. More specifically, the NNSA investigation found that only one downloaded document had any relationship to the procurement at issue, and that it was created in April 2010--eight months before the RFP was issued, and 3 months before even a draft RFP had been issued. Id. at 77. The investigation further found that, although the former employee participated in a 2009 meeting during which B&W employees speculated about which firms might participate in this procurement, none of B&W’s own procurement information was discussed at that meeting. Id. at 78-79. Finally, the NNSA investigation determined that all of B&W’s procurement data was stored on a separate server to which the employee had no access. Id. at 80. Based on NNSA’s investigation, the HCA concluded that no PIA violation had occurred. AR, Tab H.2, HCA PIA Determination, at 3.

Based on our review of the record, we do not question the reasonableness of the agency’s response to NPP’s PIA allegation. NNSA found that virtually all of the downloaded documents were unrelated to the work to be performed under the protested contract. Further, NNSA interviewed multiple B&W personnel, was advised that the former employee was not involved in preparing NPP’s proposal,

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not address. 4 C.F.R. § 21.11(b); see also Oahu Tree Experts, B-282247, Mar. 31, 1999, 99-1 CPD ¶ 69; Ervin & Associates, Inc., B-279161, B-279161.2, Oct. 13, 1998, 98-2 CPD ¶ 93 at n.4.

that he had no access to B&W's proposal information, and that any involvement with matters relating to this procurement occurred before either the RFP or the draft RFP were issued. In short, the investigation revealed that the protester's own personnel did not believe that a PIA violation had occurred, and neither B&W's forensic analysts nor the NNSA investigator could find evidence of such violation. Further, in pursuing this protest, NPP has failed to identify any aspect of CNS's proposal that reasonably reflects access to NPP's proprietary information. Although NPP complains that NNSA did not interview the employee in question, that fact does not render the investigation inadequate or unreasonable. See QinetiQ North America, Inc., B-405163.2 et al., Jan. 25, 2012, 2012 CPD ¶ 53 at 10-11. NPP's protest allegations regarding the alleged PIA violation are denied.

## RECOMMENDATION

As noted above, we sustain the protest on the basis of the agency's failure to comply with the solicitation's stated cost savings provisions. We recommend that the agency reopen the procurement, request additional information from the offerors regarding their proposed cost savings initiatives and, consistent with the solicitation's provisions, evaluate the relative size of each offeror's feasible cost savings, as well as the feasibility and quality of each offeror's proposed cost savings approach. We also recommend that, based on that evaluation, the agency make a new source selection decision taking into consideration the relative size of the offerors' feasible cost savings. Should the agency conclude that an offeror other than CNS has submitted a proposal representing the best value to the government, the agency should terminate the contract awarded to CNS and make award consistent with its revised source selection decision. We also recommend that the agency reimburse NPP and INPS for their costs associated with filing and pursuing the protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2013). The protesters' certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. Id. § 21.8(f).

The protest is sustained in part and denied in part.

Susan A. Poling  
General Counsel