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Decision

Matter of: Mechanical Equipment Company, Inc.; Highland Engineering, Inc.; Etnyre International, Ltd.; Kara Aerospace, Inc.

File: B-292789.2; B-292789.3; B-292789.4; B-292789.5; B-292789.6; B-292789.7

Date: December 15, 2003

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DIGEST

1. Agency performed reasonable price/technical tradeoff in determining that awardee's proposal for transportable water systems represented best value, based on consideration of price and the results of reasonable technical evaluation under listed evaluation factors, consistent with solicitation's evaluation plan; in making tradeoff analysis, agency had reasonable basis to focus on particular discriminator involving realism of logistics effort, even though it was not one of most heavily weighted factors.
2. Agency is not required to advise offerors of minor weaknesses or to reopen discussions where offeror's final proposal revision includes new information that constitutes a weakness or deficiency.
3. If offeror's price is not so high as to be unreasonable, agency is not required to advise that offeror that its price is not competitive.
4. Awardee's proposal on supply contract complies with the solicitation's subcontracting limitation that prime contractor perform work for at least 50 percent of the cost of manufacturing the supplies, not including the costs of materials; in

determining compliance with the limitation, the awardee's overhead and profit should be included in determining the total contract cost.

5. Agency's determination that awardee's major subcontractor did not have a significant organizational conflict of interest because of its work as a support services contractor for the agency has not been shown to be unreasonable, where there was no evidence in record showing that the subcontractor had an unfair competitive advantage resulting from access to the proprietary information of competitors, or to competitively useful or source selection sensitive information not available to the other offerors.

DECISION

Mechanical Equipment Company, Inc. (MECO), Highland Engineering, Inc., Etnyre International, Ltd., and Kara Aerospace, Inc. protest an award to Chenega Technical Products, LLC, under request for proposals (RFP) No. DAAE07-03-R-T006, issued by the Department of the Army, Tank-Automotive and Armaments Command (TACOM), for the "Camel" transportable water system. The protesters challenge the agency's evaluation and selection decision, and allege that Chenega's subcontractor has an organizational conflict of interest that makes award to Chenega improper.

We deny the protests.

The RFP, issued November 26, 2002, contemplated the award of a fixed-price requirements contract for a period of 5 years. Competition was restricted to small business concerns. The contract awarded will cover System Design and Development (SDD) of Camel system prototypes and the subsequent production of completed Camel systems.¹

The Camel system is a mobile, rapidly deployable, flexible unit water distribution system that will transport 900 gallons or more of potable water, be mounted on a government-furnished Family of Medium Tactical Vehicle (FMTV) M1905 trailer, and meet the mission profile of its intended prime mover (FMTV truck variants). The Camel system will prevent water from freezing during cold weather operations, allow operation at temperatures down to -25 degrees Fahrenheit, and chill water during hot weather operations. It will have recirculatory capability, a means for the user to monitor the chlorine residual and to rechlorinate. The water must meet U.S. Army Surgeon General standards for potability. Any Camel system components that use fuel must use the same fuel as the prime mover. The Camel system, when mounted, must be transportable by highway, rail, air, and marine transport modes, and must be able to be handled and transported by current material handling equipment.

¹ The awarded contract also contained several optional contract line items (CLIN) for such incidental items as training and drawings.

The RFP stated an evaluation plan under which the agency would make a tradeoff determination weighing the merits of non-price evaluation areas against price in order to determine which proposal represents the best value to the government. The evaluation criteria were:

Capability Area

Element 1: SDD Design Concept

Factor 1: Stability of Load and Transportability

Factor 2: Thermal Regulation of Payload and Dispensed Water

Factor 3: Chlorination and Potability Maintenance

Factor 4: Nuclear, Biological, Chemical (NBC) Survivability

Element 2: Manufacturing Facilities and Resources

Element 3: Realism of Logistics Effort

Past Performance Area

Price Area

The RFP stated that the capability area “is most important and is more important than either the Past Performance area or the Price area. The Past Performance area is slightly more important than the Price area.” Of the three elements in the capability area, the first “is significantly more important than” the second, which “is significantly more important than” the third. The four factors under the first element are listed in descending order of importance. RFP §§ M.3.1, M.3.2.

The RFP stated that a Source Selection Evaluation Board (SSEB) would evaluate proposals; assess the advantages, disadvantages and relative risks associated with each offeror and proposal; assign an appropriate adjectival rating for each evaluation criterion, except price; and narratively support the ratings. Price would be evaluated for reasonableness and realism. The RFP stated that, although a price realism analysis would assess the risk of an offeror performing at a proposed price, offered prices “shall not be adjusted as a result” of the price realism analysis. RFP § M.3.2.

In addition to meeting certain specified minimum requirements, the RFP requested that offerors consider proposing optional “desired performance characteristics.” If an offeror proposed to meet any of these desired characteristics and the agency found it would likely be fully achievable at no more than moderate risk with no associated high risk of not meeting other technical requirements, then the proposal would receive additional credit through the assessment of an advantage under the relevant evaluation factor, element and area. It was also stated that the advantages

assessed for satisfying desired characteristics could result in an increased evaluation rating. RFP § M.2.c.

On January 28, 2003, the agency received 11 proposals from nine offerors, including Chenega, Highland, Etnyre, MECO, and 3 from Kara. Two offerors were eliminated from the competition and not considered further. The remaining proposals included the protesters' and Chenega's proposals. The agency determined that all of the remaining proposals were in the competitive range. After conducting detailed written and oral discussions, the agency requested and received final proposal revisions by June 5. The results of the final evaluation with respect to the proposals relevant here were as follows:

| Evaluation Criteria | Highland | Chenega | Etnyre | MECO | Kara I | Kara II | Kara III |
|-------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Capability Area | Good | Good | Good | Good | Good | Good | Good |
| Element I | Good | Good | Good | Good | Good | Good | Good |
| Factor 1 | Good | Excellent | Good | Good | Excellent | Excellent | Excellent |
| Factor 2 | Good | Good | Marginal | Good | Good | Good | Good |
| Factor 3 | Excellent | Good | Excellent | Good | Good | Good | Adequate |
| Factor 4 | Good | Good | Good | Good | Excellent | Excellent | Good |
| Element 2 | Adequate | Adequate | Good | Excellent | Adequate | Adequate | Adequate |
| Element 3 | Marginal | Excellent | Adequate | Good | Marginal | Marginal | Marginal |
| Past Performance Area | Adequate | Adequate | Adequate | Good | Adequate | Adequate | Adequate |
| Evaluated Price (in Millions) | \$44.1 | \$51.3 | \$54.3 | \$69.7 | \$84.1 | \$85.0 | \$96.2 |

Agency Report, SSEB Presentation to SSA, at 18.

Following a briefing on the evaluation results, the source selection authority (SSA) determined that he would consider the proposals of either MECO or Chenega for award. After further consideration, the SSA concluded that MECO's proposal represented the best value, and requested that a source selection decision to that effect be drafted. The drafters--the SSEB chair and deputy chair, the contracting officer, legal counsel, and a subject matter expert for best value source selection--prepared a draft decision identifying MECO's proposal as the best value. Upon reflection on that decision, some of the drafters expressed uncertainty as to whether MECO's proposal represented the best value. The drafters therefore prepared an alternative source selection decision identifying Chenega's proposal as the best value. The SSA reviewed both draft decisions and concluded that the evaluated advantages associated with MECO's proposal did not warrant award at a price premium of \$18.4 million.

The SSA thus concluded that Chenega's proposal represented the best value and a final source selection decision document was prepared. The source selection

decision stated a detailed price/technical tradeoff analysis between Chenega's proposal and each of the other proposals, and it was concluded that Chenega's proposal represented the best value in each case.

On July 24, 2003, the agency issue a pre-award notice to all offerors stating that the agency intended to award a contract to Chenega. Several offerors protested Chenega's small business size status to the U.S. Small Business Administration (SBA). On August 21, the SBA Area Office determined that Chenega was a small business concern.² On August 22, the agency awarded a 5-year requirements contract to Chenega and issued a fixed-price delivery order under it for the SDD requirements. These protests followed. The agency has suspended performance under Chenega's contract pending resolution of the protests.

The protesters allege numerous instances of unreasonable and unequal evaluations concerning virtually every element, factor and area of their own and Chenega's proposals. In response, the agency has submitted detailed responses to each contention, which are supported by contemporaneous documentation. Based on our review, we find that the agency's evaluation was reasonable, consistent with the RFP, and did not treat offerors inequitably. While we have reviewed all of the numerous contentions raised by the protesters, we discuss below but a representative sample.

In reviewing protests challenging an agency's evaluation, we will not substitute our judgment for that of the agency regarding the merits of proposals; we will only review the evaluation to determine whether it was reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 3. A protester's disagreement with the agency does not render the evaluation unreasonable. Caterpillar, Inc., B-280362, B-280362.2, Sept. 23, 1998, 98-2 CPD ¶ 87 at 6

As an initial matter, we note that many of the allegations share a common challenge to the specific ratings that the agency assigned a given proposal. These allegations identify various terms of a given proposal and assert that the corresponding rating assigned by the agency should have been higher or lower, as the case may be. However, it is well established that ratings, be they numerical or adjectival, are merely guides for intelligent decision-making in the procurement process. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. Where a source selection decision reasonably considers the underlying bases for the ratings, including advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and

² On December 4, SBA's Office of Hearings and Appeals found that decision was flawed and remanded the matter to the SBA Area Office for a new size determination.

equitable, and consistent with the terms of the solicitation, the protesters' disagreement over the actual adjectival ratings is essentially inconsequential, in that it does not affect the reasonableness of the judgments made in the source selection decision. See *id.*; National Steel and Shipbuilding Co., B-281142, B-281142.2, Jan. 4, 1999, 99-2 CPD ¶ 95 at 15. As the remainder of our discussion of the evaluation shows, rather than resting upon a superficial comparison of ratings, the agency, as indicated by the source selection decision, reasonably considered the specific content of the proposals in weighing the relative merits of competing proposals and determining which proposal represented the best value.

The protesters challenge the evaluation ratings under the stability of load and transportability factor, which was the most important factor of the SDD design concept element, which, in turn, was the most important element in the capability area. Under this factor, Chenega's and Kara's proposals were considered superior to the other protesters' proposals.

MECO alleges that its proposal should have been rated excellent and superior to Chenega's proposal under this factor because its design for partial water payloads was superior.³ MECO references in this regard the requirement at Purchase Description § 3.5.1, which states the "Camel shall be capable of stabilizing partial water payloads during transport . . . through effective mitigation of longitudinal, lateral and vertical sloshing of the fluid." MECO states that its design uses [DELETED]. MECO asserts that, with respect to stability with partial water payloads, its design is superior to Chenega's design of [DELETED].

The agency response is that although partial payload stability was a minimum requirement that all proposals had to satisfy,⁴ it was not a consideration in the evaluation plan incorporated in the RFP. In this regard, the RFP evaluation plan stated that the agency would "assess the proposal risk probability that the offeror will credibly and timely satisfy the Dynamic stability requirements [stated at

³ The results of the Dynamic Analysis and Design System (DADS) simulation model for full and empty payloads showed that Chenega's and MECO's proposed Camel designs both exceeded the stability requirements to a similar degree; although Chenega's design performed slightly better than MECO's, the agency did not consider that difference significant (MECO's was rated at [DELETED] miles per hour (mph) compared to Chenega's [DELETED] mph). Contracting Officer's Statement (Nov. 7, 2003) at 4; Agency Report, MECO Evaluation, at 4; Chenega Evaluation, at 3. Both proposals were assessed a corresponding advantage for stability. Agency Report, Source Selection Decision, at 4, 7.

⁴ Purchase Description § 3.5.1 stated the weight and stability standards that the Camel, when towed by its prime mover, would have to satisfy "regardless of water level."

Purchase Description § 3.5.1], as simulated under full conditions and under empty conditions using the DADS computer model.” RFP § M.3.2. In this regard, the RFP requested certain data for full and empty tanks needed to run the DADS simulation model. RFP § L.1.1.1, attach. 21, DADS Data Requirements. The RFP did not request data to simulate partial payloads, nor state that the agency would evaluate, on a relative basis, stability under partial payloads. Based on our review, we agree with the agency that the RFP did not contemplate that relative stability of partially filled tanks would be an evaluation consideration.⁵

MECO, Highland and Etnyre otherwise allege that the agency unreasonably found Chenega’s proposal superior to their own proposals under the stability of load and transportability factor. We disagree. Besides being evaluated based on simulated performance with full and empty payloads, the evaluation plan identified the following two desired characteristics to be considered under this factor:

Low Velocity Air Drop [LVAD] when full ([Performance Description §] 3.6.1.5) and transport by rail without restriction when full ([Performance Description §] 3.6.1.6).

RFP § M.3.2. The proposal preparation instructions stated the following:

[I]f offerors propose systems that will meet the desired capabilities related to transport by rail without restriction when full . . . and/or for [LVAD] they shall submit drawings, calculations, analyses, or any other quantitative data supporting the capability to meet the desired capability.

RFP § L.1.1.1.

Chenega initially offered to meet both of these desired characteristics, but failed to demonstrate that LVAD was achievable. The final evaluation credited Chenega with an advantage for the rail transport characteristic being achievable with moderate risk. Agency Report, SSEB Presentation to the SSA, at 25-26. In contrast, Highland initially proposed to meet only the rail transport characteristic, but subsequently withdrew this from its proposal and did not receive any credit for the desired characteristics. *Id.* at 22. Etnyre’s revised proposal first offered to provide both desired characteristics, but restricted the type of aircraft for using LVAD and, for the rail transport characteristic, provided information only about its experience in

⁵ MECO alternatively alleges that the agency should have informed offerors that stability of partial payloads would not be relatively evaluated. The terms of the RFP were unambiguous and, since MECO did not submit data on partial payload stability, MECO never indicated to the agency that the firm contemplated that partial stability would be evaluated.

manufacturing tanks that passed TACOM's rail impact tests; the final evaluation did not credit Etnyre for either desired characteristic because it did not propose LVAD for all applicable aircraft and did not provide engineering data to demonstrate that its proposed design would satisfy the rail transport characteristic.⁶ *Id.* at 28. MECO also initially did not propose to meet either desired characteristic; in its final revised proposal, MECO stated that it would meet the rail transport desired characteristic, but did not provide any supporting data; therefore, the final evaluation did not credit MECO for this characteristic. *Id.* at 34. Kara proposed achieving both characteristics, but the agency determined that the information provided by Kara did not enable the agency to assess whether Kara could achieve either characteristic. *Id.* at 37. In sum, only Chenega received credit for the desired characteristics, and that only for the rail transport characteristic.

Otherwise, all of these offerors' proposals exceeded the stability requirement, but none, except Kara, performed better than Chenega.⁷ *Id.* at 21, 24, 27, 33, 36. Since Chenega also received credit for the rail transport characteristic and the others did not, there was a reasonable basis to rate Chenega's proposal superior to the proposals of MECO, Highland, and Etnyre under this factor. In this regard, as noted above, the RFP evaluation plan provided for higher ratings under this factor for proposals offering achievable desired performance characteristics without high risk. RFP § M.2.c.

MECO and Etnyre also allege that the agency did not conduct meaningful discussions concerning the rail transport desired characteristic. Although discussions must address at least deficiencies and significant weaknesses identified in proposals, the scope and extent of discussions are largely a matter of the contracting officer's judgment. In this regard, we review the adequacy of discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. An agency is not required to afford offerors all encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is not required to advise an

⁶ Etnyre alleges that engineering data was not required by the RFP to receive credit for the rail transport desired characteristic, and contends that the data it submitted detailing its experience in successfully manufacturing tanks that pass the rail impact tests is better than engineering data. While the RFP did not request "engineering" data *per se*, the desired characteristic and the supporting quantitative data requested fell under the SDD design concept element. As such, we view it as clear that the RFP contemplated quantitative data on the desired characteristic as applied to the design and development of the proposed Camel system, not the past performance information offered by Etnyre.

⁷ The record evidences that Kara's design was evaluated as having somewhat better stability than Chenega's. Agency Report, SSEB Presentation to the SSA, at 24, 36.

offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. Northrop Grumman Info. Tech., Inc., B-290080 et al., June 10, 2002, 2002 CPD ¶ 136 at 6; see Federal Acquisition Regulation (FAR) § 15.306(d).

MECO's initial proposal did not propose to provide the desired characteristic for rail transport and the agency's discussion question stated that the desired characteristic had not been proposed. Agency Report, MECO's Discussion Questions (May 14, 2003), at 3. MECO replied to this item with the word "pending." Agency Report, MECO's Initial Response to Discussion Questions (May 16, 2003), at 3. MECO then stated in its final proposal revisions, after discussions had closed, that it would satisfy the desired characteristic, but failed to provide any supporting data.⁸ This is not an example of inadequate discussions; nor is this an instance where it can be said that the agency abused its discretion in deciding not to reopen discussions following receipt of MECO's final proposal revisions. See Metcalf Constr. Co., B-289100, Jan. 14, 2002, 2002 CPD ¶ 31 at 5.

Etnyre also did not initially propose to provide the desired characteristic for rail transport. During discussions, following notice from the agency that Etnyre's proposal did not include the desired characteristic, Etnyre stated that it would satisfy the characteristic and provided experience data. The agency did not again address this aspect of the proposal during discussions. Once the agency addressed this aspect of the proposal, albeit by pointing out that Etnyre had not addressed the desired characteristic, additional discussions on the issue were not required, where as here the offeror revised its proposal to address the characteristic but failed to submit adequate supporting information.⁹ See Culver Health Corp., B-242902,

⁸ Although MECO's final proposal revision stated that the data was submitted in an earlier e-mail, it is now unrefuted that MECO did not submit the supporting data. Contracting Officer's Statement (Oct. 1, 2003) at 10-11.

⁹ Etnyre apparently incorrectly assumed that the two desired characteristics identified under the transportability factor would be evaluated together in order to receive credit. It asked the agency about this during discussions and the agency stated that the characteristics would be evaluated separately. Etnyre now alleges that the agency's response to Etnyre's question was an amendment to the RFP, which materially changed the issue such that meaningful discussions should be judged from the point at which the two characteristics were "uncoupled." We disagree. The agency never amended the RFP. While the protester correctly notes that the RFP stated that the agency would assess the risk of achieving LVAD "and" the rail transport characteristics, RFP § M.3.2, the RFP also stated that offerors could propose LVAD "and/or" the rail transport characteristic. RFP § L.1.1.1. The RFP thus did not restrict proposals in the manner assumed by the protester.

June 10, 1991, 91-1 CPD ¶ 556 at 6 (agencies are not required to notify offerors of deficiencies remaining in their proposals or to conduct successive rounds of discussions until omissions are corrected).

In sum, the agency reasonably evaluated, and conducted meaningful discussions concerning, the stability of load and transportability factor.

With regard to the second most important factor of the SDD design concept element, thermal regulation of payload and dispensed water, Kara alleges that the agency unreasonably evaluated as a disadvantage its proposal to use [DELETED], and failed to conduct adequate discussions on the matter.

Kara identified [DELETED] as a basis for increasing the chiller performance above the manufacturer's specifications. During discussions, the agency stated that the [DELETED] manufacturer did not identify [DELETED] as compatible with [DELETED], and asked, "Do you have any verification from [the [DELETED] manufacturer] which states that [DELETED] is compatible with [DELETED]?" Kara replied that the manufacturer did not list [DELETED] as a compatible [DELETED], but that [DELETED] is an "authorized" [DELETED] that the manufacturer does list as compatible, that Kara's claims are supported by testing, and that Kara and its assembly vendor have guaranteed [DELETED] and its operation. Agency Report, Discussion Question 4 and Kara Response (May 23, 2003).

The agency evaluated Kara's use of [DELETED] as a disadvantage because Kara did not provide verification for its claims from the [DELETED] manufacturer. The agency essentially states that because the [DELETED] manufacturer has procedures for demonstrating that a non-standard application is acceptable and obtaining the manufacturer's approval, and Kara did not obtain or provide the manufacturer's approval, there was risk associated with using [DELETED]. Contracting Officer's Statement (Oct. 14, 2003) at 18. While Kara believes its own testing and guarantees are sufficient to eliminate any performance risk, we think the agency has stated a reasonable concern supporting its evaluation. Additionally, since the agency asked for the [DELETED] manufacturer's verification of compatibility of [DELETED] during discussions and provided Kara with an opportunity to address the matter, the discussions were adequate.

Etnyre's proposal had evaluated disadvantages under the thermal regulation of payload and dispensed water factor for the chilling and the freeze protection requirements, which resulted in a marginal rating for this factor. For the water chilling requirement, Etnyre proposed to use [DELETED] in a water chilling application, and claimed the system would have twice the minimum chilling capacity required by the RFP. The agency requested both supporting calculations and manufacturer specifications for components. Etnyre submitted calculations, but stated that component specifications were not available, although it did submit a [DELETED] brochure. The agency again requested component specifications, in

response to which Etnyre submitted drawings for the compressor and condenser, and restated that component specifications were not available. Based on the limited amount of design specifications provided, the agency determined that a moderate to high risk for meeting the chilling requirements existed in Etnyre's proposal. Contracting Officer's Statement (Oct. 10, 2003) at 15-17; Contracting Officer's Statement (Nov. 7, 2003) at 3; Agency Report, Discussion Questions and Etnyre's Responses (March 31, May 14 & 21, 2003). Notwithstanding the protester's disagreement, we think that this evaluation of risk was reasonable. Also, it is apparent that discussions were adequate, inasmuch as the agency twice requested that component specifications be provided.

Similarly, for the freeze protection requirement, the agency was concerned that Etnyre's proposed heating capability lacked supporting data. The agency requested certain information including heat and mass transfer calculations to demonstrate this capability, in response to which Etnyre provided some calculations, which the agency considered inadequate. Contracting Officer's Statement (Oct. 10, 2003) at 17-21; Contracting Officer's Statement (Nov. 7, 2003) at 3-4; Agency Report, Discussion Question and Etnyre's Responses (Mar. 31 and Apr. 11, 2003). The agency followed up with Etnyre by stating the following concern:

Design information for the heating ratings were not justified. Heat and mass transfer calculations were not performed to justify any confidence in the system.

Agency Report, Discussion Question and Etnyre's Responses (May 15, 2003). Etnyre replied that available information was provided in its previous submissions. *Id.* Etnyre subsequently provided additional information, including a proposal for a new supplemental source of heat; the agency considered the submission to be unsubstantiated because Etnyre's supporting information remained severely lacking. Therefore, the SSEB evaluated Etnyre's response to the freeze protection requirements as a disadvantage, a judgment we find reasonable. Contracting Officer's Statement (Oct. 10, 2003) at 19-21; Agency Report, Discussion Question and Etnyre's Responses (May 19, 2003). While the protester argues that the information it provided and the solutions it proposed should have been considered adequate, this disagreement with the agency's evaluation does not show it was unreasonable, particularly where, as here, the agency repeatedly asked for information and substantiation for Etnyre's proposal claims that the offeror did not provide.

Similarly, even though we do not discuss them here, we find the protesters' complaints about the evaluation and failure to conduct meaningful discussions regarding the remaining factors under the SDD Design Concept element of the capability area provide no basis to disturb the award.

The protesters also allege that the agency unreasonably evaluated proposals under the manufacturing facilities and resources element. MECO, Highland and Kara

essentially allege that the evaluation unreasonably failed to negatively evaluate Chenega's proposal to construct facilities as opposed to using existing facilities as proposed by some of the protesters.

The RFP evaluation plan for this element stated the following:

The Government will assess the proposal risk probability that the offeror will credibly and timely manufacture Camel systems to meet the delivery schedule requirements, of both SDD and the Camel Production, based on the offeror[']s existing and/or proposed facilities, equipment, tooling, and manufacturing personnel. The facilities of the offeror and significant subcontractors may be included in the evaluation.

RFP § M.3.2 (emphasis added). The proposal preparation instructions for this element stated the information to be provided for evaluation of facilities and resources, as well as additional information for proposed facilities. RFP § L.1.2. Thus, the evaluation plan contemplated the consideration of more than whether the offeror was proposing an existing facility.

During discussions, the agency asked all offerors about their plans for meeting the production requirements. E.g., Agency Report, Chenega Discussion Questions (Mar. 31, 2003), Mfg. 1. The agency's discussions with Etnyre and with Highland stated the following with regard to this element:

The evaluation of manufacturing facilities and resources will be based upon ordering of maximum quantities permitted under the Camel production requirements CLINs. Explain the major events [the offeror] foresees must occur in order to produce 35 Camel systems per month, 630 days after release of the RFP.

Agency Report, Etnyre Discussion Questions (Apr. 1, 2003), Mfg. 1; Highland Discussion Questions (Apr. 1, 2003), Mfg. 1.

Chenega provided the requested information and identified major events that had to be accomplished and how it would achieve them, but its proposal was rated no higher than adequate primarily because it proposed to build a production facility, which increased the risk of its proposal. Some of the other protesters did not provide all of the information requested and to some extent the evaluation of their proposals reflected that failure, as indicated by Highland's and Kara's adequate ratings and Etnyre's good rating. For example, Etnyre's and Highland's proposals were found to not include a detailed rationale demonstrating how major milestones would be achieved to demonstrate the probability that the production delivery schedule would be met.

Etnyre and Highland argue in essence that this milestone information was not encompassed by the stated evaluation plan for this element. We disagree. As indicated above, the RFP stated that the agency “will assess the proposal risk probability that the offeror will credibly and timely manufacture Camel systems to meet the delivery schedule requirements . . . based on the offeror[']s existing and/or proposed facilities, equipment, tooling, and manufacturing personnel.” RFP § M.3.2. To the extent the RFP may not have specifically requested offerors to detail how they would meet the major milestones, the agency’s discussion question clearly did so. We find on this record that the agency reasonably evaluated the adequacy of the information that was submitted in response to the discussion request. See Scientific Research Corp., B-260478.2, July 10, 1995, 95-2 CPD ¶ 8 at 6 (protester cannot ignore the express written statements of agency during discussions, even if the agency’s statements amend the solicitation).

The protesters’ arguments with respect to the evaluation of the manufacturing facilities and resources element, rather than showing the agency’s evaluation was unreasonable or unequal, constitute mere disagreement with the significance the agency accorded isolated and limited facts that would be most favorable to each of the protesters. For example, Kara complains that, while it provided a letter of intent to lease facilities and has an ISO 9000 quality system, the agency found that its proposal was not significantly different from Chenega’s under this element, in that both Kara and Chenega had to acquire facilities (Kara’s had to obtain facilities both for SDD and production and Chenega only production facilities) and Chenega was in the process of qualifying for ISO 9001 certification.¹⁰

The protesters also allege that the agency unreasonably evaluated proposals under the realism of logistics effort element. The RFP evaluation plan for this element stated the following:

The SSEB will evaluate the proposal risk probability that the offerors proposed Logistics labor hours, mix of labor categories, and labor categories, as supported by rationale detailing the basis for the proposed hours, labor categories and labor category mix, will meet Contract requirements for [the relevant portions of the statement of work, RFP § C].

RFP § M.3.2. The proposal preparation instructions stated the following:

¹⁰ The agency evaluated MECO’s proposal to be significantly superior to Chenega’s based on its having existing facilities and resources, and providing the information requested concerning its ability to meet the production requirements. Contrary to MECO’s allegation, the SSA fully acknowledged, accepted, and credited this evaluated difference between MECO’s and Chenega’s proposal. See Agency Report, Source Selection Decision, at 7-8.

Offerors shall provide spreadsheets detailing the labor categories, labor category mix, and labor hours for each of the data requirements listed in this paragraph. Offerors shall provide written rationale supporting their labor hours, categories and mix to perform the required development and delivery of the required data. Offerors shall provide the necessary data to evaluate performance for the [the same relevant portions of the statement of work].

RFP § L.1.3.

The agency evaluated the proposals of Highland, Etnyre and Kara as having a significantly higher proposal risk (as indicated by their lower adjectival ratings) than Chenega's proposal, because their proposed logistics labor hours were substantially less than the government estimate and because they did not submit adequate supporting rationales detailing the bases for their proposed hours, categories and mix. The agency identified this problem during discussions with each of these offerors. Agency Report, Highland Discussion Questions, LOG 1 (Mar. 20, 2003), LOG 2 (May 1, 2003); Etnyre Discussion Questions, LOG 1 (Mar. 20, 2003), LOG 2 (May 1, 2003); Kara Discussion Questions, LOG 1 (Mar. 20, 2003), E-mail from Agency to Kara (May 21, 2003).¹¹ The agency determined that each of the responses from those offerors not only showed a relatively low number of labor hours, but did not provide a detailed rationale for the proposed labor hours, categories and mix. In contrast, Chenega not only proposed hours that closely approximated the agency's estimate, but it also stated detailed supporting rationale for its labor hours, categories and mix. Agency Report, Chenega's Response to Discussions, LOG 1, 2 (Mar. 20, 2003), Chenega Initial Proposal, II-48 -- II-72. The protesters have not shown that the agency acted unreasonably in finding that Chenega's proposal was significantly superior to their own proposals in this respect.¹²

¹¹ During oral discussions with Kara on May 14, the agency mistakenly indicated that there were no issues related to realism of logistics effort, but corrected this mistake by a subsequent e-mail message of May 21, stating that Kara's proposed hours were understated, that the support provided merely paraphrases the RFP, that the proposal indicates that Kara lacks understanding of the requirements, and that there is an increased risk of unsuccessful performance. Contracting Officer's Statement (Oct. 14, 2003) at 28.

¹² While Chenega's excellent adjectival rating for this element was higher than MECO's good rating, the record shows that Chenega's proposal was not regarded as being significantly superior to MECO's under this element, given that MECO's proposal offered [DELETED] hours for logistics and provided detailed supporting rationale. Agency Report, Source Selection Decision, at 7.

Etnyre and Kara assert that Chenega was evaluated unequally from them under this element, essentially because Chenega received credit for its major subcontractor, Radian, Inc., which was the primary provider of the logistics requirements, while the protesters did not receive similar credit for the participation of their highly qualified subcontractors. The record shows that the protesters' proposals and discussion responses generally reference their subcontractors' logistics experience as support for why their proposed logistics efforts were reasonable, instead of providing the supporting rationales required by the RFP. As stated above, Chenega provided the required supporting rationale. Thus, the record does not evidence unfair, unequal treatment of the proposed use of subcontractors under this element.

Highland also alleges that discussions were inadequate because the agency did not disclose its logistics estimate or advise Highland of the magnitude by which its proposed logistics effort was lower than the agency's estimate.¹³ We disagree. The agency informed Highland during discussions that its proposed logistics effort was inadequate and requested Highland's rationale for its proposed labor hours, categories and mix. This is not a case, as those cited by the protester are, where the agency either misled an offeror or failed to put an offeror on notice that its proposal was inadequate in comparison to a government estimate or failed to solicit and consider an offeror's rationale for proposing its own level of labor hours. Compare Teledyne Lewisburg; Okla. Aerotronics, Inc., B-183704, Oct. 10, 1975, 75-2 CPD ¶ 228 at 8-10 (instruction to offerors to "review [proposed labor hours] and revise if necessary" did not constitute meaningful discussions of deficiency that the proposed hours were substantially less than government estimate where the agency's evaluation and discussions did not provide for offerors to explain deviations from the undisclosed government estimate) and The Jonathan Corp.; Metro Mach. Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174 at 13-15 (unreasonable for agency not to hold discussions on disparity between proposals and an undisclosed government estimate) with GeoMet Data Servs., Inc., B-242914.4, Mar. 4, 1992, 92-1 CPD ¶ 259 at 7 (notification that prices are higher than the government estimate satisfies requirement for meaningful discussions).

The protesters also allege that the past performance evaluation of Chenega was unreasonable because the evaluation primarily relied on the experience of Chenega's major subcontractor, Radian. The record shows that Chenega proposed Radian to perform much of the SDD and logistics requirements, which comprise only a small

¹³ Highland also challenges the reasonableness of the agency's logistics estimate. However, the record shows that Chenega's proposal provided a detailed rationale to support its proposed effort and the protesters did not. Since Highland (and other protesters) were repeatedly requested to provide supporting rationale for its proposed logistics labor hours, categories and mix, and failed to adequately do so, Highland's challenge to the agency's estimate provides no basis to sustain the protest.

portion of the total potential dollar value of the contract. Otherwise, Chenega has little relevant experience, other than limited production experience. Essentially, the allegation is that Chenega either should not be credited with any relevant experience, or should not be evaluated similarly to any of the protesters.

The RFP stated the past performance area would be evaluated as follows:

The Government will assess each offeror[']s and their significant subcontractors['] performance risk that they will not be able to meet the contract requirements based on an assessment of their previous performance of relevant work. Only relevant performance on projects and programs which has taken place in the three years prior to the date of issuance of the RFP will be considered.

In evaluating each offeror[']s previous performance, the Government will look at the offeror[']s and significant subcontractors['] previous performance of prototype design, especially related to US military or commercial automotive systems, road transportable potable water storage systems, and potable water thermal regulating equipment; performance of test support for either commercial or Government conducted testing; performance of delivery schedule of production systems, especially for production of trailer mounted systems (including water storage systems) and potable water thermal regulating systems; performance of logistics tasks; delivery of data requirements for SDD and Production contracts; and customer satisfaction. . . . Offerors without a record of relevant Past Performance upon which to base a meaningful performance risk prediction will be rated as "Unknown Risk", which is neither favorable nor unfavorable.

RFP § M.3.2. Thus, both relative relevance of the experience and customer satisfaction were to be considered in evaluating past performance. Also, since the terms of the RFP provide for consideration of the relevant experience of significant subcontractors, it was not improper to consider Radian's experience.

If we accept, arguendo, that Chenega's and Radian's relative experience in total was insignificant with respect in many of the areas set out in RFP § M.3.2. (quoted above), the corresponding risk under the terms of the RFP would be "unknown," which would be neither favorable nor unfavorable.¹⁴ There is little meaningful difference in that outcome and the actual evaluation, which rated Chenega adequate and assessed a moderate risk. See Oceaneering Int'l, Inc., B-278126, B-278126.2,

¹⁴ Thus, contrary to the protesters' contentions, Chenega could not be rated marginal for past performance because of its relative lack of relevant experience.

Dec. 31, 1997, 98-1 CPD ¶ 133 at 7 (neutral rating for a firm lacking relevant past performance history is comparable to the rating given for a past performance history that is “adequately sufficient”).

In any case, the record shows with respect to Highland, Etnyre and Kara that all lacked the significant relevant and recent experience in many of the areas set out in RFP § M.3.2.,¹⁵ and discloses no significant discriminator between these protesters and Chenega (including Radian) with regard to customer satisfaction. While each protester has asserted that some aspect of its experience should cause it to receive a higher rating, the agency has persuasively demonstrated that the agency evaluation reasonably accounted for each protester’s (including their subcontractors’) relevant past performance. The record does not show that past performance is a reasonable discriminator between any of these offerors, beyond that which is already reflected in the agency’s evaluation and source selection decision.¹⁶

In sum, the protest record does not show that the agency’s evaluation of proposals was unreasonable, unequal or inconsistent with the RFP, or that meaningful discussions were not conducted in the technical areas.

Kara asserts the TACOM improperly injected a funding cap of \$1.5 million on CLIN 0001AA for the SDD prototype during discussions in May 2003, well after the receipt of initial proposals. Kara states that a funding cap was required to be added by amendment to the RFP, and that this late imposition of the funding cap prejudiced Kara because its proposal pricing for the CLIN greatly exceeded the funding cap. In response, TACOM states that at an “Industry Day” prior to the issuance of the solicitation, which was attended by Kara’s representatives, it advised potential offerors of funding levels for this CLIN, which it estimated at that time would be at a much lower figure than the funding cap announced during discussions.

This protest contention concerns an alleged solicitation impropriety incorporated into a solicitation after receipt of proposals, albeit one that was added in the May 2003 discussions rather than by formal amendment. See A & H Automotive Indus., Inc., B-225775, May 28, 1987, 87-1 CPD ¶ 546. Such protests must be filed

¹⁵ For example, while Highland had production experience (but not for water storage systems), it lacked SDD and prototype experience. Also, Etnyre had production experience only for small quantities or prototypes and had no SDD experience.

¹⁶ MECO’s past performance was rated higher than the other offerors from both a relevance and customer satisfaction standpoint, and the SSA accorded MECO’s proposal a corresponding advantage over Chenega’s in the source selection decision. Since the source selection decision fully recognized and reasonably considered this MECO advantage in the price/technical tradeoff, it is not germane whether MECO’s proposal deserved a good or very good past performance rating.

prior to the next closing time for receipt of proposals, in this case the date set for receipt of final proposal revisions, June 5. Id.; Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003). Since Kara filed its protest on September 8 (after award), its protest of this matter is untimely and will not be considered. We note, however, that Kara's proposal was not rejected for exceeding a funding cap, even though it did not revise its final proposal revision to account for the agency's stated funding limits.

Kara also asserts that it was not afforded meaningful discussions with regard to its very high relative prices. Where, as here, an offeror's price is high in comparison to competitors' prices, the agency may, but is not required to, address the matter during discussions. Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 17; see FAR §§ 15.306(d)(3), (e)(3). Accordingly, if an offeror's price is not so high as to be unreasonable and unacceptable for contract award, the agency may reasonably conduct meaningful discussions without advising the higher-priced offeror that its prices are not competitive. MarLaw-Arco MFPD Mgmt., B-291875, April 23, 2003, 2003 CPD ¶ 85 at 6. Here, since the agency determined that the prices for Kara's proposals were fair and reasonable considering its proposed approaches, we do not find that Kara's discussions on this point were not meaningful.

Kara also asserts that its proposals were improperly included in the competitive range, given the late imposition of the funding cap and the agency's failure to advise that Kara's price was noncompetitive. However, a protester's challenge against the agency's inclusion of its proposal in the competitive range does not constitute a valid basis for protest that our Office will consider. Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 8 n.4; Champion Bus. Servs., Inc., B-290556, June 25, 2002, 2002 CPD ¶ 109 at 2.

The protesters also allege that the price/technical tradeoff determination supporting the selection of Chenega's proposal over the protesters' proposals was unreasonable and inconsistent with the relative importance of the evaluation criteria stated in the RFP. Where, as here, the RFP provides that the award is to be made on the basis of a price/technical tradeoff with technical factors considered more important than price, agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results in making the tradeoff, subject only to the tests of rationality and consistency with the established evaluation factors. Trend W. Tech. Corp., B-275395.2, Apr. 2, 1997, 97-1 CPD ¶ 201 at 5.

Besides the arguments premised upon their attacks of the technical evaluation addressed above, MECO, Highland and Etnyre allege that the realism of logistics effort element was accorded much more weight in the source selection decision than was stated in the RFP evaluation plan, and thus the award was made on a basis different from that stated in the RFP and upon which the offerors competed. In support of their contention, the protesters reference the following statement from the source selection decision:

It is important to note that while [the] relative importance [of Realism of Logistics Effort (Element 3)] in the Capability Area is lowest, this element has become a significant discriminator between offers. The significance is addressed in the tradeoff analysis, below.

Agency Report, Source Selection Decision, at 2.

Contrary to the protesters' allegations, the source selection decision did not elevate the relative weight of the realism of logistics effort element beyond the importance stated in the evaluation plan. The above quotation from the source selection does not state that the relative weight of this element has changed from that stated in the RFP, but that the significance of this element as a discriminator between offerors would be addressed in the price/technical tradeoff analysis stated in the body of the decision. In this regard, an agency, in making its tradeoff analysis, may ultimately focus on a particular discriminator, even if it not one of the most heavily weighted factors, where it has a reasonable basis to do so, e.g., where other factors are equal or cancel each other out. See Keane Fed. Sys., Inc., B-280595, Oct. 23, 1998, 98-2 CPD ¶ 132 at 16; Trend W. Tech. Corp., *supra*; Teledyne Brown Eng'g, B-258078, B-258078.2, Dec. 6, 1994, 94-2 CPD ¶ 223 at 12-13.

Here, the source selection decision carefully explained and balanced the relative strengths and weaknesses of each of the proposals (not simply focusing on the realism of logistics effort element) and weighed them against price by comparing the evaluation of Chenega's proposal to the evaluation of each of the other competitive range proposals. Each of these tradeoff determinations, which we briefly discuss below, was in accordance with the RFP evaluation plan and provides a reasonable basis for selecting Chenega's proposal.

With regard to the tradeoff between MECO's and Chenega's proposals, the SSA stated that MECO's proposal was technically superior to Chenega's under the manufacturing facilities and resources element of the capability area and under the past performance area. On the other hand, Chenega's proposal was superior under the SDD design concept and realism of logistics effort elements of the capability area. The tradeoff detailed the reasons for these judgments. Unlike the tradeoff analysis with respect to the other offerors, the SSA did not indicate that Chenega's advantage under the realism of logistics effort element was significant in comparing Chenega's to MECO's proposal; in fact, the decision characterized the higher element ratings for Chenega as only "somewhat" lower risk, stated that the advantages between the two proposals in those areas were similar, and detailed the significant advantages of MECO's proposal with regard to this element. The tradeoff determination was ultimately primarily based on the much lower price of Chenega's proposal—over \$18 million lower than MECO's. The SSA stated that, notwithstanding its superiority under some of the evaluation criteria, MECO's technical merit did not warrant an award at that price premium. Agency Report, Source Selection Decision,

at 7-8. Based on our review, we find this tradeoff to be reasonable and in accordance with the RFP's evaluation plan.

For the tradeoff between Etnyre's and Chenega's proposals, the SSA stated his rationale for finding Chenega's more advantageous than Etnyre's for the SDD design concept element and the realism of logistics effort element of the capability area, and for finding Etnyre's better for the manufacturing facilities and resources element of the capability area. The tradeoff stated the past performance histories of each offeror, with regard to which the SSA did not conclude that either was better. Chenega's price was almost \$3 million lower than Etnyre's. The SSA detailed Etnyre's higher evaluated risk for the realism of logistics effort element as significant in the tradeoff. However, this discriminator was not the only basis for the tradeoff. Not only was Chenega's price lower, but its proposal was considered to be superior to Etnyre's under the most heavily weighted SDD design concept element of the capability area, "particularly since the Etnyre proposal presents a high risk of meeting both the freeze prevention and the chilling requirement." *Id.* at 9-11. Thus, even apart from Chenega's significant advantage under the realism of logistics effort element, the selection of Chenega's proposal over Etnyre's was reasonable and consistent with the RFP's evaluation plan.

With regard to the tradeoff of Chenega's and Kara's three proposals, the relative technical advantages of the proposals were detailed. The tradeoff concluded that these proposals were similarly rated for the SDD design concept and manufacturing facilities and resources elements of the capability area as well as for past performance. Chenega's proposal had a significant advantage under the realism of logistics effort element, so it was considered technically superior to Kara's. However, the most important aspect of the tradeoff was the fact that Kara's proposals exceeded that of Chenega by significant amounts: \$32,778,108, \$33,719,156, and \$44,935,252. Based on our review, we find this tradeoff to be reasonable and consistent with the RFP's evaluation plan.¹⁷ *Id.* at 5-6.

With regard to the tradeoff between Chenega's and Highland's proposals, Highland had the lowest-priced proposal, more than \$7 million lower than Chenega's next low-priced proposal. The evaluation of Chenega's proposal under the most important SDD design concept element under the capability area slightly favored Chenega's over Highland's proposal; however, the source selection decision does not indicate that this evaluated difference was of any significance in the price/technical tradeoff determination. Neither of these offerors had an advantage in the past performance area or the manufacturing facilities and resources element of the capability area.

¹⁷ Kara's argument that the agency converted the evaluation plan from one giving predominant weight to the technical factors to one providing for award based on the lowest priced, technically acceptable proposal is belied by the record.

Thus, the only technical criterion under which the SSA found any significant difference between Chenega's and Highland's proposal was in the realism of logistics effort element of the capability area. As stated previously, Highland proposed substantially fewer labor hours than the agency estimate and did not provide supporting rationale for its proposed hours, despite discussions on this point.¹⁸ The SSA stated that this demonstrated that Highland lacked a "complete understanding of the logistics requirements," posing a significant risk to the government that Highland will not succeed in performing the contract requirements. Id. at 12. The SSA also stated that "[t]his is an unacceptable prospect," "[t]his is of great concern since fielding of the Camel will be greatly affected by availability of logistics data requirements," and "[t]his adds to the significance of Highland's high risk in this element." Id. On the other hand, Chenega was rated excellent under this element, because, among other things, its proposed logistics effort was realistic, supported by a rationale, and demonstrated a clear understanding of the requirements. Id.

The SSA concluded his tradeoff of the Chenega and Highland proposals as follows:

Overall, I consider Highland's proposal to be of greater risk of unsuccessful performance, based upon their extremely low and unsupported number of hours proposed for logistics. Chenega has a significantly lower risk of meeting the logistics requirements and demonstrates a substantially greater understanding of those requirements. This justifies awarding the Camel requirements to Chenega rather than Highland, despite the \$7,236,781 difference between the total evaluated prices of the two proposals.

Id.

Based on our review, we find that the tradeoff between Chenega's and Highland's proposals was reasonable and consistent with the RFP evaluation plan. While it is true that the significant difference between the proposals in the logistics area became the technical discriminator that justified award at a price premium, this did not inappropriately elevate the importance of the realism of logistics effort element in the evaluation plan. As noted above, a lesser-weighted criterion may become the discriminator in a price/technical tradeoff where other factors are equal or cancel each other out, as was essentially the case here. In this regard, the SSA's source selection decision found no significant technical difference between the proposals, notwithstanding his analysis of the various areas, elements and factors, except for what he regarded as a very significant difference in the realism of logistics effort element that offset Highland's price advantage.

¹⁸ In fact, Highland proposed [DELETED].

In sum, the agency's price/technical tradeoff was reasonable and in accordance with the RFP's evaluation plan.

Highland also alleges that Chenega's proposal was technically unacceptable because it did not comply with the RFP's limitation on subcontracting clause (the so-called "50-percent rule"). The standard "Limitations on Subcontracting (Dec 1996)" clause, FAR § 52.219-14, which was incorporated by reference into the RFP, states in pertinent part:

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for-

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) Supplies (other than procurement from a nonmanufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) General construction. . . .

(4) Construction by special trade contractors. . . .

The agency has determined that Chenega's proposal complies with the requirements of this clause.

Highland contends that Chenega's performance of the work will be less than 50 percent of the contract value, as allegedly indicated by its proposal's cost and pricing schedules. In this regard, Highland argues that in computing Chenega's compliance with the 50-percent rule its overhead costs, general and administrative (G&A) costs, and profit must be excluded from the total contract cost, but that the agency's analysis did not do this. Highland also asserts that agency's analysis was flawed because the production quantities and the option CLINs should have been excluded from the analysis since such future orders beyond the initial prototypes are "speculative," and that only the SDD work (which will primarily be subcontracted to Radian) should be used to determine compliance with the 50-percent rule.

As a general rule, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provisions is a matter of contract administration. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, we have considered this to be a matter of the proposal's technical

acceptability; a proposal that fails to conform to a material term or condition of the solicitation such as the subcontracting limitation is unacceptable and may not form the basis for an award. KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3.

As indicated by the subcontracting clause (quoted above), the standard for compliance with the 50 percent rule is different depending whether the contract is for services or for supplies. Compare Phoenix Sys. & Techs., Inc., SBA No. 3220 (Nov. 29, 1989) (supply contract) with SM Sys. & Research Corp., Inc., SBA No. 3241 (Jan. 9, 1990) (service contract).¹⁹ The contract here is a single integrated development and production requirements contract for a 5-year term, with optional CLINs for certain incidental services or items. While there may be some incidental services included in the contract, this is a contract for supplies, as indicated by the inclusion of the clause implementing the Walsh-Healey Public Contracts Act, 41 U.S.C. 35-45 (2000), in the RFP, and the designation of this procurement under North American Industry Classification System Code 333319, "Other Commercial and Service Industry Machinery Manufacturing."

Much of Highland's argument that Chenega will not satisfy the 50-percent rule is based on its assertion that the award was only for CLIN 0001AA for the SDD prototype--work that will be primarily performed by Radian--and that the production quantities in the contract cannot be considered in determining Chenega's compliance with the subcontracting limitation because they are "speculative." This argument does not account for the fact that the production quantities are part of the contract as a whole and thus are required to be considered in determining compliance with the subcontracting limitation, and that the award of the SDD prototype was merely the initial order under the contract. For contracts without option years, as here, the subcontracting limitation applies to the contract as a whole, not to individual delivery or task orders.²⁰ MCA Research Corp., B-278268.2, Apr. 10, 1998, 98-1 CPD ¶ 129 at 6 n.5.

To determine compliance with the 50-percent rule in a supply contract, SBA's Office of Hearings and Appeals has stated that the total contract cost (including profit) less materials and subcontracting costs is to be compared with all subcontracting costs

¹⁹ The SBA no longer considers the issue of whether an offeror has complied with the 50-percent rule under its size determination program, but considers it as an element of responsibility, which would be subject to the SBA's certificate of competency procedures. See 13 C.F.R. § 125.6(c) (2003).

²⁰ Highland also asserts that the optional CLINs should not be considered in the analysis. We need not decide this issue because even if they are excluded from the analysis, the record shows that Chenega's proposal complies with the 50-percent rule.

less the subcontractor's materials costs. See Marwais Steel Co., SBA No. 3884 (Feb. 10, 1994); Phoenix Sys. & Techs., Inc., *supra*. Highland's argument that Chenega's overhead costs, G&A costs, and profit need to be excluded from the computation of the total contract cost is based upon decisions of the SBA's Office of Hearings and Appeals involving service contracts. See e.g., SM Sys. & Research Corp., Inc., *supra*. The rule for supply contracts is that overhead costs, G&A costs and profit should not be excluded from the computation of the total contract cost; rather, only material and subcontracting costs are to be excluded from the total contract cost. Phoenix Sys. & Techs., Inc., *supra*. When Chenega's overhead costs, G&A costs and profit are properly included in the calculation of Chenega's total contract cost, our review indicates that Chenega's proposal complies with the 50-percent rule, *i.e.*, that Chenega planned to perform work for more than 50 percent of the cost of manufacturing the supplies, not including the cost of materials.²¹

Finally, all of the protesters allege that Chenega's subcontractor, Radian, has an organizational conflict of interest that should preclude an award to Chenega. Radian is a long-time support services contractor with a physical presence at the TACOM facility where the Camel requirements and solicitation were developed. The primary concerns are that Radian, through its work on other contracts, may have had access to government documents and other information about the Camel acquisition that were not available to other competitors, or may have had access to proprietary information of its competitors under this RFP.

FAR § 2.101 provides:

“Organizational conflict of interest” means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Contracting officers are required to identify and evaluate potential organizational conflicts of interest 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. The situations in which

²¹ Highland also argues that the agency's determination that Chenega will comply with the 50-percent rule is erroneously premised on excluding, as material costs, the costs of Bay Tank and Fabricating, which is supplying the tank component of the Camel to Chenega, when they should be considered as subcontractor costs. We need not decide this issue because even if Bay Tank's costs are considered as subcontractor costs, Chenega's proposal complies with the 50-percent rule.

organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, generally arise from a firm's performance of a government contract and can be broadly categorized into three groups: (1) biased ground rules cases, where the primary concern is that a government contractor could have an opportunity to skew a competition for a government contract in favor of itself; (2) unequal access to information cases, where the primary concern is that a government contractor has access to nonpublic information that would give it an unfair competitive advantage in a competition for another contract; and (3) impaired objectivity cases, where the primary concern is that a government contractor would be in the position of evaluating itself or a related entity (either through an assessment of performance under a contract or an evaluation of proposals in a competition), which would cast doubt on the contractor's ability to render impartial advice to the government. Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3-4. The allegations concerning Radian are that it had an unfair competitive advantage because of biased ground rules and unequal access to information.

The responsibility for determining whether there is basis for concern about an actual or apparent conflict, and, if so, how best to address it, rests with the contracting officer. In fulfilling their responsibilities in this regard, contracting officers are required to “[c]onsider additional information provided by prospective contractors in response to the solicitation or during negotiations.” FAR § 9.506(d)(2). Contracting officers are to exercise “common sense, good judgment, and sound discretion” in assessing whether a significant conflict of interest exists. FAR § 9.505. In this regard, contracting officers are supposed to “avoid creating unnecessary delays, burdensome information requirements, and excessive documentation” in fulfilling their responsibilities, and need only formally document their judgments “when a substantive issue concerning potential organizational conflict of interest exists.” FAR § 9.504(d).

Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. We will not overturn an agency's determination as to whether an offeror or potential offeror has a conflict of interest except where it is shown to be unreasonable. Snell Enters., Inc., supra, at 4.

Here, the record evidences that the contracting officer did not contemporaneously perform an assessment of potential conflicts of interest relating to Radian when Chenega's proposal with Radian as a major subcontractor was submitted. Rather, the SSEB chair and deputy chair, upon receipt of Chenega's proposal identifying Radian as a subcontractor, considered the potential that Radian had an organizational conflict of interest, without notifying the contracting officer of the matter. These individuals determined that Radian did not have an organizational conflict of interest because it had a very limited role in the Camel program that did not provide it with an unfair competitive advantage. During the course of this

protest, the contracting officer confirmed, based on the analysis of the SSEB chair and deputy chair, that Radian did not have an organizational conflict of interest.

The record before us, which includes testimony from agency and Radian witnesses at a hearing conducted by our Office at TACOM, as well as documents produced by TACOM and Radian, does not establish that Radian had an actual or potential conflict of interest.²²

Radian provided some support services associated with the Camel program. The services were performed as part of the programmatic support services that Radian provided to the office of the Product Manager for Petroleum and Water Systems (PM PAWS), the TACOM office responsible for the design, development and construction of the Camel system. Radian's programmatic support work for PM PAWS began August 31, 1995 and ended January 21, 2001. SSEB Chair's Statement (Oct. 2, 2003) at 1.

Agency officials, who state that they have direct knowledge of the Camel program from its inception and of the extent of Radian's involvement, have provided statements and testimony, in which they have stated that Radian had a very limited role with regard to the Camel program and did not assist in preparing the statement of work or have access to what became source selection sensitive material. Hearing Transcript (Tr.) at 85-87, 153-54, 168-69, 210, 222-25; SSEB Chair's Statement (Oct. 2, 2003) at 1; SSEB Deputy Chair's Statement (Oct. 23, 2003); PM PAWS's System Project Manager's Statement (Oct. 28, 2003) at 1. These government officials testified that Radian personnel provided the agency with administrative or clerical assistance during the preparation of an acquisition strategy document for the Camel program dated October 2000. Tr. at 227-28; SSEB Chair's Statement (Oct. 2, 2003) at 1; PM PAWS's System Project Manager's Statement (Oct. 28, 2003) at 1. The content of this document was determined by government personnel without the input of Radian or any other support contractor. PM PAWS System Acquisition Manager's Statement (Oct. 28, 2003) at 1-2. Additionally, a draft operations requirements document (ORD) containing performance and operational parameters for the Camel existed at that time. Radian did not assist in preparing the ORD, although the agency states that Radian may have had access to it. Contracting Officer's Statement (Oct. 30, 2003) at 3. Other documents, including the RFP, the

²² Although substantial documentation concerning the conflict of interest issue was produced during the course of this protest, other requested documentation was not produced or promptly made available. While the protesters suggest that we should draw an adverse inference because of the documents not produced in response to the protesters' requests, we find no evidence that the agency's assertion that certain documents were unavailable was false or that the agency was acting in bad faith in order to suppress the production of relevant documents, and we decline to draw any such inference.

statement of work, the purchase description, the test and evaluation master plan, milestone decisions and the life cycle cost estimate, were created after Radian's contract with PM PAWS ended in January 2001. PM PAWS System Acquisition Manager's Statement (Oct. 28, 2003) at 2. Notwithstanding the protesters' arguments, the record before us contains no evidence to support a finding that Radian performed any services that could have shaped either the Camel requirements or the ground rules for this procurement in its favor.²³

Moreover, much of the information in the October 2000 acquisition strategy document and the draft ORD were publicly released in the Commerce Business Daily announcement, on the agency's Camel website, and at the Industry Day in 2001, where the agency provided potential offerors with detailed information about technical requirements, funding, acquisition strategy and other information. Contracting Officer's Statement (Oct. 30, 2003) at 3. Furthermore, significant changes in the acquisition strategy occurred between the Industry Day and the issuance of the RFP in November 2002. *Id.* For example, while the initial strategy was to issue multiple development contracts and, through a competitive process, select a design and award a production contract, the current RFP provides for the award of a single integrated development and production requirements contract. Another change was that while the initial strategy contemplated a two-tank design that permitted configuration of one 450-gallon tank on a small trailer and two tanks with a total capacity of 900 gallons on a large trailer, the RFP now requires a minimum water capacity of 900 gallons for use only with the larger trailer. *See* Tr. at 140-44. Thus, to the extent Radian had access to documents concerning the Camel program, they may well have been outdated by the time the RFP was issued, and, in any event, there is no evidence showing that the information contained in those documents provided Radian with an unfair competitive advantage.

The protesters also allege that Radian's presence at the agency was so "embedded" as to provide Radian with insight into the agency's operations beyond that which could be expected of a typical government contractor—that it was in effect part of the agency—such that it had the opportunity to have unequal access to source selection

²³ At the hearing, Radian's acquisition team leader/program manager made her journal regarding the Radian contract available for review. In their post-hearing comments, the protesters have identified a copy of an e-mail message to her from another Radian employee, dated May 7, 2002, suggesting that Radian ascertain the agency's interest in sole-sourcing the Camel project to Chenega/Radian. The message stated, "We designed the necessary solution for all of the CAMEL requirements and thought that maybe TACOM . . . might find this approach of interest." Highland's Post-Hearing Comments, Tab 17. Contrary to the protesters' allegations, this statement does not demonstrate that Radian either had access to non-public information or that it shaped the agency's requirements for the Camel procurement.

sensitive or competitively useful information about the Camel program. One example cited is that Radian assigned contractor personnel to each PM PAWS manager and the Radian personnel worked side-by-side with government personnel on a daily basis. Thus, according to the protesters, Radian would have had access to documents maintained in office cubicles and was within earshot of conversations by government personnel occupying these cubicles. Another example is that Radian had access to the PM PAWS electronic document database that was created prior to the conclusion of Radian's PM PAWS contract. Thus, Radian would assertedly have had access to an unknown variety of sensitive documents.

However, as indicated above, the agency indicated that source selection sensitive documents were created after Radian's effort on the PM PAWS contract ended. While the protesters assert that Radian may have been privy to sensitive agency discussions or documents in the database prior to January 2001 that imparted competitively useful information that was not made available to the offerors and that would give Chenega/Radian an unfair competitive advantage under this RFP, there is no evidence that this was the case. We may sustain a protest in appropriate circumstances where the record establishes that a contractor obtained competitively useful information as a result of being "embedded" at an agency, see Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 4-7; however, the record before us here, which includes the agency's credible testimony that Radian had very little to do with the Camel program, does not support anything beyond speculation that Radian may have had access to such information.

The protesters point to various specific examples where they assert that Radian may have obtained unequal access to competitively useful information. For example, an agency engineer began designing and constructing a demonstration model for a theoretical Camel system. The model that was built was not capable of doing much of what it was supposed to be able to do, but it did serve as a display model, which was its purpose. The model was subjected to limited demonstration assessment and stored at TACOM's facility prior to the inception of the Camel program, but it was also publicly displayed on a limited basis elsewhere, including at the Industry Day. Tr. at 326-54. While protesters allege that Radian may have had greater access to this model than did the protesters, or otherwise had access to the agency's assessments made from it, there is no evidence that Radian had special access to the model (much less used this information in its design), or to non-public information concerning the agency's assessment of it.

Another example is the allegation that Radian may have had access to agency logistics information applicable to the Camel procurement. In this case, Chenega's proposal concerning logistics effort, an area to be performed by Radian, proposed total labor hours that differed from the agency's estimate by only a few percentage points. The next closest proposal varied from the agency's estimate by approximately 40 percent. The protesters state that Radian has performed

significant logistics support services for the agency and allege that it may have had access to non-public information relevant to the agency's estimate.

Not only have the protesters not shown that Radian had special access to the Camel logistics estimate, but the proximity of Chenega/Radian's logistics hours to the agency's estimate is not proof of unequal access to information; such proximity does not rise above innuendo and suspicion and does not provide a basis to sustain the protest. See American Artisan Prods., Inc., B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ __ at 8. Moreover, the record shows that Radian has considerable logistics experience for a variety of other agencies, in addition to TACOM, and it is not unreasonable to assume that this experience, rather than access to non-public TACOM information, allowed them to more realistically address TACOM's logistics requirements.

MECO and Highland allege that Radian, as a support contractor for acquisitions other than the Camel, had access to the proprietary information of these protesters.²⁴ MECO and Highland competed under solicitations for the Tactical Water Purification System (TWPS) and the Lightweight Water Purifier (LWP). The solicitations for these systems stated that Radian was an administrative support contractor, that organizational conflict of interest provisions applied, and that Radian had signed "non-disclosure statements." Highland Supplemental Comments (Nov. 17, 2003), exh. 4, Declaration of Highland's Vice President (Nov. 15, 2003), attachs. 3, 4.

The SSEB deputy chair on the Camel procurement was also the SSEB deputy chair for both the TWPS and the LWP procurements. He testified that Radian ended up only putting together the pre-proposal conference for TWPS and did no work for LWP, and that he was certain that Radian did not have access to proprietary data. Tr. at 126, 144-47. Thus, even though the SSEB deputy chair did not consider whether Radian had access to the proprietary data of competitors when he was considering whether Radian had a conflict of interest applicable to the Camel competition, his testimony evidences that Radian's work on these contracts did not create an organizational conflict of interest. Under the circumstances, the protester's speculation that Radian actually did have such access provides no basis to find that Radian had a conflict of interest.

The protesters have made a number of other allegations to suggest that Radian had an unfair competitive advantage arising from Radian's support services for the agency, but none that rise above innuendo and suspicion. On this record, we cannot

²⁴ Etnyre also explored the possibility that Radian had access to Etnyre's proprietary data under a contract for a water distributor module. The assistant acquisition manager familiar with that procurement testified that Radian did not provide services for the acquisition planning for, or administration of, that contract. Tr. at 270-75. Etnyre did not pursue this issue in its post-hearing comments.

find unreasonable the agency determination that Radian's did not have a significant organizational conflict of interest. Under these circumstances, FAR § 9.504(e) provides that award shall be made to the apparent successful offeror.

The protests are denied.

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