Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Battelle Memorial Institute

File: B-278673

Date: February 27, 1998

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James J. Regan, Esq., Frederick W. Claybrook, Jr., Esq., Paul Shnitzer, Esq., and John E. McCarthy, Jr., Esq., Crowell & Moring, and Stuart I. Young, Esq., for DynPort LLC, an intervenor.
Col. Nicholas P. Retson, JA, Maj. Michael J. O'Farrell, JA, Jay B. Winchester, Esq., Ltc. James M. Miller, JA, Maj. Jonathan C. Guden, JA, Cpt. John C. Lavorato, JA, Elizabeth A. Arwine, Esq., and Kenneth J. Allen, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a potential contractor proposes to meet a solicitation's requirements by offering performance by a government facility, and personnel employed by that facility are involved in evaluating the competing offerors' proposals, it is incumbent on the contracting officer to consider whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation.

2. Contracting officer reasonably determined that government entity's minimal, potential involvement in contract performance did not create a significant conflict of interest requiring avoidance, neutralization or mitigation.

3. Where protester's offer proposed a more established technical approach than awardee's offer, agency's technical evaluation resulting in same technical risk for both proposals is unobjectionable where evaluation was reasonable and in accordance with stated evaluation criteria. Under stated evaluation scheme, technical approach was less important than management of total contract effort, and agency had unilateral authority to select technical approach during contract performance.

4. Since the prime contractor is ultimately responsible for successful performance of contract effort, past performance evaluation reasonably credited offeror who performed as prime contractor with relevant experience even though subcontractor on past contract was responsible for majority of technical work.

5. Where source selection authority reasonably determines that competing proposals are essentially equal in technical merit with little difference in risk, award to offeror presenting more advantageous management proposal and lower evaluated most probable cost is unobjectionable.

DECISION

Battelle Memorial Institute protests the award of a contract to DynPort LLC for development, licensure, and production of biological defense vaccines under request for proposals (RFP) No. DAMD17-95-R-5020, issued by the Department of the Army, Joint Program Office for Biological Defense. Battelle challenges the propriety of the technical and cost evaluations, based in part on an allegation of an organizational conflict of interest. Battelle asserts that the conflict arises from DynPort's proposal to use testing facilities located at the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID), an Army installation which employs two members of the source selection evaluation board (SSEB).

We deny the protest.

BACKGROUND

The Department of Defense (DOD) has an active medical biological defense (BD) research program focused on the development of vaccines and other medical products to protect U.S. forces from biological warfare agents. This program is overseen by the Joint Vaccine Acquisition Program (JVAP) Project Management Office,[1] and USAMRIID is the entity directly responsible for developing candidate vaccines and other medical products. Most of the products developed by USAMRIID are maintained as investigational new drugs (IND), and have not been licensed for use by the Food and Drug Administration (FDA). Absent FDA approval, there are limitations on the manner in which the products may be used. Based on industry input and an economic study, DOD developed an acquisition strategy for a prime systems contractor approach, and issued an RFP on August 9, 1996.[2] The stated purpose of the RFP was "to establish a prime systems contractor

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[1]While all three military services (Army, Air Force, and Navy) participate in the program, the Army serves as the lead agency for the program.

[2]The DOD had earlier considered creation of a government-owned contractor-operated facility and a contractor-owned contractor-operated facility to produce the vaccines, but rejected this approach for economic and other reasons.

who will use information and materials from the existing DOD program to create and execute an integrated approach leading to FDA licensure and long term production/stockpiling of each vaccine." RFP, § C.1. The RFP contemplated award of a cost-plus-award-fee contract, with two cost reimbursable contract line item numbers (CLINs), with a maximum performance period of 10 years.

The RFP provided for a base effort to obtain FDA licensure for 3 BD vaccine products (tularemia, vaccinia, and Q-fever), options for 15 additional vaccines, and production options for all vaccines including storage, testing, and disposition.[3] Licensure options were to be exercised following affirmative DOD "Milestone I" decisions for each product,[4] and production options were to be exercised after successful FDA product and establishment licensing to initiate production.

Rather than setting forth a statement of work (SOW), the RFP provided a statement of objectives (SOO) and required that offerors propose their own SOWs and tailor CLIN structures which would allow them to best execute their proposed programs. The SOO identified five overall objectives: (1) complete development and testing of vaccines for FDA licensure for the DOD-required product indication; (2) manufacture licensed vaccines in sufficient quantities to establish an initial stockpile; (3) maintain, test, and store vaccines in compliance with FDA and DOD requirements; (4) distribute or dispose of vaccines as required; and (5) conduct special studies in support of JVAP requirements. The SOO also identified a number of specific objectives including: establishment of a joint government/contractor integrated product team (IPT) for cost-effective risk reduction; reduction of program costs and risks through reliance on industry standards, pursuit of innovative manufacturing methods and process improvements, cost-effective use, maintenance, and sustainment of industrial facilities and capabilities, and application of performance-based incentives; provision of full life-cycle management and JVAP integration; maintain current DOD stockpile of BD vaccines; establish and maintain a program/product specific information management capability; and performance of special studies.

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[3]The option vaccines included seven botulinum monovalents, a botulinum polyvalent, ricin, staphylococcal enterotoxin B (SEB), venezuelan equine encephalitis (VEE), combined VEE, eastern and western equine encephalitis (VEE/EEE/WEE), brucellosis multivalent, and improved plague and anthrax.

[4]Prior to the "Milestone I" decision, USAMRIID performs basic and applied research and concept exploration in the development and nonclinical study of candidate vaccines. At "Milestone I," the agency determines the basic technological approach to be used in vaccine production, and the candidate vaccine is considered ready to move into an advanced development phase.

Proposals were to be evaluated on the basis of five factors, listed in descending order of importance: (1) quality of program integration and program management; (2) development, licensure, production, storage, and testing of BD vaccines; (3) past performance with program integration and in developing and manufacturing vaccines for human use; (4) availability of laboratory, animal use, production, and storage facilities meeting FDA and other government regulatory requirements and industry standards; and (5) cost.[5] Non-cost factors were scored using a color/adjectival rating system;[6] cost was evaluated for realism, reasonableness, completeness, and most probable cost (MPC). Section M also provided for evaluation of proposal risk addressing the offerors' proposed approach to accomplishing the SOO, and performance risk addressing the offerors' ability to successfully complete relevant technical and management efforts on time and within cost.[7]

Award was to be made to the offeror whose proposal demonstrated technical, management, and financial capabilities for risk reduction activities necessary to meet the objectives defined in the SOO and which represented the best value to the government.

Four proposals, including Battelle's and DynPort's, were received by the December 9, 1996, closing date. The agency conducted an initial evaluation of the proposals using separate teams for each of the evaluation factors which, together, comprised the SSEB. The SSEB determined that all four proposals were in the competitive range and sent a series of deficiency reports and items for clarification to each offeror. After reviewing the offerors' written responses, the SSEB

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[5]Each management and technical factor was divided into the following subfactors: M-1 (plans for interfacing with the government and integrating subcontractors for optimizing contract requirements); M-2 (plans for identification, avoidance, and mitigation of technical risk); M-3 (experience and responsibilities of committed, key, program management personnel; M-4 (program office structure); M-5 (approach for integrating data management across different requirements and groups); M-6 (plan for conduct of special studies; T-2.1 (soundness of approach to include optimization of production); T-2.2 (understanding of regulatory issues associated with contract requirements); T-2.3 (understanding of different technical issues associated with contract requirements); T-2.4 (application of product/process improvements to reduce product life-cycle cost); T-2.5 (plan for maintenance of current BD vaccines); T-1.1 (facilities: types, space, capacity, availability, licensed/approved); T-1.2 (equipment: types, function, availability).

[6]Blue/outstanding; green/satisfactory; yellow/marginal; and red/unacceptable.

[7]Risks were rated as low, moderate, or high.

conducted oral discussions, and obtained best and final offers (BAFO) from each offeror.

The SSEB's evaluation of BAFOs resulted in Battelle's and DynPort's proposals [deleted] being rated [deleted] under the management, past performance, and technical evaluation factors. Battelle's proposal was evaluated as [deleted] in overall performance risk, while DynPort's was rated [deleted]. Battelle's proposal risk was rated as [deleted] and DynPort's was rated as [deleted]. Battelle's total evaluated MPC was [deleted]; DynPort's was [deleted], approximately [deleted]. Upon completing its evaluation of cost and non-cost factors, the SSEB recommended award to Dynport based on the SSEB's balancing of Battelle's [deleted] and [deleted] against DynPort's [deleted] and [deleted]. The SSEB presented its findings and recommendations to the source selection advisory council (SSAC). The SSAC disagreed with the SSEB's award recommendation, and recommended to the source selection authority (SSA) that the contract be awarded to Battelle. The SSA requested a legal review of the evaluation prior to making his award determination.

In its legal review of the evaluation, the agency determined that the technical evaluators had [deleted] the proposals of Battelle, DynPort, and another offeror for the same [deleted] under different evaluation criteria, that is, the evaluators had "double counted" [deleted]. Specifically, the evaluators had assigned [deleted] to Battelle's and DynPort's proposals based on [deleted] under the first management subfactor (plans for interfacing with the government and integrating subcontractors for optimizing performance of contract requirements) and to both proposals under the "facilities" technical subfactor. The evaluators also assigned [deleted] to DynPort's proposal under another management subfactor (structure of the program management office). Concluding that such double counting was improper, the SSEB corrected the evaluation by eliminating the [deleted] from the management subfactor(s). Since the facilities issue was the only DynPort [deleted] under the first management subfactor, its elimination resulted in a change from a [deleted] performance risk rating to a [deleted] rating. Its elimination from the other subfactor resulted in a change from [deleted] risk to [deleted]. These changes in the management risk rating resulted in an improvement in DynPort's overall performance risk rating from [deleted] to [deleted]. Since Battelle's proposal was assigned other [deleted] under the first management subfactor, its management performance risk rating remained [deleted] and there was no change to Battelle's overall performance risk rating of [deleted].

Following the agency's correction of the evaluation, both proposals were rated as [deleted] with [deleted] performance risk. Based on this corrected evaluation, the SSAC recommended award to DynPort. After being briefed on the changes, the SSA weighed the significant attributes of Battelle's and DynPort's proposals, their performance ratings, risk ratings, and relative MPCs, and determined to make award

to DynPort. Following notice of the award and receipt of a debriefing, Battelle filed this protest.

CONFLICT OF INTEREST

Battelle first contends that the agency's award to DynPort violates the conflict of interest provisions contained in Federal Acquisition Regulation (FAR) subpart 9.5. Battelle maintains that, under DynPort's proposal, any aerosol challenge studies required under the contract will be performed by USAMRIID, and points out that two of the SSEB members were USAMRIID employees.[8] Battelle contends that due to USAMRIID's proposed involvement in DynPort's contract performance, the USAMRIID employees were unable or potentially unable to render objective, impartial advice in the source selection process.

The agency first responds that the conflict of interest provisions in FAR subpart 9.5 are inapplicable to government organizations, including USAMRIID. The agency maintains that, because FAR subpart 9.5 generally refers to "companies" or "contractors" rather than "agencies," the regulations may not, as a matter of law, be applied to government agencies, institutions, or their employees.

We agree that FAR subpart 9.5, by its terms, does not apply to government agencies or employees. However, in setting out the standards of conduct that apply to government business, FAR § 3.101-1 states:

> Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

The standards contained in FAR subpart 3.1 are explicitly applicable to the actions of government personnel. Id.[9]

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[8]One of the SSEB members employed by USAMRIID, an active duty officer who serves as chief of USAMRIID's Virology Division, was on the SSEB technical team. The other, a civilian employee in USAMRIID's Product Development and Regulatory Affairs Office, was on the SSEB past performance team. Aerosol testing performed at USAMRIID is done by its Toxinology Division.

[9]See also 5 C.F.R. § 2635.101 (1997), titled "Basic Obligation of Public Service," which provides that government employees must endeavor to avoid actions which create the appearance of, among other things, conflicts of interest.

FAR subpart 3.1 does not provide specific guidance regarding situations in which government employees may, because of relationships with particular government organizations, be unable or potentially unable to render impartial advice to the government.[10] In contrast, FAR subpart 9.5 addresses analogous situations involving contractor organizations.[11] Accordingly, we believe that in determining whether an agency has reasonably met its obligations to avoid conflicts under FAR § 3.101-1, FAR subpart 9.5 is instructive in that it establishes whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation.[12]

FAR § 9.505-3 generally prohibits a contractor from evaluating its own products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the government's interests.

FAR § 9.504 provides direction to contracting officers, stating:

> (a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to--
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> > (1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

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[10]When cost comparisons are performed under Office of Management and Budget (OMB) Circular A-76, the Revised Supplemental Handbook, provides the following guidance:

> As required by the FAR, the Government should establish a Source Selection Authority, including assurances that there are no potential conflicts of interest in the membership of the Authority.

[11]See FAR § 9.501(d) which provides that a conflict of interest exists when, "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."

[12]Our reliance on FAR subpart 9.5 for guidance in applying the general requirements of FAR subpart 3.1 is consistent with FAR subpart 3.6 which directs:

> The contracting officer shall comply with the requirements and guidance in [FAR] [s]ubpart 9.5 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.[13]

Accordingly, where a potential contractor proposes to meet a solicitation's requirements by offering performance by a government facility, and personnel employed by that facility are involved in evaluating the competing offerors' proposals, it is incumbent on the contracting officer, in complying with the requirements of FAR § 3.101, to consider whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation and, if so, to take appropriate remedial action.

The agency next maintains that, in any case, it reasonably determined that the particular facts here did not create a significant conflict which required avoidance, neutralization or mitigation. Based on the record, including hearing testimony,[14] we find the agency's conclusion to be reasonable.

Prior to submission of initial proposals, the agency issued various solicitation amendments containing responses to offerors' questions. RFP amendment No. 2 contained the following:

> Question: Will the contractor have access to existing government facilities? If so, which ones.
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> Answer: There is nothing to preclude the contractor from approaching Government agencies for use of existing facilities. However, no Government facilities are being provided as part of this procurement. Your proposals should clearly state the coordination approval if Government facilities are being proposed.

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[13]FAR § 9.505 further provides that:

> Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

[14]Following submission of the agency's report, this Office notified the parties that a hearing would be conducted, advising the parties that one of the purposes for conducting the hearing would be to "obtain information regarding the magnitude or significance of USAMRIID's potential involvement in the actual performance of the contract."

Thereafter, a representative of Frederick Research Corporation (FRC), one of DynPort's proposed subcontractors, contacted the Commander of USAMRIID and asked whether that facility could be used to perform aerosol challenge studies if DynPort were awarded the JVAP contract.[15] Hearing Transcript (Tr.) at 174. The USAMRIID Commander told FRC that USAMRIID would be willing to assist DynPort, on a reimbursable basis,[16] but that there would likely be space limitations on USAMRIID's ability to hold animals before or after the actual exposure. Tr. at 180, 243, 246. By letter to FRC dated November 21, 1996, the USAMRIID Commander confirmed this conversation, stating:

> In principle, our response to [FRC's] request is that USAMRIID could provide [animal testing] on a reimbursable basis. . . Attached is a cost estimate prepared by my staff that should give you a general idea of our costs.

The cost estimate attached to the letter indicated a cost of $24,600 per test.[17]

FRC also contacted Dugway Proving Grounds, another government facility with aerosol testing capabilities, and received similar assurances that Dugway would be willing to participate in DynPort's performance of the JVAP contract. At the hearing, the FRC representative testified to his understanding that Dugway had just completed construction of a new animal testing facility which was "essentially empty," and that they "were looking to bring other work[] into the facilities." Tr. at 358-59.

Thereafter, initial proposals were submitted. DynPort's and Battelle's proposals differed markedly regarding the amount of [deleted] testing that would be required. DynPort's proposal indicated that it would perform two tests based on [deleted] for each vaccine, and that other tests could be performed using alternative methods of

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[15]When a subject is exposed to a particular toxin or other agent, it is referred to as being "challenged." Challenging a subject by aerosol exposure involves creating a "cloud" of the agent, within a chamber, which the subject breathes. Because of the potential danger associated with aerosol exposure, special equipment and facilities are required.

[16]The USAMRIID Commander also advised FRC that its "offer of participation is non-exclusive, and we are obligated to respond to similar requests by other respondents to the RFP."

[17]The cost estimate carries a date of "July 29, 1996." At the hearing, the USAMRIID commander explained that this estimate had been prepared earlier in response to a request from another government agency unrelated to the JVAP procurement. Tr. at 184.

exposure. In contrast, Battelle's proposal was based on the assumption that virtually all testing would involve aerosol exposure, anticipating over 1,700 aerosol exposures over the contract period.[18]

In its initial proposal, DynPort indicated that tests requiring aerosol exposure would be performed at USAMRIID or Dugway Proving Ground, stating:

> For preclinical and clinical testing, DynPort will provide the expertise of Porton International, which has extensive knowledge of such work on botulinum neurotoxins and toxoids. The study work will be performed by FRC and PAREXEL; the essential animal studies on efficacy that will permit immune correlates and surrogate markers to be identified for human studies will include aerosol challenge that will be performed at DPG-LSD [Dugway Proving Ground-Life Science Division] or USAMRIID.

During oral discussions with the agency, FRC's representative provided clarifying information regarding its intentions, stating:

> FRC: Let me tell you a little bit about the background and history as to why we included Dugway and USAMRIID in our proposal. At FRC we have a BSL 3 facility and have experience with a number of agents at our BSL 3 levels over the past six years. We are confident that anything that we can perceive today that we would need to do in terms of challenge studies, can be done in our facility. But we are also aware that there[] may be the possibility that for some reason our facility is not available, or that new requirements may come up in the future. And in order to reduce the risk, and diversify our capabilities, I asked the question would it not be possible and a safe approach to see if the Army facilities could be used in the eventuality that some factor, parameter is introduced in the future that would make our facility unavailable whether its time, whether it's engineering constraints or whatever. So it was with that thought that I approached Dugway and USAMRIID . . . .
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> . . . . .

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[18]The parties agree that the contractor will have to perform whatever level of aerosol exposures the FDA requires. In its post-hearing comments, Battelle states: "There is no dispute that the specific amount of aerosol challenge studies that the FDA will ultimately require is unknown." DynPort asserts that, in recent years, FDA has permitted licensing of vaccines for agents normally contracted through the air without requiring aerosol challenge studies to be conducted. Tr. at 265-267.

> Agency: It would be useful to know what agents you could use out there [at FRC's facility] for aerosol testing, in particular, I don't believe I saw that in the advice of what we have on the JVAP.
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> FRC: We don't have current equipment for aerosol capabilities. . . . We certainly can bring in equipment to isolate it and so on, to be able to do nose only type of experiments, so that can be brought into the facility. We have not done that. That is one of the considerations that led us to approach USAMRIID and Dugway for their capabilities to support us. We do not know at this stage, what the FDA would require in terms of surrogate models for challenge studies that it would require aerosol exposure.

Following discussions, DynPort submitted its BAFO which contained an appendix to its integrated management plan (IMP). The appendix to the IMP contained technical summaries for each of the required vaccines; these summaries were described as "provid[ing] an enhanced discussion of our rationale and technical justification for the manufacture, product testing, clinical testing, licensed vaccine production, and post-production maintenance of the vaccines." Within the technical summaries, DynPort's BAFO repeatedly states: "testing will be performed at FRC," with no reference to either USAMRIID or Dugway.

Nonetheless, the 4-page "Overview" to the appendix stated:

> DynPort will use the test and exposure facilities at either USAMRIID or DPG [Dugway Proving Ground] to perform efficacy studies on vaccine products whenever the FDA requires efficacy data from a surrogate animal model. . . . Animals exposed to biological agents for challenge studies performed at USAMRIID can be housed either at USAMRIID or in the FRC BSL-3 facility. DynPort ensures that the use of the exposure facility at USAMRIID will never be limited by lack of animal holding space.

Nothing in the "Overview" to the appendix indicated that Dugway or USAMRIID were being proposed as backup facilities.[19]

Consistent with the explanation given by FRC's representative during discussions, the agency interpreted DynPort's BAFO as proposing that FRC would be primarily responsible for meeting any testing requirements at its own facility, with USAMRIID or Dugway to be used on an as-needed basis. Further, in the event USAMRIID were

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[19]The "Overview" did state: "where information provided in the initial IMP submission . . . conflicts with that provided in this Appendix, the technical approach summaries contained in the Appendix take precedence."

used, the agency understood that the scope of its performance would likely be limited to the actual exposure portion of the testing procedure due to the limited availability of animal holding space at USAMRIID.

At the hearing, the contracting officer testified that, during the procurement, she considered whether DynPort's proposed use of USAMRIID created a conflict of interest because two of the SSEB evaluators were employed by USAMRIID. The contracting officer testified that, after considering the magnitude of USAMRIID's involvement, the contingent nature of that involvement, and the relationship between USAMRIID and Dynport, she determined that the situation did not create a conflict of interest which required further action. Tr. at 503-535.

A contracting officer is required to identify and evaluate potential conflicts as early in the procurement process as possible, and to avoid, neutralize or mitigate significant conflicts. FAR §§ 9.504(a); Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12; D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419 at 4-5. Contracting officers must examine each situation individually on the basis of its particular facts and the nature of the proposed contract. FAR § 9-505; SC&A, Inc., B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197 at 9.[20] The responsibility for determining whether a conflict exists rests with the contracting agency, and we will not overturn the agency's judgment in this regard unless it is shown to be unreasonable. See Aetna Gov't Health Plans, Inc., et al., supra.

Based on the limited scope and the contingent nature of USAMRIID's proposed involvement, the contracting officer's determination that the circumstances here did not create a significant conflict requiring further action was reasonable.

First, USAMRIID's proposed involvement is clearly limited to the contract's requirements related to aerosol challenge studies. DynPort's proposal contemplates [deleted] studies for each of the 18 vaccines required under the solicitation. Multiplying these [deleted] tests by USAMRIID's cost estimate of $24,600 per test leads to the conclusion that USAMRIID may have anticipated receiving a total of $885,600 in reimbursement over the 10-year period of contract performance. That is, even if USAMRIID anticipated performing all of the aerosol challenge studies proposed by DynPort for the entire contract period, USAMRIID's total

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[20]The FAR provides that, "[i]n fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation," and the contracting officer's judgment regarding existence of a conflict "need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists." FAR § 9.504(d).

reimbursement would represent less than [deleted] percent of the DynPort's total evaluated cost, and less than 2.5 percent of USAMRIID's annual funding.[21]

Battelle argues that significantly more aerosol challenge studies will be required than that reflected in DynPort's proposal, pointing out that Battelle's proposal contemplates over [deleted]. However, Battelle's higher level of aerosol exposures is based on the assumption that the FDA will require virtually all challenge studies to be performed on the basis of aerosol exposures. As noted above, DynPort disagrees with Battelle's assumption in this regard, representing that the FDA has recently permitted licensing of vaccines for agents normally contracted through the air without requiring aerosol challenge studies. Tr. at 265-267. Battelle acknowledges that the FDA requirements regarding aerosol challenge studies is "unknown." On this record, we cannot conclude that the level of aerosol exposures set forth in DynPort's proposal is unreasonable, nor do we view as unreasonable the contracting officer's consideration of the scope of aerosol testing in DynPort's proposal, (rather than the scope in Battelle's) as the basis for projecting USAMRIID's potential involvement in DynPort's contract performance.

Further, we do not find unreasonable the contracting officer's conclusion that DynPort was unlikely to rely on USAMRIID to perform aerosol exposures throughout the contract period. During discussions, FRC's representative stated that FRC could install the equipment necessary to perform aerosol testing at its own facility if the FDA required significant aerosol exposures to occur. The record also indicates that Battelle, itself, contemplated limited testing requirements during the first several months of contract performance, providing further support for the agency's conclusion that any potential USAMRIID involvement in contract performance would be limited.[22] In addition, throughout its proposal, DynPort's references to assistance from USAMRIID are virtually always coupled with similar references to assistance from Dugway Proving Grounds. The record suggests that, if FRC's facility were unavailable for aerosol exposures, DynPort may have been more inclined to use Dugway rather than USAMRIID due to Dugway's greater availability of facilities. Tr. at 352, 356, 358-359, 568, 631.

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[21]At the hearing the USAMRIID Commander testified that total funding for USAMRIID in fiscal year 1997 was $38 million. Tr. at 191.

[22]At the hearing, Battelle presented testimony that it could take FRC up to 2 years to install the equipment necessary to perform aerosol exposures at its facility. Tr. at 670. Since a 10-year contract performance period is anticipated and Battelle, itself, anticipates limiting testing requirements during the first several months of contract performance, even under Battelle's scenario, it would appear that FRC could be able to perform more than 80 percent of the contract's requirements for aerosol testing requirements at its own facility.

Finally, the record does not establish that performance of aerosol testing at USAMRIID was seen by USAMRIID as providing a significant benefit for USAMRIID. The record is clear that, when first approached by FRC, the USAMRIID Commander advised FRC that USAMRIID's ability to participate in performance of the JVAP contract would be limited. Specifically, the limited availability of animal holding space at USAMRIID led the USAMRIID Commander to suggest that, even if USAMRIID's participation were sought, FRC should contemplate using USAMRIID's facility only for the actual aerosol exposure portion of the testing. This contradicts Battelle's thesis that USAMRIID desired significant involvement in performing the JVAP contract, and that such involvement was viewed as a benefit to USAMRIID that potentially influenced the USAMRIID employees' evaluation of proposals.[23]

As noted above, the contracting officer testified that she considered whether DynPort's proposed use of USAMRIID facilities created a significant conflict of interest, concluding that it did not, based on, among other things, the limited amount and contingent nature of USAMRIID's involvement. The record supports the reasonableness of that conclusion. Accordingly, this portion of Battelle's protest is denied.[24]

EVALUATION OF PROPOSALS

Battelle next argues that the agency failed to follow the evaluation criteria in its evaluation of the proposals.[25] In this regard, it is not the function of our Office to evaluate proposals de novo. Rather, we will examine an agency's evaluation only to

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[23]At the hearing, the only USAMRIID evaluator involved in the evaluation of DynPort's proposal testified that, if DynPort had proposed to use USAMRIID in more than a backup capacity, he would have viewed that as a negative aspect of DynPort's proposal. Tr. at 326-328; 487. The second USAMRIID evaluator was only involved in evaluating the past performance of an offeror other than either DynPort or Battelle.

[24]Battelle also asserts that a conflict existed by virtue of the fact that a third SSEB evaluator was employed by Walter Reed Army Institute of Research (WRAIR), and that WRAIR has a cooperative research and development agreement with one of DynPort's proposed subcontractors. We have reviewed the record and find the connection between this subcontractor and WRAIR to be too attenuated to provide any basis to sustain Battelle's protest. We also note that the record clearly shows that, throughout the evaluation process, this SSEB evaluator favored awarding the contract to Battelle.

[25]Battelle identifies a number of examples of unreasonable evaluation ratings and other flaws in the evaluation. We have examined them all and find that none has any merit. This decision will address only the more significant allegations.

ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of competing proposals is primarily a matter within the contracting agency's discretion. Information Sys. & Networks Corp., 69 Comp. Gen. 284, 285 (1990), 90-1 CPD ¶ 203 at 3; Advanced Tech. and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Medland Controls, Inc., B-255204, B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260 at 3.

EVALUATION OF DYNPORT'S RISK

Battelle first challenges the agency's evaluation of the risk associated with DynPort's proposed technical approach to development and production of the fifteen option vaccines. As a preliminary matter, we note that there are two types of risk involved in the evaluation: "proposal risk" addressing the offerors' proposed approach to accomplishing the SOO, and "performance risk" addressing the offerors' ability to successfully complete relevant technical and management efforts on time and within cost. While the agency evaluated [deleted] proposals as [deleted] in overall performance risk, the agency evaluated DynPort's proposal risk as [deleted] and Battelle's proposal risk as [deleted]. Battelle's specific challenges to the risk assessment all concern the evaluation of performance risk.[26]

Battelle's challenge to the performance risk assessments is based primarily upon the technical approach proposed by each offeror. In this regard, DynPort proposed to use a [deleted] approach for production of the toxin type vaccines, while Battelle

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[26]In its pre-hearing comments to the agency report, Battelle argued that the proposal risk assessment did not follow the evaluation criteria because there is no evidence that it was performed for each factor or that it was factored into the evaluation and scoring. The Proposal Analysis Report explains that proposal risk was evaluated by the SSEB in terms of the quality control and consistency of the proposal information to determine whether the proposed approach would accomplish the SOO. The SSEB also considered whether the proposal information was of sufficient detail and consistency to allow a cross walk of data among the various aspects of the proposal. This approach was required in order to determine the confidence level of the data used in structuring the total evaluated MPC for each offeror. It is apparent from the record that the evaluation was conducted for all aspects of the proposals. Since Battelle's proposal was assigned the [deleted] and DynPort's proposal was assigned the [deleted] the absence of individual factor ratings is not prejudicial. Further, the record reflects that the SSAC and the SSA were briefed on these proposal risk ratings prior to the award determination.

proposed using [deleted].[27] In Battelle's view, since its [deleted] its proposal should have been evaluated as [deleted] performance risk, while DynPort's approach should have been evaluated as [deleted] risk, instead of the [deleted] risk which [deleted] proposals received. Based on our review of the record, we see no basis to conclude that the agency's performance risk evaluation was unreasonable.

For example, Battelle observes that its proposal was rated a [deleted] risk under the first management subfactor regarding plans for optimizing performance of the contract requirements, while DynPort's was rated a [deleted] risk, despite the agency's recognition that the [deleted] method was a [deleted] technical approach. As the agency points out, this management subfactor is not concerned with the technical approach. Rather, it is concerned with the life-cycle management of the program. Thus, the assessment was of an offeror's ability to programmatically integrate and manage vaccine products, including program management performance, program schedules, integration of FDA requirements, managing subcontractors, and managing cost. Evaluation of this management subfactor was independent of the technology proposed for production of a specific vaccine.

Under this subfactor, the evaluators found DynPort had demonstrated an understanding of DOD requirements and had effectively integrated FDA requirements with the DOD Milestone process. DynPort also had proposed to shorten the vaccine development, licensure, and production cycle by up to 3 years through an emphasis on interaction with FDA immediately after contract award to obtain advice on the processes and protocols for each vaccine product. [28] The evaluators identified no disadvantages with DynPort's proposal and rated the proposal [deleted] risk for this subfactor. With regard to Battelle's proposal, the evaluators found [deleted] in its clear understanding of interfaces among the subcontractors, JVAP program office, and the FDA, and in the experience of Battelle's various subcontractors. [deleted] the evaluators found [deleted] in Battelle's [deleted] and in Battelle's [deleted] with the DOD Milestone process. For

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[27]Both methods are designed to produce a vaccine which will trigger an immune response in the human body without causing the adverse bodily effects the harmful agent generally causes.

[28]Battelle also challenges the evaluators' [deleted] assessment of DynPort's ability to shorten this process. In Battelle's view, the FDA will determine when and how a vaccine is approved, and there is no possibility of the FDA shortening the period for approval to meet DynPort's proposed schedule. Battelle misses the point of DynPort's proposal and the evaluated advantage. Nothing in the proposal indicates that DynPort intended to seek preferential treatment from the FDA; rather, the agency believed that DynPort's intention to seek early input and advice from the FDA, coupled with the proposal of a regulatory affairs manager with previous FDA experience, provided a credible basis for compression of the schedule.

example, the evaluators noted that Battelle had proposed to [deleted] while such lots normally are produced [deleted]. It was for these reasons that the evaluators assigned a [deleted] risk rating to Battelle's proposal for this subfactor. Since this is a cost-plus-award-fee contract, the agency reasonably concluded that [deleted] represented a [deleted] to successful performance. Likewise, Battelle's decision to propose a schedule which calls for [deleted] was reasonably perceived as presenting [deleted].

The agency correctly observes that performance risk associated with the proposed technology is properly evaluated under the technical factor, specifically, the "soundness of approach to include optimization of production" subfactor where [deleted] proposals were evaluated as [deleted] risk. Battelle also challenges this rating, arguing that it was unreasonable to evaluate its proven [deleted] approach as [deleted] as DynPort's [deleted] approach. While the risk rating is [deleted] for both proposals, the record makes plain that the ratings were assigned based on reasoned evaluations of both proposals.

In this regard, the evaluators observed that Battelle, while taking the [deleted] for vaccine production, also had taken some [deleted]. Production of vaccines using the [deleted] approach [deleted] which are, according to the agency, "more lethal than nerve agent." Since production was proposed [deleted], there was an [deleted], all combining to represent [deleted]. With regard to DynPort, the evaluators observed that by taking innovative and low cost approaches, DynPort had incurred risk which would impact on cost and schedule. Among other issues, the evaluators noted that using [deleted] for producing the botulinum and SEB vaccines (9 of the 15 option vaccines) represented a [deleted] risk, despite some advantages in safety and yields. Contrary to Battelle's contentions of inconsistency, the evaluators assigned risk based on legitimate, though different, considerations for each approach. Battelle's disagreement does not make the evaluation unreasonable. Medland Controls, Inc., supra.[29]

Notwithstanding Battelle's contentions, the proposed technical approach does not represent the sole evaluation factor and consequently may not be perceived as driving the entire risk assessment. In this regard, the technical approach is evaluated under one of five subfactors under one of the two technical factors. The relevant technical factor was valued at only 25 percent of the non-cost factor evaluation, while management, a factor under which the approach is not germane,

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[29]Battelle also notes an "inconsistency" in the evaluation of DynPort's facilities as [deleted], while evaluating its equipment as [deleted]. Again, there is nothing inconsistent in this evaluation. The two subfactors address different aspects of this technical factor; proposed facilities may be acceptable while at the same time not all required equipment is available. Further, the agency assigned a [deleted] risk rating to both subfactors.

makes up 40 percent of the evaluation. Thus, technical approach, while important to performance of the contract, constitutes a relatively small percentage of the total evaluation.

In addition, DynPort has not proposed to develop and produce all of the vaccines using a [deleted] approach. DynPort proposed to develop and produce the 3 base effort vaccines and 3 of the 15 option vaccines using [deleted] approaches. DynPort's proposal also details its team's ability to produce the toxin vaccines by the [deleted] approach in a segment which is the same length as that devoted to its discussion of the [deleted] approach. Battelle also proposed to use [deleted] technology to develop and produce the ricin and improved plague vaccines. Moreover, during negotiations, Battelle inquired about whether the agency would require the use of [deleted] technology in the production of botulinum vaccines. In advising Battelle that the [deleted] approach would not be required, the contracting officer specifically advised Battelle that the government had not yet evaluated which method would be used to produce these vaccines; that the selection of the method would come through an evaluation of technical and program elements; and that after the Milestone I decision, the government reserved the right to renegotiate the cost of the option based on the production method chosen.[30] Thus, it is not clear

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[30]In a related argument, Battelle identified a number of instances wherein it believed the evaluators were biased towards DynPort's proposal, as evidenced by ignoring DynPort deficiencies and overemphasizing slight flaws in Battelle's proposal. As indicated in our discussion of the conflict issue above, we found no evidence of bias on the part of the evaluators. In this regard, we have reviewed the examples of unequal treatment cited by Battelle and find that none have merit. For example, in the general comments preceding the technical evaluation report on Battelle's proposal, the SSEB noted that Battelle's exclusive enlistment of some contractors with experience in the development of BD vaccines had the effect of precluding other offerors from teaming with them and obtaining technical information such as the test schedule for the current BD vaccine stockpile. In the general comments concerning DynPort's proposal, the SSEB observed that DynPort was prohibited from teaming with existing (named) BD vaccine producers. Battelle argued that the agency unfairly criticized it for forming exclusive teaming agreements even though that represented normal and good contracting practice. As observed by the agency, the quote regarding DynPort is taken out of context. The entire quote merely indicates the SSEB's satisfaction with DynPort's ability to create a satisfactory team notwithstanding Battelle's teaming agreements: "Prohibited from teaming with existing BD vaccine producers . . . DynPort brought together a team of vaccine producers, capable of meeting the requirements in the RFP." Here, Battelle's exclusive agreements provided it with access to data on current developmental BD products which were not available to the other offerors. Since the general comments in question are simply statements of fact, not used to convey an

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that the agency will even allow DynPort to use the [deleted] approach. If it does select that approach, it will be because the agency's own developmental organization has determined that the approach will produce a viable vaccine. In any event, since the agency chooses the developmental approach, anticipated risk is relevant to, but not dispositive of, future success.

EVALUATION OF BATTELLE'S TECHNICAL PROPOSAL

Battelle also contends that the agency erred in evaluating its proposal with regard to an alleged schedule delay and Battelle's [deleted]. Based on our review of the record, we believe the evaluations are reasonable.

The evaluated schedule delay is attributable to Battelle's proposal to [deleted] at the facility of one of its subcontractors. Battelle's original model contract did not mention the need to [deleted]. While a plan to replace [deleted] has an impact on good lab practices (GLP) and current good manufacturing practices (cGMP), when the agency sent Battelle a clarification request (CR) on the subject of GLP and cGMP compliance, Battelle indicated that its subcontractor was fully compliant. At the same time, Battelle's initial cost proposal mentioned the plan to [deleted]. A separate CR was issued by the cost team regarding the costs for the replacement and Battelle replied that it intended to replace one handler per year for 7 years. Amendment No. 0006, requesting BAFOs, also requested offerors to provide a detailed description of all facilities and equipment that are available, must be built, or procured to meet the contract requirements and to indicate possible impacts on cost, schedule, and performance. In its BAFO model contract, Battelle advised that its subcontractor would upgrade the [deleted] in order to comply with cGMP.

When the SSEB technical and cost teams met during the final evaluation, they compared Battelle's responses and the technical team added a [deleted] regarding the intended replacement. However, the technical team believed it would be more efficient and advantageous for the government to complete the entire replacement prior to beginning contract performance. Since Battelle intended to use this subcontractor for development of the three base effort vaccines, the evaluators determined that contract performance would be delayed for the 6 months they estimated for the complete replacement.

Battelle argues that since it proposed replacement of the [deleted] in a manner which would not impact the schedule, it was improper for the agency to evaluate its proposal on a different basis. However, Battelle assumed the risk that changes in its final offer might raise questions about its ability to meet the requirements of the

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[30](...continued)
advantage or disadvantage to any offeror, there is no basis to conclude that the comments were objectionable or unreasonable.

solicitation and, thus, result in downgrading of its proposal. Cubic Field Servs., Inc., B-252526, June 2, 1993, 93-1 CPD ¶ 419 at 7; Comarco, Inc., B-225504, B-225504.2, Mar. 18, 1987, 87-1 CPD ¶ 305 at 5. The agency's evaluation, based on its own view of the best approach, was not unreasonable under the circumstances of this procurement.

Battelle had proposed this subcontractor to perform development and production of the base effort vaccines and the [deleted] in question were in the production facilities. Thus, any major replacement, even on a staggered basis, could have a significant impact on contract performance. Since the [deleted] are an important aspect of the GLP and cGMP required by FDA for licensure of the vaccines, the agency had a valid interest in ensuring that nothing interfered with that licensure. Further, since the agency was to pay for the replacement of the air handlers, it was reasonable for the agency to consider whether a one-time replacement would be more advantageous than a staggered replacement. In any event, this represented one of several evaluated disadvantages under one subfactor of the least important technical factor. While it was considered in the evaluation, when briefed to the SSAC and SSA, the SSEB advised them that it was less of a facilities problem than one associated with DynPort's proposal because the schedule impacts were quantifiable.

With regard to the [deleted] matter, Battelle's original model contract suggested use of a memorandum of understanding (MOU) to set forth the roles, responsibilities, interactions, and commitments between the contractor and the government. Among other things, the MOU would address who is responsible for "unsuccessful outcomes" when the government directs a particular decision which overrides the contractor's decision. The agency sent Battelle a CR seeking clarification as to the value of such an MOU and discussed it during oral negotiations. During these negotiations, Battelle explained its concern regarding how [deleted] would be applied if a government decision, overriding a contractor decision, was unsuccessful. The agency observed that it had an [deleted] "which is subjective to a great degree, which says . . . we agree or disagree with how well you did that, but it's the government who makes the final decision on what you do, it's you who make the final decision on how you do it." For these reasons the agency was "not sure how a MOU fits in." Subsequently, the agency issued amendment No. 0005 which contained a revised [deleted] and requested offerors to incorporate any effects of the revised plan. In its proposal revision, Battelle expressed its belief that achieving an "excellent rating" in one schedule area and four performance areas was unrealistic and/or unattainable. As support for its position, Battelle objected to the criterion specifying no issuance of FDA Forms 482 and 483 since "FDA always issues Form 482s and frequently issues a Form 483" in a given situation. In amendment No. 0006, which closed discussions and requested BAFOs, the agency modified the [deleted] to eliminate "no Form 482s" from the criteria. In its BAFO model contract, Battelle for the first time advised the agency that attempting to achieve the [deleted]. The SSEB interpreted this language as an indication that to

comply with the [deleted], additional [deleted] and [deleted] would have to be added to that already proposed. In assessing a [deleted] to Battelle's proposal under the first management subfactor, the SSEB noted that Battelle had used the [deleted], but concluded that the BAFO indicated a [deleted] to accept the [deleted].

Battelle argues that it never [deleted] or [deleted] to [deleted]. Rather, its earlier suggestion of an MOU and its criticism of the plan were simply aspects of its understanding of the "partnering" between contractor and agency which was envisioned by this contract. In our view, the evaluators reasonably concluded that the BAFO language regarding increased activities with attendant schedule extensions in order to provide "excellent" contract performance, was indicative of Battelle's [deleted] to accept the provisions of the [deleted]. The plan is very clear as to the criteria to be used in [deleted] determinations and as to the government's unilateral discretion to decide the [deleted] using those criteria. In response to [deleted], the agency revised the plan. The agency's failure to revise other aspects of the plan should have apprised Battelle that no additional changes would be made. By incorporating [deleted] for the first time in its BAFO, Battelle assumed the risk that its statements [deleted] to the evaluators and result in [deleted] of its proposal. Cubic Field Servs., Inc., supra.[31]

PAST PERFORMANCE EVALUATION

In evaluating past performance, the SSEB determined that both Battelle's and DynPort's proposal should be rated "green" with "moderate" risk. Battelle challenges this evaluation arguing that DynPort's rating should have been less favorable. In this regard, Battelle argues that the agency improperly gave DynPort credit for two contracts performed by its team member, Porton International. At the time these contracts were performed, Porton was teamed with [deleted] a firm

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[31]Battelle also contends that the agency failed to provide it with meaningful discussions on the [deleted] and [deleted]. We disagree. While contracting agencies must furnish information to offerors in the competitive range as to the areas in their proposals which are believed to be deficient so that offerors may have an opportunity to revise their proposals to satisfy the government's requirements (FAR § 15.610(c)(2) (June 1997); Pan Am World Servs., Inc. et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446 at 11), an agency need not reopen discussions to resolve technical deficiencies first introduced in an offeror's BAFO. Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 7. Technical/schedule issues with regard to the [deleted] were not apparent until submission of Battelle's BAFO. Issues concerning Battelle's views on risk allocation under the [deleted] were discussed at length prior to submission of BAFO's. However, in its BAFO Battelle for the first time asserted that attaining "excellent" ratings in certain areas would require [deleted], which was likely [deleted]. At that point, the agency was not required to reopen discussions.

which teamed with Battelle for this JVAP procurement. While Porton had claimed responsibility for developing and producing botulinum toxoids under both of these contracts, Battelle explains that [deleted] did all the development and production work while Porton was simply the marketing and distributing agency for [deleted] products and services.

The record establishes that the agency's past performance evaluation was reasonable and in accordance with the stated evaluation criteria. Advanced Tech. and Research Corp., supra. DynPort's past performance information showed successful performance by itself and other team members on eight contracts involving AIDS, influenza, botulinum, and plague vaccines. The agency specifically noted that one of DynPort's subcontractors had successfully licensed a vaccine from clinical trials in only 14 months. Other than its assertions regarding Porton's contribution, Battelle has produced nothing to indicate that the agency's rating of [deleted] with [deleted] risk was an unreasonable evaluation.

With regard to its claims regarding Porton's work on two of the contracts, Battelle is essentially arguing that the only entity that may properly list a prior contract for purposes of a past performance evaluation is the concern which actually performed the work relevant to that covered in the solicitation. We disagree. The general rule is that a prime contractor under a government contract is responsible for the performance of its subcontractors. Neal R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30 at 4. Further, subcontractors and joint venturers perform various portions of contracts and, accordingly, may obtain experience useful in predicting success in future contract performance. George A. and Peter A. Palivos, B-245878.2, B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286 at 10 (experience of a proposed subcontractor may be considered in determining whether an offeror meets a past performance requirement in a solicitation); see also Commercial Bldg. Serv., Inc., B-237865.2, B-237865.3, May 16, 1990, 90-1 CPD ¶ 473 at 6. Where an offeror was involved as a subcontractor or joint venturer in performing work under a prior contract similar to work to be included under the instant contract, such experience may properly be considered in assessing that offeror's past performance. Phillips Nat'l, Inc., B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252 at 6. Porton, as prime contractor, was responsible for managing the performance of the two contracts at issue and the solicitation here calls for a significant management effort in directing the work of a number of subcontractors. On this record, there is no basis to question the agency's consideration of Porton's prior performance in the evaluation of the DynPort team's qualifications to perform the JVAP contract.

THE COST EVALUATION

Battelle alleges that the agency failed to perform a proper cost realism evaluation because it failed to accurately measure the costs to be incurred under its proposal as compared with DynPort's. In this regard, when an agency evaluates proposals for the award of a cost reimbursement contact, an offeror's proposed estimated

costs are not dispositive, because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(c) (June 1997). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.,--Fed., 64 Comp. Gen. 71, 75 (1984), 84-2 CPD ¶ 542 at 5. When properly documented, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. Litton Sys., Inc., Amecon Div., B-275807.2, Apr. 16, 1997, 97-1 CPD ¶ 170 at 5.

We have reviewed the agency's cost evaluation and its methodology and find nothing objectionable. The agency performed a detailed and comprehensive evaluation of the proposed costs, in conjunction with the proposed approaches of the offerors to arrive at an MPC and total evaluated MPC. In this regard, the cost team familiarized itself with the structure and organization of each proposal; identified the respective roles of the prime and subcontractors; compared the offeror's BAFO with its CLIN structure; analyzed the cost work breakdown structure (CWBS); involved the Defense Contract Audit Agency to evaluate proposed rates for overhead, award fees, and escalation rates; compared each offeror's integrated master schedule with the CWBS; evaluated all CLINS; and performed analyses of the offerors' manufacturing data, clinical trials, surrogate efficacy models, animal costs, labor, and FDA licensure fee. The evaluators used the independent government cost estimate in those instances where the BAFO costs were determined to be insufficient or excessive. These analyses were combined to arrive at the MPC for each offer. The evaluators then involved the technical and management teams to evaluate the uncertainty of each CLIN based on knowledge, experience, and current data available for each technology proposed. They then calculated the total evaluated MPC by multiplying an uncertainty percentage times the total cost of each CLIN in the MPC and adding this to the cost of the CLIN.

Battelle identified several instances of cost adjustments to DynPort's proposal which it believed were too small. We have examined these and find none has merit. For example, Battelle notes that the evaluators only adjusted [deleted] DynPort's costs for equipment/structural modifications by [deleted] while its own costs in this area were adjusted [deleted] by [deleted]. Relying on a [deleted] that DynPort's facilities may not be operational at the start of contract performance, Battelle concludes that [deleted] is too small an adjustment. However, Battelle offers no specific analysis for its conclusions. Thus, its criticism amounts to mere disagreement with the evaluation which alone does not render an evaluation unreasonable. Medland Controls, Inc., supra. Moreover, as observed by the agency, cost differences and adjustments to each proposal are not directly comparable due to the offerors' responsibility to propose their own SOWs in accordance with their unique approaches and CLIN structures. In this particular instance, the adjustment to DynPort's costs was not made to account for a lack of facility readiness, but

rather was to account for equipment proposed on DynPort's equipment list for which no cost was listed in the proposal.

Battelle also questioned the uncertainty evaluation noting that its MPC was [deleted] adjusted by approximately [deleted] while DynPort's costs were [deleted] adjusted by approximately [deleted]. Battelle's basis for objecting to the amount [deleted] to DynPort's costs is its belief that the agency failed to properly take into account the risk associated with DynPort's proposed [deleted] approach. Battelle's arguments are unpersuasive. The agency's uncertainty evaluation well accounted for the difference in approaches. In this regard, of 14 areas adjusted for uncertainty, DynPort's costs were [deleted] adjusted [deleted] than Battelle's in 9 areas. In seven of these nine, DynPort's costs were [deleted] adjusted by at least [deleted] the percentage that was applied to Battelle's costs. For example, DynPort's proposal received a [deleted] uncertainty percentage for its proposed botulinum [deleted] approach, while Battelle's proposal received only a [deleted] adjustment.[32]

THE AWARD DETERMINATION

Finally, Battelle argues that cost improperly became the dominant factor in the award determination, even though it was the least important evaluation factor. It also generally challenges the award determination based on the alleged flaws in the technical and cost evaluations. Agency officials have broad discretion in determining the manner and extent to which they will make use of technical and

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[32]In its pre-hearing comments, Battelle for the first time raised new examples of flaws it perceived in the agency's cost evaluation. Where a protester files supplemental protest grounds, each new ground must independently satisfy the timeliness requirement of our Bid Protest Regulations, which do not contemplate the piecemeal presentation or development of protest issues. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13. This includes the identification of "examples" of flaws in the evaluation generally alleged in the initial protest. Id. Such new issues must be filed within 10 calendar days after the protester knew or should have known the basis for its protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997). Here, Battelle did not raise these matters until it filed its pre-hearing comments more than 10 days after receipt of the agency report. Accordingly, these matters are untimely and not for consideration. In any event, the new examples are no more meritorious than those originally raised by the protester. For example, Battelle notes that it proposed [deleted] for unusually hazardous insurance while DynPort proposed none, intending to seek indemnification by the government. As observed by the protester in its argument, the agency eliminated the consideration of this insurance in all offerors' cost evaluations because of the widely different proposals. Since all offerors were treated the same, there is nothing objectionable in the agency's decision.

cost evaluation results. Cost/technical tradeoffs may be made; the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44 at 9.

After being briefed on the original evaluation and those changes associated with the reevaluation, the SSA weighed the significant attributes of Battelle's and DynPort's proposals, their performance ratings, risk ratings, and relative MPCs. In directing award to DynPort, the SSA stated:

> This decision is based on a "Best Value" analysis that shows little difference in the risk associated with DynPort's and Battelle's proposals, and emphasizes program integration/program management while giving latitude to pursue innovative technologies relying primarily on commercial sector performers. There is a higher degree of confidence in DynPort's program management structure and in their ability to develop a close, cooperative partnership with the Government JVAP Program Management Office. In addition, DynPort's cost is less.

Based on the SSA's rationale, it is plain that cost was not the sole determinative factor. Rather, the decision was based on an integrated assessment of the relative technical/management merit, past performance, and evaluated cost of the two proposals. As discussed above, there was nothing unreasonable or objectionable in the agency's evaluation. Thus, there is no basis for questioning the award determination due to alleged evaluation flaws. To the extent that cost may be considered to have become "determinative," where, as here, the selection authority reasonably concludes that the offers are essentially equal technically, cost may become determinative notwithstanding its being of lesser importance in the evaluation scheme. Cygnus Corp., B-275957, B-275957.2, Apr. 23, 1997, 97-1 CPD ¶ 202 at 11; Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332, at 5. Accordingly, the determination to award to DynPort is unobjectionable.

The protest is denied.

Comptroller General
of the United States