DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-211627.3; B-211627.4 **DATE:** September 26, 1984

MATTER OF: Canaveral Port Services, Inc.; General Offshore Corporation

DIGEST:

1. Protest of alleged conflict of interest first orally filed with agency is untimely when subsequently filed with GAO more than 10 working days after initial adverse agency action (use of person alleged to have conflict of interest on technical evaluation panel conducting negotiations with protester).

2. GAO will not review allegations concerning the size of a firm competing for the award of a 100-percent small business set-aside.

3. Protest against distribution of a letter at preproposal conference is untimely filed with GAO when it was first untimely filed with agency (more than 10 days after basis of protest was known), since initial filing with agency must be timely.

4. Allegation that agency improperly allowed firm with known association with large business to participate in small business set-aside is dismissed as academic when complained-of firm has been declared ineligible for award and agency promptly presented issue to SBA for resolution.

5. Allegation growing out of agency's admitted typographical error in the preparation of agency report is dismissed as not constituting proper basis for protesting award.

6. GAO will not review allegations concerning successful offeror's financial capability, equipment and security clearance in view of agency affirmative determination of responsibility pursuant to preaward survey and issuance of interim clearance.

7. Protest that awardee's cost proposal was unrealistically low is denied where in camera review of source selection documents discloses only that agency intentionally negotiated down the costs of awardee's initially higher cost proposal.

8. Protest of alleged irregularities in proposal scoring is denied where GAO in camera review of source selection documents discloses only that agency decided during evaluations to score the "past performance" criterion, in the case of newly formed companies, on the basis of the past experience of proposed employees with the maximum possible score of a new company limited to half the maximum possible score of an established company since scoring is consistent with prior GAO decisions.

9. GAO will neither investigate nor cause other agencies to investigate speculative allegations of protester because protester has burden of proving its case.

10. Allegation that specification (allowing the use of twin screw tugboats) is lax and fails to reflect agency's minimum needs (as reflected in report issued by another agency) is denied where agency's technical evaluation board rated twin screw tugboats higher than any other tugboats and awardee has successfully performed with twin screw tugboats.

11. Where agency is using staggered best and final offer (BAFO) due dates and use of dates has not been timely protested, protest against extension of awardee's BAFO due date is denied since all offers remained sealed until one specific date and there is no showing that any prejudice resulted from alteration of due date.

12. Modification of contract after award to provide contractor with government-furnished equipment (GFE), which agency knew to be required prior to award, is permissible where the agency was initially required to furnish similar GFE and the need for the additional GFE was only identified after announcement of tentative awardee, since contractor did not obtain any competitive advantage over other offerors during either evaluation or award selection.

13. Unsuccessful offeror has no right to attend agency debriefing given to another unsuccessful offeror.

14. Protest that awardee (firm newly engaged in the type of work called for under the RFP) was so lacking in corporate experience that it should have received a score of "zero" under the past performance and past cost performance criteria is denied where its key personnel had both past technical and cost experience in the type of work called for and the cost proposals were not point-scored, but only reviewed under the past cost performance criteria to ascertain a firm's potential.

15. Protest that tentative awardee intended to improperly substitute personnel (based on tentative awardee's advertising of employment opportunities) is denied where RFP encouraged hiring of incumbent personnel and did not specifically require offeror to assign to the contract particular individuals whose resumes were submitted.

16. Protest that agency failed to conduct meaningful negotiations (did not advise of perceived weaknesses in manning) is denied where record shows that agency raised the issue during negotiations and left it up to the protester to correct the deficiency as it saw fit.

Canaveral Port Services, Inc. (CPS), and General Offshore Corporation (GOC) protest the Air Force's award of a 100-percent small business set-aside contract for marine utility and tugboat services to Petchem, Inc. (Petchem), under request for proposals (RFP) No. F08606-83-R-0010 issued by the Eastern Space & Missile Center, Patrick Air Force Base, Cape Canaveral, Florida. The RFP covers Air Force, Navy and National Aeronautics and Space Administration (NASA) requirements for these services. Both protests were initially filed with the Air Force and soon thereafter presented to GAO.

The protests are dismissed in part and denied in part.

Both protests raise multiple issues. (We will refer hereafter to the issues by the protester (either CPS or GOC) and the number as listed below. For example, the first issue raised by CPS would be CPS/1.) CPS initially protested: (1) an alleged conflict of interest on the part of one member of the technical evaluation board (TEB); (2) that Petchem is a large business; (3) that Petchem should have been excluded from the competitive range on the ground that its proposed costs were unrealistically low; (4) that a letter mentioning the incumbent contractor was improperly distributed at the preproposal conference; and (5) that a firm associated with a large business was allowed to remain in the competition notwithstanding its association. To these grounds of protest, CPS later added: (6) allegations of irregularities in the manner in which the proposals were scored; (7) an allegation that the Department of Labor (DOL) wage determination was ambiguous; (8) an allegation that Petchem's tugboats could not meet Navy requirements; (9) an objection to the manner in which the Air Force resolved the conflict of interest allegation raised by CPS; (10) an objection to being referred to as a large business in the agency report; (11) an objection to the Air Force's grant of an extension of the due date for receipt of Petchem's best and final offer (BAFO); (12) an objection to the Air Force's consideration of twin screw tugboats; (13) an objection to modification of the contract following award to provide government-furnished equipment (GFE), which CPS believes the contractor was already required to provide; and (14) an objection to its exclusion from debriefings given after award.

For its part, GOC initially protested: (1) Petchem's receipt of any credit under the RFP's "past performance" evaluation criteria; (2) alleged improper substitutions of personnel by Petchem; (3) Petchem's responsibility (financial, tugboats, and security clearance). To these grounds of protest, GOC later added: (4) an objection to the lack of one common cutoff date for receipt of BAFO's; (5) CPS's objection (11) (CPS/11) above; (6) an objection to the Air Force's failure to advise GOC of the perceived weakness in GOC's proposal manning; and (7) CPS's objection (13) (CPS/13) above.

BACKGROUND

Prior to this procurement, the services were performed by Port Canaveral Towing, Inc. (PCT), also known as Port Everglades Towing, Inc. (PET), which is both a large business and a subsidiary of Hvide Shipping, Inc. (Hvide), another large business.

We have entertained three previous protests concerning this procurement. The first was filed by Petchem (B-211627) and subsequently withdrawn. The second and third were filed by Canaveral Towing & Salvage, Inc. (CTS) (B-211627.2 and B-211627.6). They were dismissed in part because CTS's affiliation with both PCT/PET and Hvide disqualified it as a small business and rendered it ineligible for award. Canaveral Towing & Salvage, Inc., B-211627.2 et al., Dec. 19, 1983, 83-2 C.P.D. ¶ 702.

Although the RFP requires the contractor to perform a multitude of tasks using a variety of personnel and equipment, the central task is the provision and manning of two tugboats to be used in docking and undocking nuclear attack and nuclear ballistic missile submarines, as well as other ships. Because of the sensitive nature of the tugboat work, special attention was paid during the procurement to the subjects of tugboats, their crews and fendering. The tugboats were required to have firefighting capability and a minimum horsepower, which the government reserved the right to test. The contractor was required to provide sufficient manpower to keep the tugboats available to the government 24 hours a day, 7 days a week, with a 30-minute response time. The contractor-provided tugboats were also required to have the capability of accepting specified bow fendering. Fenders are cushions of foam rubber, rope or wood, which are placed between a tugboat and the vessel the tugboat is assisting. At the April 20, 1983, preproposal conference, offerors were advised that they would be required to provide all fendering, except side fendering, which would be government-furnished. The RFP was later amended to read:

> "Special side fendering, 3 sets, for handling . . . [nuclear ballistic missile] submarines will be provided by the government. Bow fendering similar to that decribed in . . . [Navy drawing 5364513] will be provided by the contractor."

Offers were to be evaluated on the basis of a Technical/Management (T/M) proposal and a cost proposal, in order of importance, with separate evaluation of the two proposals. The T/M proposal criteria, in order of importance, were: (1) relevant past experience; (2) understanding of job/soundness of approach; (3) organization and manning; (4) key personnel qualifications; and (5) phase-in plan. The cost proposal criteria, in order of importance, were: (1) relevant past cost performance; (2) completeness; (3) reasonableness; (4) correlation; and (5) total cost.

On June 15, 1983, 10 offers were received. The contracting officer served as source selection authority (SSA). A TEB, consisting of representation from the Air Force (one member), Navy (two members) and NASA (one member), was appointed to review the proposals and advise the SSA. Initially, six proposals were determined to be in the competitive range. Of the six, three were submitted by newly formed companies. This raised the issue of how to score the relevant past experience criterion. The Air Force decided to allow newly formed companies to receive credit for the potential of employees who reflected past performance in the utility marine business; however, new companies were limited to one-half of the maximum attainable credit under the criterion. On this basis, five of the six proposals were rated satisfactory (i.e., they had point values between 50 percent and 74 percent) and one proposal was rated marginal. Petchem and GOC had identical point scores while CPS had a lower score. However, all six proposals remained within the competitive range for further negotiations.

The Air Force reports that:

> "All contractors were advised that negotiations were to be conducted on a staggered basis and that each individual contractor's BAFO would be locked in a safe until negotiations were completed and BAFO's received from all competitive contractors."

Under this procedure, all offerors, save Petchem and perhaps CPS, were afforded 10 days, after the close of their particular negotiation session, in which to submit their BAFO. Petchem's negotiation session was scheduled for August 3, 1983. Initially the Air Force requested Petchem's BAFO on August 13, 1983; however, because the 13th fell on a Saturday, the Air Force unilaterally extended the due date to the following Monday, August 15, 1983. It is not clear whether an extension was also given CPS, whose BAFO due date also fell on a Saturday (August 20, 1983). On August 16, 1983, at Petchem's request, the Air Force granted Petchem a further extension until August 19, 1983. Petchem met this due date.

On August 22, 1983, all BAFO's were opened. The BAFO's were evaluated and ranked by the SSA on the basis of both T/M and cost proposals, as follows:

1.	Petchem	Satisfactory	$5,724,741
2.	GOC	Satisfactory	5,727,526
3.	----	----	-----
4.	----	----	-----
5.	CPS	Satisfactory	6,027,620
6.	----	----	-----

On August 24, 1983, the Air Force notified all offerors of its intent to award the contract to Petchem and afforded them an opportunity to protest Petchem's size status to the Small Business Administration (SBA). On August 30, 1983, the Air Force sought an interim security clearance on Petchem's behalf. On September 1, 1983, CTS filed the first of its two aforementioned protests against the proposed award with GAO. On September 2, 1983, CPS protested to GAO after initially filing with the Air Force. On September 6, 1983, the tugboats proposed by Petchem were surveyed. On September 14, 1983, an affirmative preaward survey was returned on Petchem. On September 19, 1983, GOC protested to GAO after initially filing with the Air Force. On September 26, 1983, SBA issued a determination that Petchem is a small business and eligible for the award. On October 7, 1983, Petchem received its interim security clearance. Finally, on November 23, 1983, notwithstanding the protests of CTS, CPS and GOC, the Air Force made award to Petchem.

GAO ROLE

Initially, we note it is not our function to conduct a de novo review of technical proposals, nor is it our function to independently determine their relative merit, since the evaluation of proposals is properly the function of the procuring agency. E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 C.P.D. ¶ 192. Procuring agencies are relatively free to determine the manner in which proposals will be evaluated so long as the method selected provides a rational basis for source selection and the actual evaluation is conducted in accordance with the established criteria. See Francis & Jackson Associates, 57 Comp. Gen. 224 (1978), 78-1 C.P.D. ¶ 79. Thus, our function is not to select one of several proposals as most advantageous to the government, but rather to decide whether the procuring agency's selection has been shown to be legally objectionable. INTASA, B-191877, Nov. 15, 1978, 78-2 C.P.D. ¶ 347. Finally, where there is an irreconcilable conflict between the agency's and the protester's versions of the facts, in the absence of probative evidence (other than statements from each side), we must accept the agency's version of the facts. Contract Support Company, B-184845, Mar. 19, 1976, 76-1 C.P.D. ¶ 184.

UNTIMELY OR OTHERWISE NOT FOR GAO CONSIDERATION

In our view, a number of the issues raised are untimely or otherwise not for our consideration under our Bid Protest Procedures, 4 C.F.R. part 21 (1984).

CPS/1 is untimely. According to the vice president of CPS, the basis of the allegation that a member of the TEB had a conflict of interest was first learned "when the RFP was first mailed out." This would have been early April 1983. An oral protest was filed with the contracting officer, who looked into the allegation and decided that it lacked merit. CPS admits that it was advised of this finding and that it decided not to press the matter. Under our decisions, CPS then knew the basis of its protest (either initial adverse agency action or lack of proper agency action concerning CPS/1) and should have filed its further protest with GAO within 10 days of notification. See The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, Aug. 15, 1977, 77-2 C.P.D. ¶ 116, affirmed, Nov. 23, 1977, 77-2 C.P.D. ¶ 395.

On August 29, 1983, CPS formally protested to the Air Force and on September 2, 1983, also filed a protest concerning the issue with GAO. While it is not clear exactly when the contracting officer denied the oral protest, it is clear that CPS participated in negotiations on August 10, 1983, with the TEB. Since the TEB member with alleged conflict of interest was at that time on the TEB, CPS certainly knew by then that its oral protest had been denied. 4 C.F.R. § 21.2(a) (1984) requires that, if a protest is initially filed with the contracting agency in a timely manner, any subsequent protest to GAO must be filed within 10 working days of the protester's learning of initial adverse agency action. Since this occurred by August 10, 1983, at the latest, CPS's protest of September 2, 1983, is untimely. In any event, the protester must establish more than the appearance of a conflict of interest and the opportunity for bias; it must establish "hard facts" that a conflict of interest existed which biased the procurement in favor of Petchem. Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 C.P.D. ¶ 694. CPS has not shown with "hard facts" that a conflict of interest existed which biased the procurement in favor of Petchem. Further, our in camera review of both source selection and Air Force investigatory documents disclosed nothing indicative of an actual bias in favor of the awardee by the TEB member in question. CPS's allegations are mere speculation. CPS/1 therefore is dismissed.

CPS/2, the allegation that Petchem is a large business is likewise not for our consideration, since, under our Bid Protest Procedures, challenges of the size standards of particular firms are reviewed solely by SBA under 15 U.S.C. § 637(b)(6) (1982). 4 C.F.R. § 21.3(g)(2) (1984). We note that SBA has determined that Petchem is a small business for purposes of this procurement and that the Air Force may properly rely on SBA's initial determination for purposes of determining the propriety of a contract award. See Mil-Tec Systems Corp.; ACR Electronics, Inc.--Reconsideration, B-200260.3, Apr. 15, 1981, 81-1 C.P.D. ¶ 286. CPS/2 therefore is dismissed.

CPS/4, the objection to the distribution of a letter mentioning the incumbent contractor at the preproposal conference, is untimely. The preproposal conference was on April 20, 1983. CPS first protested this to the Air Force on August 29, 1983, over 4 months later.

Our Bid Protest Procedures provide for our consideration of protests which were initially timely filed with the contracting agency at any time up until 10 working days after the protester learns of initial adverse agency action on its protest. 4 C.F.R. § 21.2(a) (1984). To be timely filed with the contracting agency, the protest has to be received by the contracting agency within 10 working days after the basis of the protest was known. 4 C.F.R. § 21.2(b)(2) (1984). Here, CPS knew the basis of its protest on April 20, 1983, when the letter was distributed. Therefore, its protest to the contracting agency on August 29, 1983, is untimely and, consequently, its September 2, 1983, protest to GAO is also untimely. SACO Defense Systems Division, Maremont Corporation, B-212436, Aug. 10, 1983, 83-2 C.P.D. ¶ 200. CPS/4 therefore is dismissed.

CPS/5, the objection to CTS's participation in the competition notwithstanding its known association with large business firms is, in our opinion, academic, since SBA subsequently determined that CTS is not a small business for purposes of this procurement and ruled it ineligible for award. CPS/5 therefore is dismissed.

CPS/9, the objection to the manner in which the Air Force resolved the conflict of interest allegation raised by CPS in CPS/1, above, is untimely. This objection was first raised in CPS's January 19, 1984, comments on the first agency report. However, CPS knew the basis of this ground of protest prior to its August 10, 1983, negotiations with the TEB. For the reasons cited in CPS/1 above, this objection is untimely. CPS/9 therefore is dismissed.

CPS/10, an objection by CPS to its being referred to as a large business in the agency report, is in our view academic. CPS claims the reference, which it believes was the result of "either gross mishandling and/or intentional manipulation," was responsible for the Air Force's denial of its protest to the agency and the basis for CPS's not receiving the award because throughout the procurement CPS was regarded as an ineligible large business. The record before us does not support these contentions. It shows that the reference was, as the Air Force reports, merely a typographical error, wherein CPS was typed when CTS should have been, and that all necessary personnel within the Air Force were promptly advised of the mistake. We will not consider this objection further, since, in our view, an openly admitted typographical error is not a proper basis upon which to challege the validity of an award. CPS/10 therefore is dismissed.

GOC/3, protesting Petchem's financial responsibility, ability to obtain the tugboats, and lack of security clearance, is not for our consideration. Under our Bid Protest Procedures, we will not review affirmative determinations of responsibility absent a showing that the determination was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(g)(4) (1984). The Air Force reports that on September 14, 1983, an affirmative preaward survey was returned on Petchem. Since the affirmative determination of Petchem's responsibility is not challenged on the basis of fraud or alleged misapplication of definitive responsibility criteria, GOC's objection to such determination will not be considered further. Snowbird Industries, Inc., B-193792, June 28, 1979, 79-1 C.P.D. ¶ 468. The Air Force also reports that on October 7, 1983, Petchem was issued an interim security clearance. Since this is a matter of responsibility, it is within the scope of the above discussion and likewise not for our consideration. See Career Consultants, Inc., B-200506.2, May 27, 1981, 81-1 C.P.D. ¶ 414. GOC/3 therefore is dismissed.

GOC/4 is an objection to the lack of one common cutoff date for receipt of BAFO's. GOC contends that the Air Force violated Defense Acquisition Regulation (DAR), § 3-805.3(d), reprinted in 32 C.F.R. pts. 1-39 (1984), which reads:

> "At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written 'best and final' offers shall be established and all remaining participants so notified. If oral

> notification is given, it shall be confirmed in writing. The notification shall include information to the effect that (i) discussions have been concluded, (ii) offerors are being given an opportunity to submit a 'best and final' offer and (iii) if any such modification is submitted it must be received by the date and time specified, and is subject to the Late Proposals and Modifications of Proposals provision of the solicitation."

The Air Force admits that it held "staggered negotiations" because of the large number of proposals (six) within the competitive range and that it also staggered the cutoff dates in a manner designed to provide each firm 10 calendar days in which to prepare and submit its BAFO. We have already noted above the Air Force advice that all offerors were told both of the staggered negotiations and of the fact that it would be necessary to lock up individual BAFO's until the process was completed. The Air Force contends that this was sufficient notice of the fact that BAFO's, as well as negotiations, were staggered. For its part, GOC admits that it was aware of the fact that negotiations were being conducted on a staggered basis, but denies any knowledge of the fact that BAFO's were also staggered. We note that CPS, although aware of this ground of protest (CPS has supported its protest with a CTS document containing the same argument), has not alleged that it did not know that the BAFO's were being submitted on a staggered basis.

Since the Air Force failed to confirm in writing the oral notification concerning the procedures under which it intended to conduct the negotiations, we are confronted with a situation where the conflicting statements of the protester and the agency constitute the only available evidence of what transpired. However, even if we agree that GOC protested this issue timely and that the Air Force acted improperly in staggering BAFO due dates, GOC does not appear to have been prejudiced by the failure of the Air Force to grant it additional time in which to submit its BAFO. Moreover, the BAFO's received as much protection as sealed bids and were opened on a common date. See "EXTENSION OF AWARDEE'S BAFO DUE DATE" below. GOC/4 therefore is dismissed.

COST REALISM

CPS/3, the allegation that Petchem's proposed costs were unrealistically low, lacks merit. CPS reports that it hesitated to submit its lowest BAFO because the contracting

officer had warned during negotiations that submission of a price so low as to indicate intentional underbidding or buy-in would result in the offending offeror being excluded from the competitive range.

The RFP provided that the Air Force would evaluate, under the cost reasonableness criteria, the cost realism of proposed costs for the fixed-price contract and that offerors were responsible for supporting the realism of their proposed costs.

Our in camera review of the source selection documents shows that the Air Force, upon receipt of Petchem's initial offer, performed a contract price analysis and also requested a Defense Contract Audit Agency (DCAA) audit of the firm. On the basis of the Air Force price analysis, it was concluded that Petchem's price was too high. The Air Force then set lower price objectives for both cost and profit, which it hoped to negotiate. During negotiations, the Air Force raised questions about various cost elements of the Petchem cost proposal. In its BAFO, Petchem met the Air Force's objectives by reducing both costs and profit across the board. We note that Petchem retained some costs at levels higher than the Air Force objective, but that it generally reduced its profit below the Air Force objective.

In the circumstances, it appears that the final price proposed by Petchem was the result of negotiations by the Air Force. The Air Force reviewed the final price and decided that it was reasonable. In view of the agency's discretion in making cost realism evaluations (Grey Advertising, Inc., 55 Comp. Gen. 1111 at 1133 (1976), 76-1 C.P.D. ¶ 325 at 28) and the agency's determination of price reasonableness in this case, CPS/3 is denied.

IRREGULARITIES IN PROPOSAL SCORING

CPS/6, the allegation of irregularities in the manner in which the proposals were scored, was initially raised by CTS's letter of September 27, 1983. On November 18, 1983, CPS filed the same allegation with GAO by incorporating by reference CTS's earlier allegation into CPS's protest. CPS stated that it had just learned of the issue "within the past several days." As initially raised, the alleged irregularities were:

> "A. We have been informed that the technical/management score sheet of one member of the evaluation team may not have been included in the final tally of technical/management qualifications. If this is true, and if the unincluded

score sheet rated PETCHEM lower than its competitors, it may invalidate the Notice of Intent to award the contract.

"B. We were further informed that the system used to tabulate the individual scores recorded by members of the technical/management evaluation panel may not have been in conformity with that earlier relayed by the Contracting Officer to the panel members. If this is true, the panel members may have prepared their score sheets under a serious misapprehension as to how their individual ranking of bidders was to count toward the final compilations, thus severely altering the intended overall result each believed their score would reflect."

With regard to point scoring and the use by contracting agencies of point scores to evaluate proposals, we have long held that, unless the RFP sets out a precise numerical formula and provides that award will be made to the offeror whose proposal receives the highest number of points, award need not be made on that basis. Telecommunications Management Corp., 57 Comp. Gen. 251, 254 (1978), 78-1 C.P.D. ¶ 80. Otherwise, we regard point scores merely as guides for intelligent decisionmaking by selection officials. See, e.g., Group Hospital Service, Inc. (Blue Cross of Texas), 58 Comp. Gen. 263, 268 (1979), 79-1 C.P.D. ¶ 245; Grey Advertising, Inc., 55 Comp. Gen. at 1118, 76-1 C.P.D. ¶ 325 at 9.

We have reviewed in camera source selection documents, which the Air Force has not disclosed to the protester, and found no indication that a scoresheet was not included in the final tally of the T/M qualifications. We noted above the fact that the Air Force scored newly formed companies on the basis of their employees' past experience. The documents before us show that one TEB member wanted to exclude Petchem from application of this scoring approach on the ground that the company was chartered in 1978 and, therefore, was not a newly formed company. We note that the SSA reviewed the situation and decided that Petchem should be scored as if it were a newly formed company because the nature of its previous business endeavors (one-man maritime consulting company) differed significantly from what it was currently proposing to do (utility marine business). On this basis, the SSA found that, for all intents and purposes, Petchem was a new company. The same member questioned the past experience of key Petchem personnel. The SSA referred the question to the balance of the TEB members having the experience necessary (2 members of 3) to

judge the past experience of Petchem's key personnel. They found the past experience of Petchem's key personnel satisfactory. The SSA on this basis raised Petchem's past experience score, but not to the full one-half of the possible past performance criterion points available under the newly formed company scoring scheme. We see no basis for questioning these actions. SSA's are not bound by the recommendations and conclusions of TEB members, and, as a general rule, we defer to an SSA's judgment, even when the SSA disagrees with an assessment of technical expertise required for such evaluations. See Boone, Young & Associates, Inc., B-199540.3, Nov. 16, 1982, 82-2 C.P.D. ¶ 443; Tracor Jitco, Inc., 54 Comp. Gen. 896, 899 (1975), 75-1 C.P.D. ¶ 253. The selection decision and the manner in which the SSA uses the TEB results and cost evaluations and the extent of tradeoffs between the two are subject only to the tests of rationality and consistency with established evaluation factors. Frank E. Basil, Inc., et al. B-208133, Jan. 25, 1983, 83-1 C.P.D. ¶ 91; Grey Advertising, Inc., 55 Comp. Gen. at 1119, 76-1 C.P.D. ¶ 325 at 10. Regarding the Air Force decision to use the experience of proposed key personnel in evaluating the past performance of newly formed companies, we have specifically held that, in evaluating a new business, an agency could consider the experience of supervisory personnel. Data Flow Corporation; Dynamic Keypunch, Inc.; SAID, Inc., 62 Comp. Gen. 506 (1983), 83-2 C.P.D. ¶ 57; B-167054(1), July 14, 1970.

CPS/6 therefore is denied.

AMBIGUOUS WAGE DETERMINATION

CPS/7, the allegation that the DOL wage determination was ambiguous, was initially raised by CTS's letter of September 27, 1983, and, like CPS/6 above, incorporated by reference by CPS into its protest. As initially raised, CTS speculated that the price variations in the offers may have been attributable to significant variations in labor costs among the proposals, which CTS further speculated was the result of different offerors interpreting the provisions of the wage determination and the RFP in different ways. This was in part based on CTS's knowledge of the collective bargaining agreement between the incumbent contractor and its employees, which provided for a specific work schedule, which CTS believed could not be changed. In CTS's view, labor costs based on this required work schedule should have been similar. However, CTS clearly realized the speculative nature of its allegations because it urges a DOL preaward audit of all offers to see if its allegations were correct. Notwithstanding CTS's, and now CPS's, request for an audit,

it is the responsibility of the protester to present sufficient evidence to establish its case. We will not conduct investigations nor cause other agencies to conduct investigations for the purpose of establishing the validity of a protester's speculative statements. Therefore, in the absence of probative evidence, we assume CTS's/CPS's allegations are speculative and conclude that CPS has not met the required burden of proof. Dependable Janitorial Service and Supply, B-190231, Jan. 3, 1978, 78-1 C.P.D. ¶ 1. CPS/7 therefore is denied.

TWIN SCREW TUGBOATS

CPS/8, an allegation that Petchem's tugboats could not meet Navy requirements, and CPS/12, an objection to the Air Force's consideration of twin screw tugboats for use on the contract, were both initially raised by CTS's letter of September 27, 1983, and, like CPS/6 and CPS/7 above, incorporated by reference by CPS into its protest. The CTS contention grew out of CTS's acquisition of a limited distribution, August 1981 Navy report treating the technical aspects of tugboat support for nuclear ballistic missile submarines. The report was compiled by the Navy in collaboration with PCT/PET personnel. The study was premised upon the use of single screw (one propeller) tugboats identical to the ones used by PCT/PET (the incumbent). It specified that all tugboats had to be "adequately fendered, side and bow, to preclude any metal to metal contact under all possible tug-submarine handling arrangements." In its discussion of fendering, the report states that "[p]ermanent fendering for twin screw tugs for alongside (parallel) handling would require large stand-off special fenders with consequent prohibitive drag." Apparently, because of this concern about prohibitive drag on properly fendered twin screw tugboats, the report clearly states a preference for single screw tugboats. Despite the 1981 report's preference for single screw tugboats, the 1983 RFP, which the Air Force reports was drawn up with Navy technical assistance, is silent on the subject and, consequently, allows offerors to propose the use of twin screw tugboats.

Therefore, the protest is not that the RFP was unduly restrictive, but that is was not restrictive enough. Normally, a protest of an allegedly defective specification is untimely if it is not filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1984). Amdahl Corporation, B-191215, Mar. 28, 1978, 78-1 C.P.D. ¶ 237, affirmed, June 6, 1978, 78-1 C.P.D. ¶ 414. However, we find this protest timely because information concerning the requirements applicable to the docking and undocking of nuclear ballistic missile submarines is

restricted. The Navy has advised that only the Navy and the incumbent contractor should have been aware of the contents of the report. In our view, offerors lacking this knowledge would have no basis for a protest. There is no indication in the record as to exactly when either CTS or CPS gained access to the report, although CTS's attorney reports that he received a copy of the Navy report on September 23, 1983. Moreover, it appears that the Air Force did not confirm that Petchem was proposing the use of twin screw tugboats until it admitted the same to CTS's attorney on October 17, 1983. We therefore will consider this objection to the Air Force's determination of its minimum needs.

We have consistently held that contracting agencies are primarily responsible for determining the minimum needs of the government and the best means of meeting such needs. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 C.P.D. ¶ 181; 38 Comp. Gen. 190 (1958). This is because the contracting agencies are familiar with the conditions under which the supplies, equipment or services have been used in the past and how the government intends to use them in the future. Manufacturing Data Systems, Inc., B-180586, B-180608, Jan. 6, 1975, 75-1 C.P.D. ¶ 6. We therefore will only question an agency's determination of its minimum needs where there is a clear showing that the determination has no reasonable basis. Manufacturing Data Systems, Inc., B-180586, B-180608, supra. Moreover, where a protester alleges that a specification is defective, it must establish that the performance requirements cannot be met using the allegedly defective specification. See Science Spectrum, B-189886, Jan. 9, 1978, 78-1 C.P.D. ¶ 15, affirmed, Feb. 9, 1978, 78-1 C.P.D. ¶ 111. Finally, we will not consider a protest against a contracting agency's determination that less restrictive specifications will meet the government's needs absent a clear showing that the specifications are defective. See Transtector Systems and Jaslyn Mfg. & Supply Co., B-188920, B-188921, Sept. 19, 1977, 77-2 C.P.D. ¶ 202.

We find no merit in CPS's allegation. Our review of the record shows that three out of the four TEB members rated the twin screw tugboats proposed by both Petchem and GOC as superior to all other tugboats proposed. Moreover, Petchem has apparently successfully performed the contract requirements using the GFE special fendering without encountering the predicted prohibitive drag. We cannot conclude on the basis of this record that the specifications were defective. CPS/8 and CPS/12 therefore are denied.

EXTENSION OF AWARDEE'S BAFO DUE DATE

CPS/11 and GOC/5 constitute objections to the Air Force granting Petchem an extension of the due date for receipt of Petchem's BAFO beyond the 10 calendar days after BAFO's afforded to other offerors. The Air Force unilaterally changed Petchem's due date from August 13, 1983 (Saturday), to August 15, 1983 (Monday), and CPS's due date of August 20, 1983 (Saturday), may also have been changed to August 22, 1983 (Monday), in order to have the BAFO's submitted on a government working day. Petchem was granted a further extension of its BAFO due date to August 19, 1983, at its request. Likewise, the record shows that GOC was originally scheduled for negotiations on August 8, 1983, with its BAFO due August 18, 1983; however, GOC requested and was granted an earlier negotiation date of August 5, 1983, and, consequently, received an earlier BAFO due date of August 15, 1983.

CPS objects to the Air Force granting Petchem an extension because:

> "This gives the last company a big bid advantage and appears unfair to the other companies and out of the ordinary in the bid process."

We see no merit in the CPS objection since the record shows that CPS was the last company to submit a BAFO and, therefore, CPS would have been the company to enjoy the "big bid advantage."

GOC also believes that it was prejudiced by the Air Force's granting of Petchem's request for an extension. Specifically, GOC reports that, during its negotiations with the Air Force on August 5, 1983, it told the Air Force of its plan to withdraw the tugboats it had initially proposed:

> ". . . in favor of two which were superior in all respects. GOC then presented the names of the tugboats, photos, specifications, and the source. Sometime after this meeting and before Petchem submitted their . . . [BAFO] (for which they had requested a two-day extension), Petchem obtained a quotation on these same two tugboats and presented them in their . . . [BAFO]."

Despite GOC's speculation, our in camera review of source selection documents shows that Petchem initially proposed to provide two new twin screw tugboats, which it planned to

purchase. During the August 3, 1983, negotiations, faced with Air Force questions regarding the high cost of purchasing the tugboats proposed, Petchem said it would consider providing used tugboats in order to be more competitive. It is therefore clear that Petchem was for its own reasons searching for two used twin screw tugboats at least 2 days prior to GOC disclosure to the Air Force that it had located two such tugboats.

On this record, we cannot find that either protester was prejudiced by the Air Force granting Petchem's request for a changed due date, since CPS may also have enjoyed a changed date and, in any event, was given the last due date and GOC was granted its request for a changed date. GOC has not established that any information concerning its proposed tugboats was in fact leaked to Petchem by the government. It is just as likely that Petchem discovered the tugboats on its own. Finally, the BAFO's received as much protection as sealed bids would have received in an advertised procurement in that none were opened until all had been received. See CompuServe, B-194286, June 5, 1979, 79-1 C.P.D. ¶ 393. Bearing in mind the unique circumstances (staggered BAFO's) of this procurement, CPS/11 and GOC/5 are denied.

CONTRACT MODIFICATION TO PROVIDE GFE

CPS/13 and GOC/7 are objections to the Air Force's modification of Petchem's contract following award to provide GFE in addition to the specific GFE mentioned in the RFP. The protesters urge that under the RFP, Petchem was obligated to furnish the GFE that the government furnished through the protested modification. GOC contends in particular that it is prejudiced because of its understanding that, if it elected to use twin screw tugboats, it would be responsible for any additional side fendering or propeller guards required. On the basis of this understanding, GOC alleges that it increased its offer to cover these costs.

As we noted above, the RFP provided that the contractor would furnish bow fendering and the Air Force would furnish as GFE "special side fendering" for handling nuclear ballistic missile submarines. The 1981 Navy report, mentioned above, noted that twin screw tugboats operating parallel to submarines would require "large stand-off special fenders." The RFP appears to have been drawn up on the assumption that offerors would not propose the use of twin screw tugboats. On this basis, the government clearly accepted the responsibility of furnishing as GFE all necessary side fendering, apparently planning to transfer the GFE fendering that the

incumbent was currently using on its single screw tugboats. It was only with CTS's September 27, 1983, protest against the use of twin screw tugboats that the Navy began to review the adequacy of the GFE side fendering. The 1981 Navy report states that it was assumed that the "side fendering is adaptable to any tug shape with no change in detail from one tug to another." However, the report assumed that only single screw tugs would be used. On October 12, 1983, the Navy issued a sketch for additional fendering to include propeller guards and chine fendering (chines are edges on the sides of a boat, such as where the bottom and the sides of a flat or V-bottomed boat intersect). By letter of October 19, 1983, the Navy advised the Air Force that chine fendering and propeller guards were necessary. On November 23, 1983, the contract was awarded to Petchem. On December 2, 1983, a shipyard, apparently on the basis of the Navy sketch, issued drawings for the additional fendering. On December 6, 1983, the Air Force received a purchase request for the additional fendering. Finally, on December 13, 1983, the contract was modified to have Petchem purchase on behalf of the government and have installed on its tugboats the additional fendering.

Ordinarily, we do not consider protests concerning contract modification because modifications fall within the ambit of contract administration, which is within the authority of the contracting agency. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 C.P.D. ¶ 278. However, although we recognize the necessity for contract modifications, see 50 Comp. Gen. 540 (1971), we have consistently taken the position that modifications should not be used to circumvent the competitive procurement statutes. Die Mesh Corporation, B-190421, July 14, 1978, 78-2 C.P.D. ¶ 36. Nevertheless, where, as here, negotiations, BAFO's and evaluations have been completed and a proposed awardee announced (Air Force announced its intent to award to Petchem on August 24, 1983), and where the RFP only requires the contractor to provide bow fendering, we do not see how the provision of additional GFE fendering can be said to have conferred any competitive advantage on Petchem during either the evaluation or award selection, especially when the government is already responsible for the side fendering. Under these circumstances, the Air Force had no obligation to notify all other offerors of its intent to furnish additional GFE. See National Biomedical Research Foundation, B-208214, Sept. 23, 1983, 83-2 C.P.D. ¶ 363. CPS/13 and GOC/7 therefore are denied.

DEBRIEFINGS

CPS/14, an objection by CPS to its being excluded from Air Force debriefings given to other offerors following the award to Petchem, lacks merit. The objection is based on CPS's mistaken belief that the Air Force automatically debriefs all offerors after an award and that the Air Force invites all offerors to one debriefing. DAR, § 3-508.4(b), provides for debriefings at the written request of unsuccessful offerors. DAR, § 3-508.4(c), further provides that, while offerors should be advised of the areas in which their proposals were weak or deficient, agency officials should not make point-by-point comparisons with the proposals of other offerors nor should confidential information concerning other offerors' proposals be disclosed. Since CPS did not request a debriefing, we see no reason for it to be granted one. Moreover, the presence of two offerors at the same debriefing is totally inconsistent with the regulatory prohibitions against comparison of proposals and disclosure of confidential information. CPS/14 therefore is denied.

AWARDEE'S LACK OF CORPORATE EXPERIENCE

GOC/1, objecting to Petchem's receipt of any credit above "zero" for either "relevant past performance" or "relevant past cost performance," lacks merit. The record shows that Petchem as a firm does not have either applicable technical nor applicable cost experience, even though it was incorporated in 1978, principally because it operated as a one-man corporation in the field of maritime consulting. However, for the reasons given above, in our discussion of CPS/6, it is clear that contracting agencies can consider the past technical experience of key personnel in arriving at an assessment of corporate experience/past performance. Regarding "past cost performance," the RFP states that offerors' cost proposals will be evaluated in order to "establish offeror's potential for successful accomplishment of this acquisition." It is clear from our review of the source selection documents that the cost proposals of all offerors were evaluated in detail for compliance with the RFP instructions, but that they were not scored. In the absence of scoring, we see no basis for contentions regarding whether a particular cost proposal was entitled to any credit above "zero." Moreover, the criteria was apparently intended to gather information upon which to extrapolate an offeror's future "potential." Since Petchem lacked an applicable past cost performance, it appears that the Air Force was satisfied that the past experience of Petchem's key personnel in the administration of contracts established Petchem's future potential. GOC/1 therefore is denied.

AWARDEE'S SUBSTITUTION OF PERSONNEL

GOC/2, an allegation that Petchem's placement of an advertisement in a local newspaper (2 days before the August 30, 1983, target date for contract award) "seeking" qualified personnel is either (1) an admission that the personnel proposed by Petchem were not really qualified; or (2) an indication that Petchem intended to improperly substitute different personnel for the personnel proposed prior to award, lacks merit. Petchem admits that it placed the advertisement after it was tentatively notified (on August 24, 1983) that it would receive the award. Petchem did this for two reasons. First, Petchem wanted to hire any incumbent personnel that might become available consistent with the provisions of RFP clause H.47 continuity of services. Second, due to the considerable length of time it was taking to receive final award, Petchem feared the possible unavailability of some of the personnel who had promised earlier to join Petchem. In this regard, we note that Petchem finally received the award on November 23, 1983, almost 3 months after the tentative award notification.

The RFP only required offerors to submit resumes for key personnel. In the absence of a specific requirement in the RFP, an offeror is not required to assign to the contract the particular individuals whose resumes were submitted in good faith with its proposal and no basis exists for questioning a contracting agency's evaluation of proposals on the basis of personnel reflected therein. Bokonon Systems, Inc., B-189064, Apr. 19, 1978, 78-1 C.P.D. ¶ 303.

GOC/2 therefore is denied.

FAILURE TO ADVISE OF PROPOSAL WEAKNESS

GOC/6, an objection to the Air Force's alleged failure to advise GOC of its perception that GOC's proposal was weak in the area of manning, lacks merit.

GOC reports that it learned at its debriefing that the Air Force considered GOC's technical proposal weak in two areas: (1) understanding of job/soundness of approach; and (2) organization and manning. In both instances, the preception resulted from GOC offering fewer people than the Air Force believed to be necessary to adequately perform the job. GOC advises that it was never told either before or during negotiations that its total manning was considered inadequate. Moreover, GOC claims that the TEB induced it into a reduction of the manning level it initially proposed. According to GOC, the TEB asked GOC to "look again"

at its proposed manning of four men per tugboat because the TEB felt that three men per tugboat "might be adequate." GOC admits that it agreed with the TEB because it was now proposing newer, more maneuverable twin screw tugs, which made it "possible to reduce crew labor requirements since the number of line-handling functions can be reduced."

The Air Force reports that it addressed several manning questions to GOC during negotiations. GOC was asked about manning on the government-furnished NASA tugboat. The Air Force pointed out that a cook and a mate that GOC was proposing for sea duty were not within the scope of the present solicitation. The Air Force further reports that it asked all offerors proposing four-man crews "if the contractor needed four people on each tug crew?" The parties agree that GOC's response to the question was that because of the different tugboats, GOC might be able to operate with less personnel. The Air Force adds that GOC agreed to look into the matter and include its resolution of the issue in its BAFO. Although GOC reduced its manning in the BAFO, the Air Force was not satisfied with the resolution because of GOC's proposed use of some part-time personnel in some areas and GOC's failure to comply with the Air Force assessment of total required man-years using the right mix of skills.

In our view, GOC's objection is that the Air Force failed to conduct meaningful negotiations in that by not advising GOC of the weakness in manning, GOC was precluded from an opportunity to cure the deficiency. It is well established that the contracting agency must generally provide all offerors within the competitive range with information concerning the deficient areas of their respective proposals so that they can revise their proposals to satisfy the RFP's requirements. Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. Nevertheless, the content and scope of such discussions (oral or written) are largely left to the discretion of the contracting officer to be determined under the particular circumstance of each case. Moreover, we will not disturb the contracting officer's assessment of such matters unless it is clearly without a reasonable basis. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 C.P.D. ¶ 61.

In this case, GOC was clearly advised during negotiations that the Air Force was concerned about its proposed manning in several respects. GOC agreed to look at the matter and actually further altered its proposal. However, the alteration, in terms of man-years and skill mixes,

was not what the Air Force thought was required. We find the Air Force's conduct of the negotiations reasonable under the circumstances. GOC/6 therefore is denied.

for Milton J. Socolar
Comptroller General
of the United States