



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

REDACTED VERSION

**Matter of:** American Development Corporation

**File:** B-251876.4

**Date:** July 12, 1993

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Lawrence M. Farrell, Esq., and Susan Heck Lent, Esq., McKenna & Cuneo, for the protester.  
Brian A. Bannon, Esq., and Sean C.E. McDonough, Esq., Dyer, Ellis, Joseph & Mills, for Lake Shore, Inc., an interested party.  
Jeffrey I. Kessler, Esq., and Carol Rosenbaum, Esq., Department of the Army, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. While relevance of prior contracts was not explicitly identified in the solicitation as an evaluation criterion, it may nonetheless properly be considered in evaluating proposals, where the solicitation states that the agency will evaluate the offerors' past performance in order to assess the likelihood that the procurement will be successfully performed, because relevance is logically encompassed in that evaluation criterion.
2. Agency methodology for assessing the relevance of past performance is unreasonable where it excessively favors offerors which performed at least one relevant prior contract, irrespective of the quality of the performance under that contract.
3. Agency failed to conduct meaningful discussions where it did not raise during discussions its concerns that the protester's proposal did not satisfy the solicitation requirements in various areas and that lack of detail in other areas constituted a weakness.

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\* The decision issued on July 12, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

4. Agency treated offerors unequally during the conduct of discussions by addressing specific areas with one offeror but failing to raise identical concerns with another offeror.

5. Where solicitation stated that offerors would be provided the opportunity to rebut derogatory performance evaluation comments provided by agencies with which the offerors had held prior contracts, agency may not fail to solicit rebuttal to negative comments on the basis that submission of proposal provided offerors an opportunity for rebuttal "in advance."

6. Where cost/technical tradeoff was based on incomplete and inaccurate information, our Office will not infer that there was no prejudice to the protester where the impact of the errors on the tradeoff decision is not clear from the record.

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#### DECISION

American Development Corporation (ADCOR) protests the award of a contract to Lake Shore, Inc. under request for proposals (RFP) No. DAAK01-92-R-0140, issued by the Department of the Army's Troop Support Command. ADCOR contends that the technical evaluation of proposals was unreasonable and inconsistent with the RFP evaluation criteria; that the discussions held with ADCOR were inadequate and less extensive than those conducted with the awardee; and that, if the cost/technical tradeoff had been performed on the basis of a proper technical evaluation, ADCOR's proposal would have been selected for award.

We sustain the protest in part and deny it in part.

The RFP, issued on May 29, 1992, provides for the acquisition of modular causeway ferry systems and anticipates award of an indefinite-quantity contract for three 1-year ordering periods. The RFP provided for award to the offeror whose proposal represented the "best overall value" to the government and indicated that technical factors would be given twice the weight of price in the source selection decision. By amendment, the RFP incorporated the Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause entitled "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns," DFARS § 252.219-7006, which provides for a 10 percent price evaluation preference for SDB concerns.

Section M of the RFP indicated that the agency would initially evaluate proposals on a pass/fail basis to determine compliance with three specific RFP requirements.

Proposals which passed that review were then subject to detailed evaluation and scoring. Individual evaluators rated the proposals, and team leaders, after reviewing those ratings, wrote team leaders' evaluations. The 10 factors considered in that evaluation and the points assigned to them under the agency's source selection evaluation plan were as follows:

Speed/cargo capacity	10
Endurance	10
Freeboard	10
Transportability	10
Operator's cab & controls	10
Performance characteristics	10
Quality assurance	5
Integrated logistics support (ILS)	10
Management/staffing/facilities	10
Past performance	<u>15</u>
TOTAL	100

Most of these factors were subdivided into subfactors. The performance characteristics factor was divided into the smallest units, with 19 subfactors together accounting for the overall 10 points assigned to that factor. Each of those 19 subfactors was thus worth 0.53 points.

Section M stated that the past performance evaluation would assess the probability that an offeror would satisfy the RFP requirements, as indicated by that offeror's performance record. In that regard, offerors were required to provide certain information regarding all contracts performed during the preceding 3 years and with a value over \$500,000. The RFP advised offerors that the government could use independently obtained information as well as data contained in the proposals in evaluating past performance, but noted that, if "a source outside of the offeror's proposal provides the Government with derogatory past performance information, the offeror will be given the opportunity to rebut or corroborate such information."

The source selection evaluation plan, which was not disclosed to offerors, indicated that the technical evaluators were to use a scoring guideline different from that to be used by the contracting officer, who was the source selection authority (SSA) for this procurement. Specifically, the evaluators' guideline showed 0-19 points (out of a total of 100 points) as the unacceptable range, while under the SSA's guideline any score of 59 points or less was unacceptable.

[Deleted] proposals were received by the September 4, 1992, closing date, including the proposal from ADCOR, which is an SDB, and Lake Shore, which is not. One offeror's proposal (not at issue in this protest) was rejected as outside the competitive range because it failed to satisfy one of the pass/fail factors.

Discussions were conducted through written notices of errors, omissions, or clarification (EOCs) sent to offerors. The agency states that it issued EOCs when "an uncorrected error or omission, or lack of clarification[,] would have necessitated the rejection of an offeror's proposal." The agency advises that "[w]eaknesses that were determined to be the result of an offeror's lack of competence, diligence or inventiveness were not brought to the attention of the offeror."

Eight EOCs were sent to ADCOR during the course of September, and ADCOR's responses were due and received by September 25.<sup>1</sup> No additional EOC was sent to ADCOR after that date. Three of ADCOR's EOCs pertained to the pass/fail evaluation areas, while one questioned a mathematical error; the remaining four arose from evaluation areas in which scores were assigned. The latter EOCs consisted of a total of 19 questions, including instances of the agency pointing out that ADCOR's proposal lacked either information regarding the weight of certain items or an explanation of how the offeror intended to satisfy specified paragraphs of the statement of work.<sup>2</sup> ADCOR received no question related to transportability or past performance; in the area of operator's cab and controls, the protester received no questions in any way bearing on the capacity of the heater it proposed for the cab; a cab searchlight; clutch engagement and transmission controls; or the impact of [deleted] failure on steering control.

Lake Shore received [deleted] EOCs, of which [deleted] related to pass/fail issues. As with ADCOR, the EOCs sent to Lake Shore contain multiple questions. Among those questions are the following:

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<sup>1</sup>Originally, nine EOCs were sent to ADCOR, but one was withdrawn.

<sup>2</sup>Sixteen of the 19 questions asked of ADCOR were included in one EOC. The 16 questions, all of which concerned the operator's cab and controls, raised specific inquiries such as the cab noise levels; the size of the cab and of the control panel; the frequency and loudness of alarms; and the presence on all windows of wipers and demisters.

"Please provide clarification on your proposed method of [deleted], Your response should include an estimate of the [deleted] and information describing a satisfactory [deleted]."

"[P]lease provide clarification on how the [deleted] meets the [deleted] requirement of [the RFP]."

The agency also sent Lake Shore an EOC seeking information indicating whether the firm's proposed [deleted] would satisfy the RFP [deleted] requirement. After finding errors in Lake Shore's response, which was received in early October, the Army sent Lake Shore a follow-up EOC requesting correction of the errors and further explanation.

The evaluation process, which had begun immediately upon receipt of proposals on September 4, continued during the course of October and November. The agency advises that the evaluators focused on the pass/fail criteria through approximately September 18, and turned their attention to the evaluation of the non-pass/fail factors (that is, the scored criteria) thereafter. The record includes evaluator worksheets, apparently written in October or later, in which the agency evaluators identified a number of RFP requirements that ADCOR's proposal failed to satisfy; those deficiencies were not covered by the EOCs that had been sent to ADCOR in September. Those failed requirements were in the areas of transportability, operator's cab and controls, performance characteristics, and ILS. In the area of performance characteristics, the evaluators assigned ADCOR's proposal scores of [deleted], meaning that the proposal was unacceptable, for [deleted] of the 19 subfactors. Among the evaluators' criticism of ADCOR's proposal in the area of operator's cab and controls were the following:

[quotation deleted]

[quotation deleted]

[quotation deleted]

[quotation deleted]

In some instances, team leader evaluations omitted the individual evaluators' references to failure to meet RFP requirements. In other instances, those references were repeated, with some modification, in the team leader evaluations. In the example cited above, the team leader evaluation of ADCOR's proposal in the area of operator's cab and controls stated:

[quotation deleted]

[quotation deleted]

[quotation deleted]

In the area of performance characteristics, the team leader's evaluation of ADCOR's proposal includes the following language: "ADCOR does not meet the [deleted] requirements" and "ADCOR does not address the [deleted] requirements." In the area of transportability, the team leader prepared a chart listing the requirements in that area and bearing a checkmark where a proposal met a requirement. In that chart, ADCOR's proposal lacks a checkmark for [deleted] requirements.

In some instances, the team leaders changed the point scores assigned by individual evaluators. Thus, in the area of ILS, the team leader upgraded the score assigned to Lake Shore's proposal and downgraded the ADCOR proposal's score. The team leader has explained that he made those changes because he found, after reviewing the proposals, that the individual evaluator's write-up of ADCOR's proposal overlooked certain weaknesses in the proposal, and that the write-up of Lake Shore's proposal included inconsistencies and incorrect assumptions that led to that proposal being improperly downgraded. In the area of quality assurance, by contrast, the team leader raised the score assigned to ADCOR's proposal by the individual evaluator. As with the changes to the ILS scores, the agency has provided the reason for the improvement to the ADCOR proposal's quality assurance score.

As part of the past performance evaluation factor, the agency had decided, prior to receipt of initial proposals, to consider the relevance of past contracts. This decision

was based on the agency's assessment that experience gained in work irrelevant to the production of modular causeway systems would not have significant bearing on the criterion described in Section M as "the probability that an offeror will perform the solicitation requirements."

The agency states that it was concerned that consideration of relevance might give undue preference to offerors with significant experience in the area of modular causeway systems and thus place smaller manufacturing concerns at a disadvantage. Based on this concern, the evaluators decided to rate relevance by, first, calculating the average performance rating based largely on comments received from other government agencies, for all of an offeror's contracts from the appropriate time period; second, assigning a relevance rating, ranging from zero through 27, for each of those contracts; and, third, multiplying the average performance rating times the highest relevance rating that the offeror received on any contract, to reach the overall past performance score.

This methodology increased Lake Shore's proposal's point advantage relative to ADCOR's proposal in the area of past performance, because Lake Shore had one contract which the evaluators found to be [deleted] relevant to the modular causeway system procurement, thus leading to a [deleted] relevance rating. On that contract, Lake Shore received a [deleted] percent performance rating. For the [deleted] Lake Shore prior contracts for which the evaluators were able to develop a performance rating, the offeror received an average rating of [deleted] points, driven largely by a [deleted] performance rating ([deleted] points) received for a contract which the agency did not view as particularly relevant ([deleted] points) to the work to be performed here. Multiplying [deleted] points times [deleted] points for the [deleted] relevance score, the agency assigned Lake Shore an overall score of [deleted] points for past performance.<sup>3</sup> ADCOR's most relevant prior contract was evaluated as worth only [deleted] (out of 27) relevance points, so that its average performance rating of [deleted] points (based on [deleted] contracts) was reduced to [deleted] through multiplication of the [deleted] relevance factor.<sup>4</sup>

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<sup>3</sup>In terms of the overall technical evaluation 100-point matrix, the Lake Shore proposal's [deleted] point score translated into [deleted] points out of the total possible 15 points for past performance.

<sup>4</sup>In terms of the overall 100-point matrix, the ADCOR proposal's [deleted]-point score translated into [deleted]  
(continued...)

As explained above, the performance ratings were based on comments received from other government agencies which had been contacted directly by the Army because the offerors had held contracts with them. Although some of the comments received regarding ADCOR's prior performance were negative, ADCOR was not advised of that fact, nor was rebuttal or comment solicited from the protester in that regard. The contracting officer believed that there was no need to solicit ADCOR's view because the offeror had already been afforded the opportunity, in its proposal, to self-evaluate its performance on all prior contracts "in advance," including the ones for which the contracting agencies provided negative comments.

Once the agency had completed its evaluation of past performance as well as of the other technical factors, the [deleted] offerors whose proposals had been determined to be in the competitive range were invited to submit BAFOs. All [deleted] did so by the November 25, 1992, due date, but no offeror included further changes to its technical proposal in its BAFO. The evaluations were then forwarded to the contracting officer.

On November 30, the contracting officer was advised that the narrative related to one technical evaluation factor, speed and cargo capacity, indicated that all [deleted] proposals failed to meet the RFP speed requirement. The contracting officer discussed this matter with technical evaluators and learned that the agency's own evaluators had found that all proposals would satisfy that requirement, but that an outside consultant had concluded that none would satisfy the requirement. After considering the Army evaluators' reasons for believing that all proposals would satisfy the speed requirement, the contracting officer concluded that the narrative language should be changed accordingly. The appropriate changes to the narrative were then made, for all [deleted] proposals; no change was made to any proposal's score.

The contracting officer then turned to consideration of the technical scores and proposed prices of the competing proposals. He noted that the ADCOR proposal's overall

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<sup>4</sup>(...continued)

points out of the 15 points available for past performance. Without the reduction for relevance, ADCOR's proposal would have received credit for the [deleted]-point average performance rating, which equates to [deleted] points on the overall 100-point scale.

technical score was [deleted] points, which was near the top of the unacceptable range under the applicable guideline. The contracting officer determined to "give [ADCOR] the benefit of the doubt" and keep ADCOR's proposal in the competitive range. The remaining [deleted] proposals all received higher technical scores; Lake Shore's score of [deleted] points was the [deleted] score.

Of the [deleted] proposals remaining in the competitive range, ADCOR's evaluated price of [deleted] was low, and Lake Shore's evaluated price of [deleted] was [deleted] low. After the SDB adjustment was taken into account, Lake Shore's evaluated price rose to [deleted], that is, more than [deleted] dollars higher than ADCOR's.

The contracting officer conducted a cost/technical tradeoff that led to the conclusion that Lake Shore's proposal represented the best overall value. In the technical evaluation portion of that analysis, the contracting officer focused almost exclusively on the point scores. Based on the cost/technical tradeoff, award was made on December 23, 1992, to Lake Shore.

ADCOR raises a number of challenges to the evaluation process. Specifically, ADCOR alleges that (1) the agency's evaluation of the relevance of past contracts was improper both because relevance was an undisclosed evaluation criterion and because the particular evaluation methodology used was unreasonable; (2) the agency improperly failed to conduct discussions regarding areas in which ADCOR's proposal was found deficient or weak; (3) the agency improperly conducted more comprehensive discussions with Lake Shore than with ADCOR; (4) contrary to the requirement of the RFP, the agency failed to afford ADCOR the opportunity to rebut the negative comments from other agencies with which ADCOR had held a prior contract; and (5) the agency showed favoritism toward Lake Shore by changing the two offerors' scores in the area of ILS and in the way that the evaluations in the area of speed and cargo capacity were changed shortly before the source selection decision was made.

The Army concedes one error in the evaluation of ADCOR's proposal in the area of transportability, but argues that the error did not prejudice ADCOR because the resulting 1.7-point change could not have made a difference in the cost/technical tradeoff. Otherwise, the agency defends its actions, as explained in the following issue-by-issue discussion.

## CONSIDERATION OF THE RELEVANCE OF PAST PERFORMANCE

ADCOR contends that the agency was not permitted to consider the relevance of work performed under past contracts to the work to be performed under the RFP, because the RFP did not list relevance as one of the criteria to be considered in evaluating past performance. We find this contention without merit, since the RFP explicitly put offerors on notice that the comparative merit of offerors' past performance would be evaluated to assess the probability of successful accomplishment of the work at issue here, and relevance is logically encompassed by and related to the past performance factor. See AWD Technologies, Inc., B-250081.2; B-250081.3, Feb. 1, 1993, 93-1 CPD ¶ 83. Assessment of relevance was thus permitted under the RFP evaluation criteria.

In reviewing an agency's evaluation of proposals, however, we consider not only whether the agency deviated from the RFP evaluation criteria, but also whether the actual evaluation was unreasonable. See Systems Research Laboratories, Inc., B-246242.2, Apr. 21, 1992, 92-1 CPD ¶ 375. Here, the specific methodology adopted by the agency lacked a rational basis, and ADCOR was disproportionately disadvantaged by it. The agency emphasizes that it evaluated the relevance of past performance in order to ascertain the likelihood that the offeror would perform successfully if awarded the contract here. The agency reasonably viewed an offeror's having performed well on a relevant contract as an advantage ("If one time you've shown you can do it, then you can do it," in the agency's words).

The agency's methodology, however, failed to take into account the implication of an offeror having performed less than well on a relevant contract. The agency, in fact, concedes that its methodology "divorced [the] contract performance rating from [the] relevancy rating." In effect, the methodology chosen rewarded offerors which had held at least one contract relevant to the work to be performed under the RFP without consideration of the quality of the work performed under that contract.

The Army's methodology had an adverse impact on ADCOR's relative position in the competition under the RFP. The Army evaluators, having learned that Lake Shore had performed one contract more relevant than the most relevant contract performed by ADCOR, ignored the fact that, on that relevant contract, Lake Shore was found to have performed [deleted] less well than ADCOR did on its most relevant contract ([deleted] points for Lake Shore's prior contract

versus [deleted] points for ADCOR's). Instead, the evaluators gave Lake Shore the benefit of one [deleted] relevant contract (without considering the performance rating assigned to that contract) and the benefit of a very good score on another contract (without consideration of that contract's [deleted] relevance rating). We find that methodology unreasonable. Accordingly, we conclude that the agency acted unreasonably in deducting [deleted] points from ADCOR's proposal's score vis-à-vis Lake Shore's due to the relevance evaluation.<sup>5</sup>

#### ADEQUACY OF DISCUSSIONS

Federal Acquisition Regulation (FAR) § 15.610(c)(2) requires that a contracting agency "[a]dvice the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements." Although discussions with offerors need not be all-encompassing, they must be meaningful, which means that an agency is required to point out weaknesses, excesses, and deficiencies in proposals unless doing so would result in technical transfusion or technical leveling. FAR § 15.610(c), (d); Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527.

Here, the agency evaluators identified weaknesses in ADCOR's proposal, including matters as to which ADCOR's proposal was found not to meet the RFP requirements, but failed to raise many of those areas in EOCs, which were the only form of discussions conducted.<sup>6</sup> The Army offers various justifications for the lack of discussions, although it has not argued that the risk of technical transfusion or technical leveling was a basis.

At times, the Army has stated that it did not raise the weaknesses identified in ADCOR's proposal in discussions because they reflected a lack of diligence on ADCOR's part,

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<sup>5</sup>At a hearing conducted in this matter, the agency offered a different methodology and newly calculated scores, which purported to take into account both the relevance of the offerors' prior contracts and the reported quality of their performance. In light of the disposition of the protest, we need not rule on the appropriateness of this alternative methodology, and instead we simply set aside the [deleted] point effect that the contemporaneous relevance evaluation had on ADCOR's score.

<sup>6</sup>The Army does not allege that the EOCs it issued to ADCOR led the offeror into the general area of any of the weaknesses at issue here.

and the agency seemed to view the weaknesses as revealing a significant flaw in the proposal. At other times, the Army has downplayed the significance of the weaknesses identified: it has argued that the weaknesses, which in many instances were mere lack of detail in the proposal, were of little importance because they concerned matters which are routinely resolved during performance; and it has pointed out that the unacceptable ratings on specific subfactors "rolled up" to overall acceptable ratings for every technical evaluation factor, so that the apparent deficiencies, at least in the form of the point scores, disappeared by the time the higher level evaluations were prepared. Where the higher level evaluation documents clearly indicate that ADCOR's proposal failed to comply with one or another RFP requirement, the agency has argued that the documents are inartfully worded or otherwise do not mean what they say, and that the intent was merely to identify minor weaknesses in ADCOR's proposal.

The agency has also defended its failure to apprise ADCOR of the weaknesses identified in its proposal by arguing that all offerors were treated equally in this regard. The agency thus claims that ADCOR was not prejudiced by the limited nature of the discussions, since, if more extensive discussions were held with ADCOR, they would have to be held with all offerors. Such discussions, in the agency's view, would lead to an equal improvement in all offerors' scores, so that it could not affect the source selection.

Where discussions are conducted, the agency must at a minimum advise offerors of deficiencies in their proposals so that they are given an opportunity to satisfy the government's requirements. FAR § 15.610(c)(2). Notwithstanding the agency's argument that only minor weaknesses were at issue, the record plainly establishes that the agency identified [deleted] areas under the transportability factor and [deleted] areas under the performance characteristics factor in which ADCOR's proposal lost at least [deleted] points for failure to meet RFP requirements.<sup>7</sup>

In arguing that only weaknesses were at issue, the Army apparently means that it did not treat ADCOR's proposal's perceived failure to satisfy RFP requirements as rendering

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<sup>7</sup>As explained above, the record indicates that further points were deducted for other areas in which ADCOR's proposal was found not to satisfy RFP requirements (such as the [deleted] requirement involving the [deleted], under the operator's cab and control factor), but the evaluation documentation does not indicate the precise number of those points.

the proposal ineligible for award. While this may be true, it does not resolve the matter. Indeed, it suggests that the Army would be willing to make award on the basis of a proposal that failed to comply with solicitation requirements. The agency has not explained how it could make such an award, which would appear to be improper. See Telemetrics, Inc.; Techniarts Eng'g, B-242957.7, Apr. 3, 1992, 92-2 CPD ¶ 168.

Although not clearly articulated, the agency's position may be that the RFP requirements at issue are immaterial, and that noncompliance with the requirements thus might not render a proposal unacceptable. It is true that only failure to conform with material terms and conditions of a solicitation renders a proposal unacceptable. See Telemetrics, Inc.; Techniarts Eng'g, supra. Concerning ADCOR's proposal, however, a substantial number of requirements were at issue, and the agency has not demonstrated that these areas of perceived noncompliance are immaterial--for example, the agency has not explained how the failure to provide a [deleted] could be other than material. More important, the cumulative effect of the failing scores assigned to ADCOR's proposal in the various areas detailed above was that the proposal was, in fact, rated as technically unacceptable overall ([deleted] points versus 60 points as the minimum for an acceptable proposal).<sup>8</sup>

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<sup>8</sup>The contracting officer claims to have provided ADCOR the "benefit," after evaluations were completed and BAFOs received, of a second competitive range determination, in which he found the protester's proposal acceptable. The record suggests that the agency may have believed that this finding precluded the need for further discussions, which, in the agency's view, would have been required if ADCOR's proposal's unacceptable rating were allowed to stand, since it would be apparent that the agency had failed to discuss the aspects of the proposal leading to its being unacceptable. If so, the agency was mistaken. The competitive range determination is made for the purpose of conducting discussions, because those discussions are limited to offerors whose proposals are within the competitive range. FAR § 15.609(a). If the Army's post-BAFO competitive range determination had any relevance to the conduct of further discussions, it thus suggested the propriety of such discussions with ADCOR, as an offeror whose proposal was in the competitive range; it certainly could not justify the lack of meaningful discussions with such an offeror.

Underlying the Army's defense of its very limited discussions with ADCOR is the agency's assumption that it was only required to discuss issues which make a proposal unacceptable. That assumption is unfounded. Agencies are required to discuss weaknesses in an offeror's proposal where the weaknesses have a significant adverse impact on the proposal's technical rating, although discussions need not address every area in which a proposal receives less than a perfect score, and the need for meaningful discussions may be constrained to avoid technical leveling, technical transfusion, and an auction. Department of the Navy--Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ \_\_\_\_.

Since none of the latter constraints is an issue here, the only question is whether the weaknesses noted in ADCOR's proposal had a significant adverse impact on the proposal's rating. The record makes clear that they did. Focusing on the point scores, since the agency relied heavily on point scores in making the award determination, we note that ADCOR lost more than [deleted] points due to matters that were not raised during discussions, generally involving the lack of detail provided in the proposal.<sup>9</sup> It cannot be denied that those point deductions had a significant adverse impact, in absolute as well as relative terms. Regarding the latter, we note that the points deducted for deficiencies and weaknesses not raised in any EOC represented the majority of the approximately [deleted] points separating ADCOR's from Lake Shore's scores.<sup>10</sup> The overall reduction in ADCOR's point score due to the matters addressed here could thus have been determinative of the outcome of the competition, particularly since the agency relied so heavily on the point

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<sup>9</sup>These include [deleted] points in the area of speed and cargo capacity (where the only reason for deducting points was an informational deficiency concerning [deleted]); [deleted] points for failures to meet requirements in the area of transportability; [deleted] points for failure to meet requirements in the area of performance characteristics. In addition, at least a portion of the [deleted] points deducted in the area of operator's cab and controls was apparently attributable to failure to meet requirements and for lack of detail in that area, and a further, unclear amount seems to have been deducted under performance characteristics due to lack of detail.

<sup>10</sup>Of the some [deleted] points that the agency found separated ADCOR's and Lake Shore's scores, only approximately [deleted] remain after correction of the [deleted] points that ADCOR's proposal lost due to the agency's unreasonable relevance analysis and the [deleted] points associated with the agency's conceded error in the area of transportability.

scores in the award decision. Despite the potentially determinative nature of the point deductions, the agency did not raise with ADCOR any of the concerns which underlay them, and the discussions were therefore not meaningful.<sup>11</sup>

The agency's defense that it did not need to discuss these matters because the weaknesses reflected the offeror's lack of diligence is unpersuasive. While many of the points deducted from ADCOR's score were attributed to the lack of detail in the protester's proposal, the agency has repeatedly downplayed the significance of that detail, which it explains is routinely supplied after award in a procurement such as this one. It appears inconsistent to penalize an offeror for not providing detail that the agency itself views as minor. Moreover, the alleged lack of diligence refers at most to the care invested in preparing the proposal, with no bearing on the quality of the proposed ferry system.<sup>12</sup> In any event, while an agency need not spoon-feed a careless offeror and may not engage in technical leveling, attributing a proposal's deficiencies to an offeror's lack of diligence cannot serve as a talisman to wholly exempt the agency from the requirement that discussions conducted must be meaningful. This is particularly true where, as here, the agency has determined that part of a proposal does not satisfy solicitation requirements. Accordingly, notwithstanding the Army's allegation that the shortcomings in ADCOR's proposal demonstrated a lack of diligence on the offeror's part, we find that the agency failed to conduct meaningful discussions with ADCOR.

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<sup>11</sup>It appears that the agency effectively concluded its discussions with ADCOR in mid-September, before the evaluators had identified the various areas in which ADCOR's proposal was later found not to satisfy RFP requirements. As a result, the agency seems to have been reluctant in October to issue an additional round of EOCs to cover the newly identified deficiencies and weaknesses. Neither that reluctance nor the fact that the agency had alerted ADCOR to some of the agency's concerns in the September EOCs constitutes a reasonable basis for the agency's failure to raise the concerns identified during October.

<sup>12</sup>For example, while the evaluators criticized ADCOR's proposal for not discussing the [deleted], despite an RFP requirement that it do so, the Army's concern was unrelated to any problem with the actual proposed [deleted], which the agency characterizes as a relatively straightforward design detail.

In addition, as to at least two specific issues, the spotlight's range requirement and the cab's heat loss, Lake Shore was sent an EOC requesting further information; but while ADCOR's proposal was found deficient for lack of virtually the same information, the agency did not mention the matters in any EOC sent to that firm. We note as well that, while the Army deducted points from ADCOR's score due to an inaccuracy in the [deleted] data without raising the issue in an EOC, the agency sought information regarding Lake Shore's proposed [deleted] in an EOC, and then sent a follow-up EOC when Lake Shore's initial EOC response proved inaccurate. Regarding these areas, therefore, the agency failed to treat the offerors equally during the conduct of discussions.

The final protest ground related to the content of the discussions concerns the negative comments provided by agencies with which ADCOR had previously held a contract. Although the RFP stated that offerors would be provided an opportunity to rebut derogatory comments about the offeror's past performance, the Army failed to provide ADCOR that opportunity. We find unreasonable the Army's position that ADCOR's proposal could have "rebutted" the outside agencies' derogatory comments "in advance," since the RFP provision assuring offerors that they will be given the opportunity to rebut negative comments can only be reasonably interpreted to mean that the Army would advise offerors that it had been given derogatory comments, which the agency failed to do here. One cannot rebut comments in advance of seeing them. In this regard, the evaluation was thus inconsistent with the RFP.<sup>13</sup>

Regarding the overall conduct of negotiations, the agency's contention that ADCOR was not prejudiced by the lack of meaningful discussions because further discussions would have improved all offerors' scores equally is unfounded. The impact of meaningful discussions is not predictable in advance, and both technical rankings among offerors and the offerors' proposed prices may be significantly altered as a result of those discussions. See Pan Am Support Servs., Inc.--Recon., 66 Comp. Gen. 457 (1987), 87-1 CPD ¶ 512. The agency's speculation about how various offerors would respond to meaningful discussions does not provide a basis to deny the protest.

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<sup>13</sup>While the record does not provide detail of the points at issue in this matter, we note that ADCOR's proposal lost [deleted] points (over and above the deduction of [deleted] points due to the faulty relevance analysis) of the total 15 evaluation points available for past performance.

## OTHER CHALLENGES TO THE TECHNICAL EVALUATION

ADCOR challenges other aspects of the technical evaluation as unreasonable. Specifically, ADCOR contends that it was improper for the team leader to revise the ratings assigned by individual evaluators. We deny this protest ground. ADCOR has not demonstrated that the team leader lacked a reasonable basis for the revision, but instead argues essentially that the revision is per se improper. That position is misplaced. Higher level evaluators are not bound by the opinions of lower level ones, and where, as here, the higher level evaluator has articulated a reasoned justification for the revisions made, there is nothing improper in those revisions. Schweizer Aircraft Corp., B-248640.2; B-248640.3, Sept. 14, 1992, 92-2 CPD ¶ 200.

ADCOR also contends that the agency demonstrated bias in favor of Lake Shore in the way that the evaluations in the area of speed and cargo capacity were changed shortly before the source selection decision was made. Government officials are presumed to act in good faith and, therefore, for us to conclude that bias exists, the record must establish that contracting officials intended to injure the protester. SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320. The record here does not support such a conclusion, and we therefore deny this basis of protest.

## COST/TECHNICAL TRADEOFF

The cost/technical tradeoff performed by the Army was based on inaccurate and incomplete information. As explained above with regard to the impact of additional discussions, we disagree with the agency's presumption that the cost/technical tradeoff would remain unaffected by the cumulative effect of the error conceded by the Army in the area of transportability, the unreasonable methodology used to evaluate the relevance of past performance, and the inadequate discussions.

The agency performed the cost/technical tradeoff on the basis of a [deleted]-point difference in the technical scores assigned to Lake Shore's and ADCOR's proposal. That difference drops to [deleted] points after the unreasonable relevance analysis and the Army's conceded error in transportability are taken into account, and it may shrink to less than [deleted] points after factoring in the deductions arising from deficiencies and weaknesses related to lack of detail, for which no discussions were held, and the lack of an opportunity to rebut derogatory comments concerning past performance.

Because ADCOR's evaluated price is approximately [deleted] million dollars lower than Lake Shore's (in the context of an overall contract price of roughly [deleted] million dollars), there is no basis to accurately predict the impact on the cost/technical tradeoff of these improvements in ADCOR's technical score. This is particularly true since, as the agency correctly notes, a further round of discussions and submission of BAFOs could lead to all offerors' revising both their technical proposals and their proposed prices.

#### CONCLUSION AND RECOMMENDATION

For the reasons set forth above, we conclude that the decision to award to Lake Shore was improper. We recommend that the Army reopen negotiations with ADCOR and all other offerors in the competitive range, conduct meaningful discussions, and request a new round of BAFOs. If a firm other than Lake Shore is selected for award as a result of the agency's evaluation of BAFOs, the Army should terminate Lake Shore's contract and make award to that other firm. We find that ADCOR is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), ADCOR's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Army within 60 days after receipt of this decision.

The protest is sustained in part and denied in part.

Comptroller General  
of the United States