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Comptroller General
of the United States
Washington, D.C. 20548

1134168

Decision

Matter of: Textron Marine Systems

File: B-255580.3

Date: August 2, 1994

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Janice Passo, Esq., Rhonda Russ, Esq., and Susan P. Raps, Esq., Department of the Navy, Naval Sea Systems Command, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Incumbent's protest that awardee's contract should be terminated--and the firm excluded from a recompetition--because it employed a former government employee who had access to proprietary information of the incumbent, as well as to information concerning the incumbent's performance of that contract, and disclosed some of that information to the awardee as part of his participation in preparing the awardee's proposal for that follow-on procurement, is denied where the information disclosed did not give the awardee an unfair competitive advantage.

2. Protest that award of contract was improper because, during the conduct of the procurement, awardee employed the daughter of a NAVSEA official alleged to have been involved in the procurement, is dismissed as untimely where protest failed to diligently pursue information establishing this basis of protest.

3. Protest that agency improperly failed to conduct adequate discussions with protester by not informing the firm that its costs were excessive is denied where record shows agency did not consider protester's cost to be excessive considering its technical approach.

4. Protest that agency conducted unequal discussions among offerors is denied where record shows discussion questions were consistent with the deficiencies evident in both offerors' proposals.

5. Protest that agency engaged in improper technical leveling with awardee is denied where, for some issues, no successive rounds of discussions took place, and for another issue, primary purpose of discussions was to ascertain what the offeror was proposing to furnish, rather than to raise the offeror's technical proposal to the level of the protester's proposal.

6. Protest that agency's cost realism analysis of awardee's cost proposal was defective because it failed to consider the possibility that the awardee might eventually be compelled to pay wages in accordance with a collective bargaining agreement is denied where this contention is unsupported.

7. Protest that agency violated a mandatory regulatory base fee limitation by making award to firm whose base fee exceeded that limitation is denied where there is no evidence that the protester could have been the successful offeror absent the violation.

8. Protest that agency improperly failed to determine that the Service Contract Act was applicable to this procurement is dismissed as untimely where protester should have known of this basis of protest prior to the date of submission of initial proposals, and did not file the protest until after award, and where issue does not fall within the significant issue exception to our timeliness rules.

DECISION

Textron Marine Systems (TMS) protests the award of a contract to Resource Consultants, Inc. (RCI) under request for proposals (RFP) No. N00024-92-R-2210, issued by the Naval Sea Systems Command (NAVSEA) for the technical and engineering support of the Navy's Landing Craft Air Cushion (LCAC) program. TMS primarily argues that RCI and one of its employees, a former employee of the agency, violated various provisions of the conflict of interest and procurement integrity statutes, thereby gaining an unfair competitive advantage for RCI.

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

BACKGROUND

The LCAC is a high-speed, amphibious landing craft capable of transporting up to 75 tons of weapons systems, equipment and Marine personnel from ship to shore and over the beach. The LCAC, which operates from Naval ships, flies at an altitude of 4 feet above sea or land surfaces on an air cushion created by four large lift fans. TMS has manufactured 50 of the 65 craft delivered to the Navy to date; the remaining 15 were manufactured by Avondale Gulfport Marine (AGM). The Navy expects to have 91 LCACs in operation with Fleet Marine forces by the mid-1990s.

The LCAC support contract consists of training LCAC crews, integrated logistics support, and material support. This support is provided principally at the Coastal Systems Station (CSS) in Panama City, Florida, a NAVSEA field activity. Four support contracts have been awarded during the life of the LCAC program. The first three were sole-source awards to TMS. Competition for the fourth contract was restricted to the two LCAC manufacturers, TMS and AGM, and that contract, No. N00024-89-C-2111 (hereinafter Contract 2111), was awarded to TMS for a period running from December 1988 to September 1992.

Revision H of the LCAC acquisition plan, dated March 3, 1992, states that the competition for the follow-on support contract would be restricted to TMS and AGM. However, the agency reports that, sometime after that date, it perceived that a larger resource base was beginning to exist as a result of various contractors having worked on pieces of the program under related contracts. Therefore, the decision was made to conduct a full and open competition for the award of a follow-on contract to Contract 2111.[1] An announcement soliciting interest in the proposed solicitation was published in the Commerce Business Daily (CBD) on May 12.

The RFP was issued on September 29, and contemplated award of a cost-plus-award fee contract for a 1-year base period and 3 option years. The RFP specified the level of effort required for each year of support for such contract line items (CLIN) as engineering and technical support, as well as for the training subline item for the operation and maintenance of the training craft; however, offerors were

[1]The procuring contracting officer for this RFP attests that it was his responsibility to determine whether the competition would be full and open, and that he does not recall the exact date when that determination was made.

permitted to deviate from the specified man-hours if they provided adequate justification. Offerors were required to propose their own estimates of the number of man-hours required to perform the training subline item for actual instruction. Offerors were to provide a proposed estimated cost for the material support line items, which had specified not-to-exceed dollar amounts; these line items would be awarded as firm, fixed-price orders. Finally, offerors were instructed to propose a base and award fee amount.

Section M of the RFP stated that award would be made to that offeror whose proposal was considered to be most advantageous to the government, cost and other factors considered. Aside from cost, the only factor to be considered was technical, and the RFP listed four technical evaluation categories, in descending order of importance: training, engineering and technical support services, material support, and overall project management capability. As for the cost evaluation, the RFP stated that each offeror's proposed cost[2] (except for the costs associated with material support line items) would be evaluated to determine a projected cost. To do so, the government would evaluate the realism and reasonableness of the costs presented in the offeror's proposal in light of available data.

The RFP informed offerors that the agency would conduct a projected cost versus technical superiority trade-off analysis to determine which proposal was most advantageous to the government, and that the agency was willing to pay a premium of up to 20 percent for a technically superior proposal.[3] Award would be made to that responsible offeror whose proposal was responsive, technically acceptable, and determined to be most advantageous to the government within this cost/technical trade-off parameter.

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[2]The RFP defined proposed cost as the sum of the proposed estimated costs, including proposed fees.

[3]Specifically, the RFP stated that the maximum cost premium the agency would pay for higher technical scores was contained in the slope defined by the movement of one point in technical score equating to the movement of .667 percent in projected cost. Conceptually, this relationship allows up to a maximum of 20 percent premium for a proposal possessing the highest achievable technical score (100) when compared to a proposal having the lowest possible technically acceptable score (70) and the lowest projected cost.

On December 14, four offerors submitted proposals in response to the RFP. After the technical evaluation review panel (TERP) and cost analysis panel (CAP) issued their initial reports in May 1993, the contract award review panel (CARP) recommended holding discussions with offerors.[4] The TERP evaluated responses to written discussion questions in August, and issued additional discussion questions to both RCI and TMS. Based on the responses to these additional questions, the TERP issued a revised technical evaluation report on September 27, and the CARP recommended removing one offeror from the competitive range. Best and final offers (BAFO) were requested and submitted by the remaining offerors on October 8, and the TERP and CARP issued their final reports later that month, with the following final results:

	Technical Evaluation	Proposed Cost	Projected Cost
TMS	91.73	$11,004,817	$10,977,415
RCI	80.44	7,208,683	7,404,249
SAIC	73.74	11,629,368	11,475,390

After reviewing these reports, on October 19, the CARP recommended awarding the contract to RCI. The CARP determined that RCI had the lowest evaluated cost of any offeror, with a technical proposal rated within the "good" range.[5] Although TMS had provided a higher-scored technical proposal than RCI, TMS' projected cost was not within the 20-percent premium amount set forth in the RFP. Using the formula set forth in the solicitation, the government would have been willing to pay up to a 7.53-percent premium for TMS' technically superior proposal; however, TMS' projected cost was 32.5 percent higher than that of RCI. The source selection authority (SSA) concurred in the CARP's recommendation. On October 20, NAVSEA awarded the contract to RCI for the first year of required LCAC support, and this protest followed. Performance of the contract has been suspended pending resolution of this protest; however, since continued performance was considered to be vital to the operation of the LCAC program, the

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[4]In accordance with Federal Acquisition Regulation (FAR) § 52.215-16, Alternate III, the RFP had advised offerors that the government intended to make award on the basis of initial proposals without conducting discussions with offerors, but reserved the right to conduct discussions if determined by the contracting officer to be necessary.

[5]The range of technical proposal scores was as follows: unsatisfactory (0-69 points); satisfactory (70-79 points); good (80-89 points); and outstanding (90-100 points).

contracting officer has extended the existing contract with TMS.

PROTESTER'S ALLEGATIONS

In its initial protest, TMS alleged that Mr. David C. Braa, a former NAVSEA employee now employed by RCI, violated the prohibition against personal conflicts of interest by conducting employment discussions with RCI while he had access to TMS proprietary information. See 18 U.S.C. § 208(a) (Supp. V 1993). TMS also alleged that RCI, through Mr. Braa, improperly solicited and obtained TMS proprietary information, thereby violating various conflict of interest provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423(a), (b), (d) (1988 and Supp. IV 1992).[6] TMS' first supplemental protest alleged that RCI and Mr. Braa also violated various post-employment restrictions of the OFPP Act, 41 U.S.C. § 423(f) (Supp. IV 1992). TMS' second supplemental protest alleged an improper conflict of interest between RCI and a now-retired NAVSEA employee, Mr. Melvyn S. Green.

After the initial protest was filed, the Naval Criminal Investigative Service launched an investigation, still ongoing, into the criminal allegations raised by the protester. A separate investigation was conducted by NAVSEA in response to the protest issues before our Office. We have decided to proceed with the protest concurrent with the ongoing criminal investigation. See Litton Sys., Inc., 68 Comp. Gen. 422 (1989), 89-1 CPD ¶ 450; Aydin Corp., B-232003, Nov. 25, 1988, 88-2 CPD ¶ 517.

In addition to the allegations concerning conflict of interest and procurement integrity, TMS also contends that the Navy failed to conduct adequate discussions with the firm and engaged in technical leveling with RCI; conducted an inadequate cost realism analysis of RCI's cost proposal; violated the regulatory base fee limitation; and improperly determined that the procurement was not subject to the Service Contract Act.

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[6]In that initial protest, TMS also alleged that Mr. Braa violated the Trade Secrets Act, 18 U.S.C. § 1905 (Supp. V 1993), and that the Navy had a pattern of affording RCI preferential treatment. In its report, the agency addressed these allegations in some detail and, in its comments filed on that report, the protester did not rebut the agency's contentions. As a result, we consider the issues to be abandoned and will not consider them. See Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328. The protester's revival of these contentions in subsequent filings does not alter our position.

CONFLICT OF INTEREST--MR. BRAA

Timeliness

As a preliminary matter, both the Navy and RCI argue that TMS' protest regarding Mr. Braa is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1994). According to both the Navy and RCI, although TMS knew--based upon a September 1992 response to a Freedom of Information Act (FOIA) request, a CSS log-in sheet signed by Mr. Braa on October 28, 1992, and comments Mr. Braa asserts that he made to TMS employees in June 1992 and January 1993--that RCI had employed Mr. Braa and that he had contributed to RCI's business development efforts, TMS did not protest until October 26, 1993. TMS states, however, that it did not learn of the basis for its protest concerning Mr. Braa until it received a debriefing after the award to RCI, on October 25, 1993.

While the response to the FOIA request, Mr. Braa's signature on the log-in sheet, and his alleged statements to employees of TMS may have indicated his employment with and involvement in the business development efforts of RCI, we fail to see why TMS should have known from these events that Mr. Braa would later participate actively in the preparation of RCI's proposal in response to this RFP. The response to the FOIA request merely indicated that Mr. Braa was seeking employment with RCI. The log-in sheet only indicated that Mr. Braa was at CSS concerning the reprocurement on a date preceding the submission of initial proposals. As for the statements Mr. Braa attests that he made to TMS employees, neither specifically addresses Mr. Braa's extensive role in the preparation of RCI's proposal.

Since, under this negotiated procurement, the agency had not informed TMS which firms had submitted proposals or which proposals were being considered, TMS had no way of knowing until it received the notice of award on October 20, 1993, that RCI had not been eliminated. TMS filed a timely protest on October 26. See General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379.

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[7]However, in its comments filed in response to the initial agency report, TMS alleged, for the first time, that Mr. Braa's participation in the preparation of RCI's proposal violated 18 U.S.C. § 207 (Supp. V 1993). As TMS was put on notice of this basis of protest in the agency report which it received December 3, 1993, and did not raise (continued...)

Background

Mr. Braa served as the alternate contracting officer's technical representative (COTR) on TMS' LCAC support contract from December 1990 to May 15, 1992, when he left government service to work as the operations manager of RCI's Panama City office. According to Mr. Braa's appointment letter, one of his duties as alternate COTR was to review and, upon concurrence, sign all technical instructions (TIs) to TMS to assure that all tasks were performed within the scope of the contract. The COTR on the contract, Mr. Bruce Nolte, states that Mr. Braa concentrated on the training aspects and other assigned discrete aspects of the contract, such as the closeout of TIs.

TIs were the method by which TMS was directed to perform work on Contract 2111. According to Mr. Nolte, CSS initiated a TI with the preparation of a statement of work (SOW), and the finalized SOW was given to TMS when the COTR or alternate COTR initialed a release line. TMS responded by preparing a contractor proposal, consisting of a contractor-generated SOW and a pricing proposal, and returned the TI to the Navy for review and acceptance. Appropriate Navy personnel reviewed the technical content of the proposal, and the COTR or alternate COTR reviewed the cost details, which were submitted on a separate pricing sheet. The final package, consisting of the TI coversheet and the pricing sheet, remained in the possession of TMS until final COTR or alternate COTR approval.

The Navy concedes that, in the course of his duties as alternate COTR, Mr. Braa had exposure to TMS' proprietary information on "numerous occasions." The only formal TI response the protester has provided for our examination is that concerning TI 828, apparently the last formal TI with which Mr. Braa was associated. That response included the firm's rates for each category of costs. The Navy states that, assuming Mr. Braa received the sheet showing the TMS cost data, which Mr. Braa suggests is the case, he would have received similar information on "numerous previous occasions."[8]

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[7](...continued)
it until December 22, 1993, more than 10 days later, this basis of protest is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

[8]The Navy has also provided us with TMS' response to TI 589, discussed further below, which contains cost information similar to that found in the TMS response to TI 828.

Both the Navy and Mr. Braa also concede that he was involved in the drafting of the SOW for the follow-on procurement during 1991 and the early part of 1992. The Navy reports that Mr. Braa reviewed the training and logistics portions of Contract 2111's SOW, updating and amending it for current requirements, and assessed the number of LCAC crew members estimated to require training under the reprocurement.

According to Mr. Braa, in mid-March 1992, he learned that RCI was looking for a manager for its Panama City office. RCI's general manager for NAVSEA business, Mr. John Scotch, has submitted an affidavit in which he recounts the genesis of the ensuing employment discussions. Mr. Scotch states that during March 1992, he contacted Mr. Green of NAVSEA, the subject of TMS' second supplemental protest, to explore his interest in the position. Mr. Green indicated that he was not interested, but advised that Mr. Braa might be available. Mr. Scotch told Mr. Green to have Mr. Braa contact him if he had sufficient interest in the position. Mr. Braa telephoned Mr. Scotch shortly thereafter, and they arranged to meet at RCI's Virginia offices on April 7. At that time, Mr. Braa was informed that employment discussions could not commence until Mr. Braa executed RCI's procurement integrity form, thereby assuring RCI that he was not a procurement official under the OFPP Act.

Sometime between April 7 and April 10, Mr. Braa attended a meeting at NAVSEA headquarters in Virginia to discuss the follow-on procurement. When the contracting officer announced that the procurement would be conducted on a full and open competition basis, Mr. Braa recused himself. He states that this announcement surprised him, because he had always understood that the new procurement would be a limited competition between TMS and AGM.[9] Prior to leaving the meeting, Mr. Braa states that he explained to those in attendance that he was investigating possible employment with a company that might be a competitor in a full and open competition.

By memorandum to CSS' ethics counselor dated April 10, Mr. Braa requested an ethics opinion concerning post-civil service employment restrictions. Contrary to Mr. Scotch's account, Mr. Braa stated that he had answered a blind

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[9]Mr. Braa's supervisor, Mr. Nolte, attests that on April 8, 1992, he attended a meeting at NAVSEA headquarters in Virginia to discuss completion tasking strategy for Contract 2111. This meeting, he states, represents the earliest date that he recalls it was confirmed that the follow-on procurement would be via full and open competition (it is not clear from the record whether this is the same meeting attended by Mr. Braa).

advertisement and received an inquiry from RCI, with whom he now wished to be employed. He asserted that he spent approximately 15 percent of his time as alternate COTR on the TMS LCAC support contract.[10] He also referenced the agency's decision to conduct the procurement on a full and open basis, and stated that he had announced at the meeting described above that he felt he should not participate as a member of the technical panel developing the SOW because he intended to seek employment outside the government and, since this would be a full and open competition, there might be a conflict of interest.

By memorandum to NAVSEA counsel dated April 16, Mr. Braa clarified his earlier memorandum in light of a set of guidelines given him by the ethics office at CSS. Despite his involvement in the preparation of a draft SOW for the follow-on procurement, he stated that his involvement during the conduct of a procurement was "nil." He also stated that he had disqualified himself as a prospective member of the technical panel developing the requirements for the follow-on procurement to ensure that there was no conflict if he were to be employed with a firm that might propose on that procurement.

On April 21, Mr. Braa formally disqualified himself from further official actions in matters concerning RCI. Even though he was aware that RCI might be a competitor with TMS for the follow-on procurement for LCAC support, Mr. Braa remained the alternate COTR on TMS' LCAC support contract. On April 21, apparently under the erroneous impression that the Navy had determined he was not a procurement official,[11] Mr. Braa signed RCI's procurement integrity form and commenced employment discussions with the firm. On April 29, Mr. Braa signed off on TMS' TI 828 response, which contained cost data proprietary to TMS. The next day, he signed RCI's offer of employment, and left the Navy for RCI on May 15, 3 days after the solicitation of interest for the follow-on procurement was published in the CBD.

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[10]In addition to his duties as alternate COTR on TMS' LCAC support contract, Mr. Braa had duties associated with RCI's contract to provide technical support to his functional area at CSS.

[11]The Navy evidently did not make this determination until December 22, 1993, after TMS' first supplemental protest concerning this procurement was filed. There is also no evidence that the Navy ever issued a written ethics opinion in response to Mr. Braa's request.

Mr. Braa began working for RCI on May 18, and, according to Mr. Scotch, identified the follow-on procurement as a potential business opportunity for the firm 2 days later. During the month of July, prior to the issuance of the solicitation, Mr. Braa wrote three memoranda for the firm concerning the LCAC support contract. The first is a draft analysis of TMS' Contract 2111, containing background information on that contract's requirements and what Mr. Braa expected to be in the follow-on solicitation; a description of TMS' organizational structure and a detailed analysis and critique of each department; and strategies for "beating" TMS based, in part, on perceived weaknesses of the firm. The second memorandum is a brief narrative relative to the TMS LCAC support organization with areas identified where RCI "might do it better." The third memorandum is a final assessment report on the business development effort, containing information such as expected RFP requirements and RCI's understandings and capabilities for each area of the reprocurement, as well as additional information concerning TMS' operations.

After the solicitation was issued, Mr. Braa requested and received permission from RCI to submit a proposal on its behalf. Mr. Braa was designated as proposal manager for the LCAC procurement, and participated as a team member in the preparation of RCI's technical proposal.[12] The record shows that Mr. Braa played an active role in preparing RCI's technical proposal. The list of preliminary assignments found in Mr. Braa's July 29, 1992 memorandum assigns to him the overall responsibility for the management and technical sections of the proposal; the request to submit a proposal lists Mr. Braa as the comanager of the proposal's training section; and the request to submit a BAFO makes Mr. Braa responsible for answering the discussion questions for every section of RCI's technical proposal. RCI's proposal also named Mr. Braa as the firm's project manager for the LCAC support contract.

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[12]A former RCI employee attests, on information and belief, that Mr. Braa assisted in the preparation of RCI's cost proposal. However, Mr. Braa's assertion that he did not participate in the preparation of RCI's cost proposal is supported by Mr. Scotch, who attests that RCI's cost proposal was prepared by RCI's Corporate Director of Contracts, with input from him, at the firm's offices in Virginia. Further, RCI's bid and proposal request form for the initial proposal indicates that the cost section would be managed in Virginia, and does not mention Mr. Braa's involvement with that proposal. Under the circumstances, we find no persuasive evidence that Mr. Braa actually assisted in the preparation of RCI's cost proposal.

TMS maintains that: (1) Mr. Braa, as alternate COTR, had access to TMS proprietary information and "inside" information concerning TMS' performance of its LCAC support contract, at least some of which he disclosed to RCI; (2) Mr. Braa's participation in the preparation of the RFP for the follow-on procurement made him a procurement official and provided him with access to inside information concerning that procurement, at least some of which he disclosed to RCI; and (3) Mr. Braa's access to and disclosure of such information, combined with his active role in the preparation of RCI's proposal, conveyed to RCI an unfair competitive advantage which requires the termination of RCI's contract and the exclusion of RCI from a reprocurement for these services.

The Navy counters that: (1) while Mr. Braa, as alternate COTR, was exposed to TMS' proprietary information, the information that he disclosed was not proprietary because it could have been obtained or derived by RCI from other sources, and the information concerning TMS' performance of its LCAC support contract was not "inside" information, but merely Mr. Braa's opinion; (2) Mr. Braa's participation in the preparation of the RFP for the follow-on procurement was so peripheral that he was not a procurement official, and any information to which he might have been privy as a result of that participation was not inside information, as it was disclosed in the solicitation or otherwise available to all offerors; and (3) the information to which Mr. Braa had access and which he disclosed did not convey to RCI an unfair competitive advantage because it was not competitively useful, considering that TMS' technical proposal received a much higher score than did RCI's technical proposal, and that RCI's cost proposal does not evidence a reconstruction of TMS' pricing structure.

Analysis

Contracting agencies are to avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. FAR § 3.101-1. A contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; Holmes & Narver Servs., Inc./Morrison-Knudsen Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra; Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267.

In making such judgments, contracting officers are granted "wide latitude to exercise business judgment." FAR § 1.602-2; Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992). Accordingly, the responsibility for determining to what extent a firm should be excluded from the competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629; RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213.

In reviewing the reasonableness of the contracting officer's determination in cases such as this one--where the issue is whether the awardee derived an unfair competitive advantage as a result of a disclosure of information--we begin by examining the nature of the information to which the awardee had access, for example, whether the information involved is cost-related, General Elec. Gov't Servs., Inc., supra; whether the information is proprietary[13]; whether the information is source selection sensitive, Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra; or whether the information was obtained through improper business conduct. Compliance Corp., supra. Based on the record here, we conclude that while RCI did gain an advantage by virtue of its employment of Mr. Braa, the information shared by Mr. Braa is not so clearly the type of information usually considered to afford an unfair competitive advantage that the agency must exclude the contractor.

Information Concerning TMS

TMS asserts that Mr. Braa had access to proprietary information contained in its TI responses, and contends that Mr. Braa's memoranda to RCI evidence actual disclosure of such information, as well as Navy assessments of the firm's performance of that contract, for the express purpose of "beating" TMS in the follow-on procurement.[14] While the

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[13]Proprietary information is defined in the OFPP Act, for example, as cost or pricing data, information contained in bids or proposals, and information submitted to the government by a contractor and designated as proprietary. 41 U.S.C. § 423(p)(6) (Supp. IV 1992).

[14]TMS argues that Mr. Braa's participation in employment discussions with RCI while he was the alternate COTR under TMS's LCAC support contract violated the

(continued...)

Navy concedes that Mr. Braa had access to information concerning TMS, both the Navy and RCI argue that there is no evidence that the proprietary cost information contained in TMS' response to TI 828 or other TIs was provided to RCI.[15] The Navy and RCI also contend that the non-cost information contained in TMS' response to TI 828, and the information contained in Mr. Braa's memoranda, should not be viewed as proprietary to TMS so as to render improper the award to RCI.

As discussed above, it is undisputed that Mr. Braa was exposed to TMS' TI responses, including that to TI 828. That response, authorized by Mr. Braa on April 29, 1992, stated that TMS would provide, as requested, a preliminary listing of a data inventory for the COTR's review, and listed TMS' estimated costs for fulfilling the TI. A separate sheet contained the labor hours and categories necessary to complete the TI, and yet another sheet listed the rates for those labor hours. This last sheet included TMS' average rate base for such categories as manufacturing overhead; engineering/logistics overhead; labor overhead at various facilities; and general and administrative, as well as some average rates for specific departments. The response contained a legend stating that the pricing data furnished in connection with the response was restricted.

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[14](...continued)
prohibition against government employees participating personally and substantially in any matter that would "affect the financial interests of any person with whom the employee is negotiating for employment." 18 U.S.C. § 208; FAR § 3.104(b)(2). However, this contention is not within the purview of our bid protest regulations, because 18 U.S.C. § 208 is a criminal statute, and its interpretation and enforcement is a matter for the procuring agency and the Department of Justice. Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132; Central Texas College, 71 Comp. Gen. 164 (1992), 92-1 CPD ¶ 121. Our review, within the confines of a bid protest, is limited to whether the applicable procurement regulations prohibit RCI from receiving a contract because of Mr. Braa's employment by the firm.

[15]While TMS asserts generally that its TI responses included data concerning its staffing strategies, organizational make-up, training procedures, and detailed cost information, the only formal TI response it has chosen to submit for our examination is that for TI 828. It has also submitted an informal TI request, which we will not discuss separately because it requests the same information as TI 828 does.

After examining this TI response and the remainder of the record, we have no basis to conclude that Mr. Braa's access to the pricing information[16] it contains would have provided an unfair competitive advantage to RCI in the preparation of its proposal. We think that without referencing the actual documents TMS submitted to the Navy in connection with its support contract, including this response to TI 828 or similar documents, it would be virtually impossible for Mr. Braa to accurately reproduce the cost data at issue here.

It is true that, despite the Navy's procedures to prevent the exposure of TMS' proprietary information,[17] a copy of the portion of TMS' 1991 response to TI 589 containing the firm's pricing data was found by the Navy among documents it asserts belonged to Mr. Braa. Since it appears that Mr. Braa did, after all, have physical possession of at least this piece of TMS' pricing data (which TMS chose to send to CSS by facsimile in 1991, contrary to the usual handling procedures described in footnote 17), the issue arises whether he conveyed any such information to RCI when he left the Navy. However, Mr. Braa has attested that he did not take any of TMS' proprietary data with him when he left government service, and his statement that he seldom paid attention to the breakdowns of TMS' pricing data, and made no effort to note or recall TMS' pricing data, is supported by the absence of such detailed pricing information from his memoranda. Finally, as discussed

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[16]The preliminary data inventory list submitted to the Navy is dated May 13, 1992, and addressed to Mr. Nolte. The list, marked proprietary, consists of the name, quantity, and location of a number of data items, as well as the contract with which it was associated; these items include such things as software packages, log books, manuals, and reports. Mr. Braa and Mr. Nolte attest to their belief that Mr. Braa never saw this list, delivered no earlier than May 13, 2 days before he left government service. Even if he did have access to this list, the protester has not explained, and we cannot discern, anything in this list that could have provided RCI with an unfair competitive advantage.

[17]The agency reports that, due to TMS concerns about the exposure of its proprietary information, a procedure was instituted whereby the cost information submitted by TMS in response to technical TIs was never copied and never reviewed except in the presence of TMS personnel, and never out of the possession of TMS employees. Upon COTR authorization, TMS retained the original and only copy of the pricing sheet for the associated TI.

above, there is no persuasive evidence that Mr. Braa had any role in the preparation of RCI's cost proposal. See id.

Turning to the memoranda, it is evident that Mr. Braa had access to information concerning the organizational structure of TMS' Panama City office and its performance of the LCAC support contract, and that he disclosed such information to RCI. The question, then, is whether RCI must be disqualified from receiving an award because it used, in the competition, information about TMS' contract performance provided by a former government employee who became familiar with TMS' performance while he was employed by the government. As discussed below, our review of the record leads us to conclude that the information in the memoranda did not afford RCI an unfair competitive advantage in this procurement that would require the agency to disqualify the firm.

Mr. Braa's memoranda describe the organizational structure of TMS and its Panama City office, department by department, and identify, by name, most TMS senior employees responsible for the LCAC support contract. In some instances, Mr. Braa also discloses how many "bodies" perform certain contract functions, and estimates the total number of TMS employees working on the contract.

The Navy asserts that any current or on-base support contractor with any connection to the LCAC program could have reconstructed the TMS Panama City organization, along with the names of key personnel, since the TMS organization has remained basically unchanged for many years. The Navy specifically identifies several current RCI employees, former employees of either CSS or TMS, who would have been privy to this information. We agree that the information regarding TMS' organizational structure and staffing cannot reasonably be considered proprietary, given that it could be discerned by regular observation, for example, by other contractors as a result of their own authorized access to the CSS facility. Further, an intercom listing of TMS' Panama City office, provided by TMS to CSS, contains the names of its staff and some of its facilities. We do not think it reasonable for TMS to consider that such a listing would be proprietary.[18] Accordingly, we have no basis to

[18]The Navy also asserts that copies of TMS organizational charts and trailer plot plans, documents from which the Navy asserts TMS's organizational structure could be derived, are in circulation at CSS and thus easily obtainable by other contractors. Our review of these documents leads us to conclude that they contain confidential information that should not be readily available to other CSS contractors.

(continued...)

conclude that RCI received an unfair competitive advantage in this regard.

Mr. Braa's memoranda also contain evaluations of the experience of TMS instructors, its heads of engineering and quality, and its operations employees. Mr. Braa also asserts that TMS lacks direct fleet feedback, that fewer craftsmen could be used to maintain the training craft than TMS used, and that the system used by TMS to track delivery orders is hard to understand. While TMS urges us to consider these to be disclosures of confidential information about its performance of the contract, the Navy contends that they are mere statements of Mr. Braa's opinion, and TMS has provided us no basis upon which to disagree with the Navy.

Likewise, TMS urges us to consider several other passages in the memoranda to be disclosures of Navy "inside" information about TMS' performance of the contract. A careful examination of these passages, along with the submissions of the parties, leads us to conclude that they are also either statements of Mr. Braa's opinion or information available to all offerors. For example, Mr. Braa asserts that the Navy finds TMS' management structure to be cumbersome and not in the best interest of the interim support contract. The Navy's denial of this statement is supported by the excellent and outstanding award fee grades given to TMS during its performance of Contract 2111, as well as the high technical evaluation scores it received in the area of management under the instant procurement. Further, the Navy asserts, and TMS does not dispute, that Mr. Braa's assertions that the "maintenance philosophy" was to send major components out for rework, and his disclosures of the amount of inventory under Contract 2111, consist of information available to all offerors in the reading room.

Mr. Braa also describes TMS' practice of using interim support material to fill production part needs, and states that this practice is a concern to the Navy. While the Navy argues that this information was known and discussed widely both at CSS, at fleet organizations, and at NAVSEA headquarters, it is unclear to us why the Navy's knowledge of this information should be imputed to RCI or any other offeror, aside from TMS. However, we cannot discern how this information could have provided RCI an unfair

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[18](...continued)
As a result, these documents are covered by the protective order issued in this protest and are subject to the restrictions imposed by the applicable regulations. 4 C.F.R. § 21.3(d), (g).

competitive advantage, as this particular practice is related to TMS' role as a manufacturer of the LCAC.

In conclusion, the information contained in Mr. Braa's memoranda is not proprietary, cost-related, or source selection information. Rather, it is principally Mr. Braa's opinion based on his observation of how TMS performed the contract. Since we see no basis to regard it as information that would confer an unfair competitive advantage on RCI, we conclude that the record supports the agency's decision not to exclude RCI from the competition.

Information Concerning the Procurement

It is undisputed that Mr. Braa contributed to the drafting of the SOW for the follow-on procurement. However, the parties disagree as to whether that participation was personal and substantial, thus rendering Mr. Braa a procurement official for purposes of the OFPP Act.[19]

Based on our review of the record, we agree with the agency's conclusion that Mr. Braa was not a procurement official under the terms of the OFPP Act because his participation in the drafting of the SOW, while personal, was not substantial.

According to the Navy, Mr. Braa reviewed the training and logistics portions of Contract 2111's SOW, updated and amended it for current requirements, and assessed the number of LCAC crew-based courses required.[20] The Navy argues that the near-identity of the SOW for Contract 2111 and the SOW for the follow-on procurement, and the fact that the SOW for the follow-on procurement was substantially revised by amendment long after Mr. Braa's departure from the Navy, necessarily limited the inside information to which Mr. Braa would have been privy as a result of his participation in its preparation.

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[19]Under the Act, a procurement official is, with respect to any procurement, any civilian or military official or employee of an agency who has participated personally and substantially in, for example, the drafting of a specification for that procurement. 41 U.S.C. § 423(p)(3)(A).

[20]While TMS argues that Mr. Braa's participation in the preparation of the SOW was more far-reaching than this, the Navy strenuously disagrees, and there is no evidence to support the protester's position.

The record shows that in July of 1991, in preparation for the instant RFP, Mr. Braa was asked to "review and mark-up" the SOW from Contract 2111, as well as the CLIN structure developed for the follow-on solicitation. In November of 1991, he was sent a "very rough" draft SOW for the follow-on solicitation, and asked to "review, edit, comment, enhance, and generally provide verbiage to help fill in all the holes."

In response, Mr. Braa suggested expanding the CLIN structure to include the option years; added a requirement to store spare material in warehouses; recommended subdividing a line item into subline items and provided the wording for those subline items; and refined the list and reworded the description of courses to be taught. The record shows that none of these suggestions substantially changed the SOW from which he was working (from Contract 2111), a public document available to all offerors. Further, the final SOW was not one to which Mr. Braa contributed, as it was substantially revised over the course of the procurement by various amendments--in fact, a majority of Mr. Braa's suggestions were not incorporated in the final solicitation.

While Mr. Braa also contributed the number of crew-based courses and weeks of training required, the Navy contends that the former was contained in the RFP, and the latter could have been inferred from Contract 2111 and the LCAC course curriculum, both of which were made available in a reading room for potential offerors. The information that was disclosed in the RFP or readily accessible in the reading room, was not inside information, as it was disclosed to all offerors, see General Elec. Gov't Servs., Inc., supra, and our review of the Contract 2111 SOW confirms that most of the training information to which Mr. Braa had access, and which he disclosed in his memoranda, could have been gleaned from that document. As for the remaining information, since the Navy has not provided our Office with the LCAC course curriculum, we cannot determine whether it could have been used to infer the weeks of training required under the support contract. However, TMS has not explained, and we do not discern, how any access to this information could have provided RCI with an unfair competitive advantage.

We also disagree with TMS' assertion that various information contained in the memoranda is indicia of Mr. Braa's substantial participation in the reprocurement. For each of the instances wherein Mr. Braa states he "expects" the RFP to contain a particular requirement, a review of the RFP indicates that he is incorrect, evidencing his limited knowledge of the RFP's requirements.

Mr. Braa was also asked to "provide dollar estimates" for all CLINs "under [his] [cognizance]" for fiscal years 1992-1997. In his responsive memorandum, he stated that the training estimate could be found in the operations support cost accounting report, and that the funding estimates for LCAC operation and maintenance were possessed by the LCAC acquisition division. TMS asserts that this response indicates Mr. Braa had access to the government estimate or at least could "get it if he wanted to do so." In addition, the Navy provided to our Office an unexplained sheet of handwritten calculations which it stated were among the documents found in Mr. Braa's belongings, and which it thought might be relevant to this protest. This sheet contains the number of man-hours for such categories as instruction, maintenance, transition, and material, as well as the estimated costs to perform each category, and totals for several years. TMS argues that these figures represent a calculation of the costs for the training line items in the follow-on solicitation, using TMS' actual costs.

The Navy conducted a further review of the sheet of handwritten calculations and concluded that it is completely unrelated to this procurement and should not have been provided to our Office. The Navy reports that it represents Mr. Braa's personal estimate of LCAC training costs for a proposed omnibus training support contract for various naval vessels--a contract that was never implemented--and states its belief that the numbers represent Mr. Braa's estimate in round figures of the amount of man-hours for these categories of work, and the corresponding estimated loaded labor costs to perform them. We have no basis to disagree with the agency's conclusion that the sheet concerns a separate procurement from this one, and therefore has no bearing on Mr. Braa's participation in this procurement.

CONFLICT OF INTEREST--MR. GREEN

TMS' second supplemental protest asserts that award of the contract to RCI was improper because, during the conduct of the procurement, RCI employed the daughter of a NAVSEA official, Mr. Melvyn S. Green. TMS asserts that Mr. Green and/or his subordinates were involved in the follow-on procurement and other matters concerning RCI. We dismiss this ground of protest as untimely.

Before his retirement from government service in August 1993, Mr. Green was Director for Systems Acquisition in NAVSEA's then-designated Amphibious Warfare and Strategic Sealift Office, and had been responsible for, among other things, several contracts for the construction of LCACs. The Navy asserts that Mr. Green's sole connection to this support contract procurement was to have his name listed in an August 17, 1992, memorandum appointing him to the CARP--a

document contained in the agency's December 22, 1993, report filed in response to the original protest. Mr. Green attests that when he learned of his appointment to the CARP, he immediately informed the program manager of his daughter's employment with RCI and requested that he be removed from the CARP. The program manager complied with Mr. Green's request. Accordingly, none of the CARP reports, all of which were submitted as attachments to the agency's December 22 report, contained Mr. Green's name or evidenced his participation.

Counsel for TMS attests that "sometime in February" 1994, one of its witnesses, former RCI employee Mr. Clarence Wages, informed her that he had been interviewed by an agent with the NCIS. He informed her that, during the course of that interview, he told the agent that when he worked for RCI he was asked to find a job in RCI's Panama City office for Mr. Green's daughter; he states that he had no open positions at that time. Counsel for TMS attests that Mr. Wages told her that he never learned if RCI had hired Mr. Green's daughter.

Counsel for TMS further states that on March 10, after receiving the agency's March 9 submission referencing Mr. Green's recusal, she telephoned Mr. Wages and asked if he had learned anything more about Mr. Green's daughter having worked for RCI. Mr. Wages telephoned her that evening and informed her that Mr. Green's daughter had worked for RCI. On March 17, TMS asked the agency to provide it with additional information about Mr. Green's recusal and to confirm RCI's employment of his daughter. After the agency's March 22 response, TMS filed this protest on March 24.

Bid protests are serious matters which require effective and equitable procedural standards to ensure that protests can be resolved without unduly disrupting the procurement process. Amerind Constr. Inc.--Recon., B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. In this regard, our Bid Protest Regulations require that a protest based on other than apparent solicitation improprieties must be filed within 10 days after the protester knew or should have known the protest basis. 4 C.F.R. § 21.2(a)(2); Technical Co. Inc., B-233213.2, Feb. 26, 1990, 90-1 CPD ¶ 222. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. To ensure that long-standing timeliness requirements such as this one are met, a protester has the affirmative obligation to diligently

pursue the information that forms the basis for its protest. East Carolina Builders, B-243926, June 10, 1991, 91-1 CPD ¶ 559; Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231117.2, July 26, 1988, 88-2 CPD ¶ 86.

TMS' protest does not indicate that the firm took any steps after learning that Mr. Green's daughter might have been employed by RCI to confirm such information between the time Mr. Wages raised the issue, "sometime in February," and March 10. This failure to pursue further information came in spite of TMS' long-held knowledge that Mr. Green had been listed as a member of the CARP for the follow-on procurement but had not participated in its proceedings, as well as its knowledge, discussed above, of Mr. Green's role in RCI's eventual employment of Mr. Braa. TMS has not persuaded us that it should be entitled to merely wait for an unspecified period of time--between "sometime in February" and March 10--to pursue this basis of protest. A protester who is challenging an award on one ground should diligently pursue information which may reveal additional grounds of protest. J&J Maintenance, Inc.--Recon., B-240799.4; B-240802.4, Apr. 10, 1991, 91-1 CPD ¶ 364; S.A.F.E. Export Corp., B-213026, Feb. 10, 1984, 84-1 CPD ¶ 165. Moreover, the diligent pursuit of additional grounds of protest is a continuing obligation of the protester while its initial protest is pending. Id. TMS did not fulfill this obligation.

DISCUSSIONS

TMS argues that the Navy improperly failed to conduct adequate discussions with it by not informing the firm that its costs were excessive considering its technical approach.

In negotiated procurements, agencies are required to conduct meaningful discussions with competitive range offerors, Arthur Anderson & Co., 71 Comp. Gen. 233 (1992), 92-1 CPD ¶ 168, and an agency is permitted to inform an offeror during discussions that its cost or price is considered to be too high or unrealistic. FAR § 15.610(d)(3)(ii). However, if an offeror's higher cost is not considered excessive for its technical approach, the higher cost is not a deficiency required to be pointed out. E. J. Richardson Assocs., Inc., B-250951, Mar. 1, 1993, 93-1 CPD ¶ 185. The government has no responsibility to inform an offeror that its price is too high unless the government has reason to think that the price is unreasonable. Applied Remote Technology, Inc., B-250475, Jan. 22, 1993, 93-1 CPD ¶ 58; Inside Outside, Inc., B-250162, Jan. 5, 1993, 93-1 CPD ¶ 7; Warren Elec. Constr. Corp., B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. Moreover, an agency has no duty to enter into price discussions with an offeror solely because its price

is significantly higher than another offeror's. Applied Remote Technology, Inc., supra.

The Navy contends that it did not consider the costs proposed by TMS in its initial proposal to be high, given the technical approach TMS proposed. The Navy points to a pre-discussions CAP report, which analyzes each area within TMS' cost proposal as part of its cost realism analysis.[21] The report contains no indication that TMS' costs were excessive in relation to its technical approach. On the contrary, the various components of TMS' cost proposal were found to be unobjectionable. For example, the report states that TMS' proposed labor mix for each CLIN was reviewed to determine the reasonableness of the proposed labor mix, and that, based on discussions with the program office technical personnel, it was determined that it was representative of the effort required and, therefore, considered reasonable.[22] The CAP found that TMS' proposed direct labor hours were consistent with the RFP's requirements. In addition, TMS' labor rates and indirect rates were found unobjectionable by the Defense Contract Audit Agency and the Navy, as they were consistent with recent TMS wage bulletins.

TMS' argument is based largely upon a statement in the CAP chairman's report to the SSA dated June 23, 1993, that, "[a]lthough TMS is clearly technically superior to all offerors, their cost proposal currently appears excessive." However, when read in context, this statement does not mean that TMS' cost proposal is excessive for the technical approach used, but that TMS' cost proposal is excessive when compared to the projected costs of two other offerors. Further, TMS' assertion that, given the disparate cost of the TMS and RCI proposals, it is unreasonable to believe that both cost proposals were reasonable for the approach employed, overlooks the technical differences between the proposals as reflected in the technical evaluation scores.

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[21]The purpose of a cost realism analysis is to determine what, in the government's view, it would realistically cost the offeror to perform, given the offeror's own technical approach. Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 CPD ¶ 106.

[22]Thus, TMS' argument that it should have been asked to provide the rationale for its proposed labor mix and demonstrate that it satisfied the requirements of the RFP because the third offeror was asked to do so, and because both of these offerors proposed direct labor rates 20-30 percent higher than the other two offerors, is without basis, as the agency did not find its proposed labor mix to be objectionable.

TMS also argues that the Navy conducted unequal discussions between it and RCI because it asked RCI five discussion questions on its cost proposal that would have had a bearing on its ability to receive the award, and did not ask TMS any such questions.

Contracting agencies have wide discretion in determining the nature and scope of negotiations, and their discretion should not be questioned unless it is clearly shown to be without rational basis. There is no requirement that all offerors receive the same number or type of questions. Rather, the content and extent of discussions are within the discretion of the contracting officer, since the number and type of deficiencies, if any, will vary among proposals. Consequently, the agency should individualize the evaluated deficiencies of each offeror in its conduct of discussions. Pan Am World Servs., Inc.; et al., B-231840, et al., Nov. 7, 1988, 88-2 CPD ¶ 446; Indian Community Health Servs., Inc., B-217481, May 15, 1985, 85-1 CPD ¶ 547. Because the degree of deficiencies in proposals will vary, the amount of specificity or detail of the discussions will also vary among the offerors. Pope Maintenance Corp., B-206143.3, Sept. 9, 1982, 82-2 CPD ¶ 218.

The Navy asserts, and the record clearly shows, that each offeror was presented with questions tailored to the differences identified in their cost proposals during the proposal evaluation by the CAP. For each deficiency recognized in RCI's cost proposal, a discussion question was asked. The only deficiency noted in the CAP report for TMS' cost proposal concerned its labor categories: this was the only discussion question asked TMS concerning its cost proposal.[23] As the record shows that the discussion questions were consistent with the deficiencies evident in both offerors' cost proposals, that TMS was presented with a different number of questions than was RCI is a reflection of the results of the cost evaluations, rather than any inequality in the treatment of offerors.

TECHNICAL LEVELING

TMS alleges that the Navy engaged in improper "technical leveling" by helping or coaching RCI through discussions to bring its proposed man-hours into conformance with the agency's manhour estimate, and to comply with the requirement to submit valid letters of intent for contingent hires. TMS asserts that the Navy improperly "led RCI by the hand" to correct its failures to comply with the RFP's requirements, even though there was no obligation to do so.

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[23]This question asked the firm to provide a matrix matching specific individuals with a cost center or labor category.

Where the government enters into discussions, it has an obligation to lead all offerors into the areas of their proposals that are weak or deficient or in need of amplification. InterAmerica Research Assoc., Inc., B-237306.2, Feb. 20, 1990, 90-1 CPD ¶ 293. However, during discussions, the government must be careful not to cross the line into technical leveling, which FAR § 15.610(d) defines as helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out inherent weaknesses that remain in the proposal because of the offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them. CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308; Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. Striking the appropriate balance between meaningful discussions and technical leveling is an area where contracting officers necessarily must have considerable discretion, since the number and type of proposal deficiencies will vary among proposals. CBIS Federal Inc., supra.

RCI's initial proposal included manhour estimates for several training subline items which the CAP found to be significantly underestimated. In accordance with the RFP's instruction that offerors' projected costs would be determined based on the realism of their proposed costs, the CAP used what it considered to be the more realistic government estimate of man-hours for these line items in its determination of RCI's projected cost, noting that the issue would be clarified during discussions. Indeed, during the initial round of discussions, RCI was asked to demonstrate its understanding of these subline items and its ability to perform the required effort, given that the number of man-hours it proposed appeared to be underestimated. In response to the discussion question, RCI increased the estimated number of man-hours for the relevant subline items.

While NAVSEA asked no additional questions concerning these subline items prior to the receipt of BAFOs, RCI's BAFO reduced its proposed manhour amount for two of the subline items, stating that the firm had undertaken additional analysis of these man-hours to reconfirm initial staffing requirements and to obtain additional cost reductions. The CAP calculated RCI's BAFO projected cost based on what the technical personnel believed to be the more realistic estimated level of man-hours for these subline items.[24]

[24]While the TERP, not completely convinced by RCI's rationale for this reduction, removed a minor strength from (continued...)

Since the concept of technical leveling requires successive or repeated rounds of questioning, we think that NAVSEA's one round of discussions with RCI concerning this issue was not technical leveling. See CBIS Federal Inc., supra.[25]

RCI's initial proposal also failed to include letters of intent for all proposed contingent hires, even though such letters of intent were specifically required by the RFP. Since roughly 6 months had passed between the receipt of initial proposals and the issuance of discussion questions, NAVSEA asked all competitive range offerors to identify any changes to the proposed key personnel, providing the information required by section L-40(c) of the RFP, the section of the solicitation requiring letters of intent.

In its response, RCI indicated changes in its key personnel and staffing, and provided various letters of acceptance from contingent hires. NAVSEA noticed that these letters of acceptance had expired, and reopened discussions to so notify RCI. RCI responded by providing contingent hire letters of intent with extended expiration dates; however, some of these letters had been extended through oral confirmation. In the letter requesting BAFOs from RCI, NAVSEA stated that verbal confirmation of acceptance of a key personnel contingent hire letter of intent would not be acceptable. RCI provided the required current signed letters of intent with its BAFO.

TMS argues that since the first question made specific reference to the section of the RFP mandating the letters of intent, RCI was put on notice of the need to provide letters of intent for all contingent hires. TMS points out that since RCI was subsequently notified that its letters of intent had expired, and further notified that oral extensions to such letters were impermissible, technical leveling occurred.

Even if we consider that that first question constituted discussions, in our view, the Navy's efforts in this regard were intended to discern whether or not RCI was proposing

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[24](...continued)
RCI's technical score, the overall consensus score did not change.

[25]Similarly, NAVSEA's initial round discussion question asking RCI to correct the discrepancy between the manhours it proposed for engineering and technical support line items and the RFP's required manhours for those line items does not constitute technical leveling. RCI responded to that single question by proposing the required number of manhours for these line items in its BAFO.

contingent hires who intended to work for RCI if RCI were awarded the contract. Where the primary purpose of discussions is to ascertain what the offeror is proposing to furnish rather than to raise the offeror's technical proposal to the level of the protester's proposal, technical leveling has not occurred. CBIS Federal Inc., supra; Ultrasystems Defense, Inc., B-235351, Aug. 31, 1989, 89-2 CPD ¶ 198. In determining whether there was technical leveling, emphasis should properly be placed not on the number of times discussions were held, but on whether the communication amounted to coaching. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430. Here, RCI's submission of expired letters of intent, and later submission of orally-extended letters of intent, did not make it clear that the individuals proposed by RCI remained interested in working for RCI under this contract. We also note that RCI's technical proposal score improved only slightly after discussions, an indication that no technical leveling occurred. See Matrix Int'l Logistics, Inc., B-249285.2, Dec. 30, 1992, 92-2 CPD ¶ 452.

Finally, while TMS correctly argues that an offeror's failure to comply with a specific RFP requirement need not be pointed out, see, e.g., Dynamic Sys. Technologies, Inc., B-253957, Sept. 13, 1993, 93-2 CPD ¶ 158, the agency is not prohibited from pointing out such a failure.

COST REALISM

TMS argues that the Navy's cost realism analysis of RCI's cost proposal was defective because it failed to consider the "reasonable prospect" that RCI's work force under the contract would organize and obtain a collective bargaining agreement (CBA) which would force RCI to pay substantially higher wages.[26] The protester asserts that RCI's proposal was "premised on the assumption" that most of its work force under the contract would come from TMS employees under the current support contract, many of whom work under a CBA. TMS argues that it is unrealistic to assume that a union would not organize at RCI if a substantial number of TMS

[26]In its initial protest, TMS argued that the Navy's cost realism analysis was flawed because, TMS asserted, there was an inconsistency between RCI's proposed composite burdened labor rate for the subject contract and RCI's burdened labor rate under another Navy contract for what TMS asserted to be work similar to that involved here. In its report, the agency addressed this allegation in detail and, in its comments submitted in response to that report, TMS did not rebut the agency's contentions. As a result, we consider the issue to be abandoned. See Datum Timing, Div. of Datum Inc., supra.

workers move to RCI, and more unrealistic to assume that RCI would not have to make wage concessions that would increase its costs. As a result, argues TMS, in analyzing the realism of RCI's cost proposal the Navy should have considered RCI's potential conformance to a CBA.

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive, because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183, aff'd, American Management Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510 (1991), 91-1 CPD ¶ 492; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

Here, we do not believe that the Navy was required to consider the possibility that RCI might eventually conform to a CBA. While TMS asserts that "information coming to its attention" indicates that its employees are being offered jobs by RCI, it has not produced such information. RCI denies that it intends to hire TMS personnel,[27] and TMS has not shown that RCI does not intend to utilize the employees it has proposed at the proposed rates. Since, as discussed below, the Navy viewed this contract as one principally for the procurement of supplies, under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), and not principally for services, under the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988), the Navy was not otherwise required to review whether RCI had conformed to TMS' CBA. FAR § 22.1002-3. Under the circumstances, there is no basis to require the Navy to speculate not only that RCI would hire a substantial number of TMS employees, but also that those employees would unionize and obtain wage concessions from RCI that would increase the firm's costs. See RCA Serv. Co., B-219636, Nov. 4, 1985, 85-2 CPD ¶ 518.

[27]RCI's proposal shows that it has offered only one TMS employee a job under the contract.

VIOLATION OF BASE FEE LIMITATION

TMS argues that the Navy's award of the contract to RCI violates the mandatory base fee limitation applicable to this contract under Defense Federal Acquisition Regulation Supplement (DFARS) § 216.404-2, which provides that the base fee shall not exceed 3 percent of the estimated cost of the contract, exclusive of fee. Here, RCI proposed, and contract award was based upon, a base fee of 4 percent of its estimated costs, exclusive of award fee.

The Navy asserts that this discrepancy, resulting from administrative oversight, can be corrected either by obtaining a deviation to the requirement under Naval Acquisition Procedures Supplement § 5201.4(2)(i), or by issuing a modification to the contract lowering the base fee to no greater than 3 percent; NAVSEA indicates its intention to pursue the latter course.

If a solicitation, proposed award, or award does not comply with statute or regulation (that is, where there is a violation of applicable regulations by the agency), we will sustain the protest unless we conclude, based on the record, that the protester would not have been the successful offeror absent the violation. Paramax Sys. Corp.; CAE-Link Corp., B-253098.4; B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282. Here, TMS does not argue that it was prejudiced by the agency's violation of DFARS § 216.404-2(B), and we see no evidence of such prejudice. If this discrepancy had been noticed prior to award, and NAVSEA had required RCI to reduce its proposed base fee from 4 percent to 3 percent, RCI's projected cost would have been even lower than that of TMS. Even if RCI's combined proposed base and award fee were increased to the statutory maximum of 10 percent of estimated cost, permitted by amendment No. 0007 of the RFP, RCI would still have a projected cost so much lower than TMS' that TMS would still not be in line for award under the terms of the solicitation. Moreover, the Navy asserts, and TMS does not dispute, that lowering RCI's award fee to 3 percent would not have any significant effect on RCI's technical proposal.

SERVICE CONTRACT ACT

In its initial protest, TMS argued that the Navy improperly failed to determine that the Service Contract Act of 1965 (SCA) applied to this solicitation. The SCA applies to government contracts where the principal purpose is to furnish services through the use of service employees. 41 U.S.C. § 351; FAR § 22.1003-2. The agency responded by pointing out that the RFP did not contain any provisions relating to the SCA and contended, therefore, that if TMS believed the SCA was applicable, it should have raised the

issue prior to the closing date for receipt of initial proposals. See Sea Corp., B-244380, July 12, 1991, 91-2 CPD ¶ 51; Bid Protest Regulations, 4 C.F.R. § 21.2(a). The agency states that the solicitation did contain provisions concerning the Walsh-Healey Public Contracts Act, which applies to contracts for the manufacture or furnishing of supplies. The agency suggests that this contract is not covered by the SCA since the principal purpose of the contract is to procure supplies, not services.[28]

In its comments filed in response to the agency report, TMS concedes that this basis of protest was untimely filed, but requests that we consider the matter under the significant issue exception in our regulations. See 4 C.F.R. § 21.2(c). TMS argues that to the extent the agency concluded that this procurement, which was evaluated on the basis of services, is not principally a service contract simply because a greater portion of the procurement, in terms of price, is devoted to supplies, that conclusion is unreasonable.

In order to prevent our timeliness rules from becoming meaningless, the significant issue exception is rarely used. Midwest Pipeliners, Inc., B-250795, Jan. 12, 1993, 93-1 CPD ¶ 40. The exception is limited to untimely protests that raise issues of widespread interest to the procurement community and that have not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

TMS' protest of the applicability of the SCA to this procurement does not meet this standard. We have often considered the applicability of the SCA to particular solicitations. See, e.g., Management Eng'rs, Inc.; KLD Assocs., Inc. B-233085; B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156; OAO Corp., B-211803, July 17, 1984, 84-2 CPD ¶ 54; Advance, Inc., B-213002, Feb. 22, 1984, 84-1 CPD ¶ 218. Further, the decision as to whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. 29 C.F.R. § 4.111(a). That, and the unique structure of this procurement, involving level-of-effort line items along with not-to-be-exceeded supply line items that are not evaluated, makes this case of limited interest to the procurement community. The resolution of issues that only

[28]Where applicable, the SCA mandates that service employees normally be paid at least the minimum hourly wages set forth in Department of Labor area wage determinations. 41 U.S.C. § 351(a)(1).

relate to the requirements of a single solicitation does not generally fall within the exception. See NFI Management Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548.

The protest is denied in part and dismissed in part.

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