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Comptroller General
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United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: Jacobs COGEMA, LLC

File: B-290125.2; B-290125.3

Date: December 18, 2002

Marc F. Efron, Esq., Thomas P. Humphrey, Esq., Elizabeth W. Newsom, Esq., and J. Catherine Kunz, Esq., Crowell & Moring, for the protester.
Richard O. Duvall, Esq., Craig A. Holman, Esq., and Kara L. Daniels, Esq., Holland & Knight, for Uranium Disposition Services, LLC, an intervenor.
Gena E. Cadieux, Esq., Beth Kelly, Esq., Joseph A. Lenhard, Esq., and Mary D. Copeland, Esq., Department of Energy, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Statutory provision enacted after proposals were evaluated but before source selection decision was made, which directs Secretary of Energy to, "notwithstanding any other provision of law," ask offerors to confirm or reinstate their offers within a certain time, select for award of a contract the "best value of proposals" for the solicitation's scope of work within 30 days of enactment, and negotiate with the awardee for certain contract modifications, does not remove the procurement from the coverage of the ordinarily applicable procurement laws and regulations, including those governing General Accounting Office jurisdiction over a protest of the procurement, where the statutory provision's requirements are not inconsistent with these ordinarily applicable procurement laws and regulations.

2. Protest that contracting agency improperly evaluated offerors' technical and cost proposals is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation criteria; source selection decision based upon the evaluation results was also reasonable, consistent with the stated evaluation criteria, and well supported.

DECISION

Jacobs COGEMA, LLC (JC) protests the award of a contract to Uranium Disposition Services, LLC (UDS) under request for proposals (RFP) No. DE-RP05-01OR22717, issued by the Department of Energy (DOE) for the design, construction, and operation of depleted uranium hexafluoride (DUF_6) conversion facilities at Paducah,

Kentucky, and Portsmouth, Ohio. JC primarily argues that DOE improperly evaluated offerors' technical and cost proposals and made an improper source selection decision.

We deny the protests.

BACKGROUND

Beginning with the development of the atomic bomb and continuing over the last half of the twentieth century, the United States processed large quantities of uranium using gaseous diffusion to produce enriched uranium suitable for use as fuel for nuclear reactors or military applications. The gaseous diffusion process uses uranium in the form of uranium hexafluoride, or UF_6, and "depleted" UF_6, or DUF_6, is a byproduct of the enrichment process. During that process, the DUF_6 is transferred as a gas to large steel cylinders (typically 12 feet long by 4 feet in diameter), cooled to convert the gas to solids in the cylinders, and stored in the cylinders. DOE is responsible for the government's inventory of approximately 700,000 metric tons of DUF_6 stored in approximately 57,000 cylinders. Since the 1950s, such material has been stored at the government's gaseous diffusion plants in Paducah and Portsmouth, and at the East Tennessee Technology Park (ETTP) in Oak Ridge, Tennessee.

Since 1990, DOE's cylinder management has focused on the ongoing surveillance and maintenance of the cylinders containing DUF_6, which involves cylinder inspections, recoatings, and relocations to ensure that DUF_6 is safely stored pending its ultimate disposition.[1] Id. § II.B.6. In 1998, Congress passed the McConnell Act which, among other things, directed DOE to prepare a plan to construct facilities in Paducah and Portsmouth to treat and recycle the DUF_6. Pub. L. No. 105-204, § 1, 112 Stat. 681, 682 (1998). In March 1999, DOE provided its initial plan to Congress and issued a Request for Expressions of Interest to industry. DOE submitted its final plan in July 1999, and issued the instant solicitation on October 31, 2000.

DOE's overarching requirement is to convert its DUF_6 inventory to a more stable chemical form and to reuse or dispose of the converted product and byproducts. In general, this process involves (1) heating the cylinders in an autoclave to physically transform the DUF_6 from the solid phase to the vapor phase, (2) reacting the vaporous DUF_6 with steam and hydrogen in a conversion apparatus to produce a solid uranium compound and HF vapor, (3) separating the reaction products,

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[1] The chemical and physical characteristics of DUF_6 pose potential health risks. Uranium and its decay products in DUF_6 in storage emit low levels of radiation. If DUF_6 is released to the atmosphere, it reacts with water vapor in the air to form hydrogen fluoride (HF) and a uranium oxyfluoride compound called uranyl fluoride (UO_2F_2), both of which are chemically toxic. RFP Statement of Work (SOW) § II.B.2.

(4) packaging the solid uranium compound, (5) condensing the HF vapor to the liquid phase, (6) and disposing of both conversion products by reuse, commercial marketing, or disposal at a waste depository.

The RFP contemplated the award of a cost-reimbursement, performance-based contract for the design, construction, and operation of DUF_6 conversion facilities at Paducah and Portsmouth[2] beginning with the date of award through 5 years of operation.[3] Offerors were to select the technology process to be used to convert DOE's inventory of DUF_6 to triuranium octaoxide (U_3O_8), uranium dioxide (UO_2), uranium tetrafluoride (UF_4), uranium metal, or some other stable chemical form acceptable for transportation, beneficial use/reuse, and/or disposal. The successful contractor will assume responsibility for cylinder management activities for DUF_6 cylinders 1 year before the start of conversion plant operation, and will assume responsibility, as well, for the transportation and disposition of conversion products, all waste forms, and empty and heel cylinders.[4] SOW § C.I and RFP Cover Letter at 1.

The RFP stated that, in accordance with the Federal Acquisition Regulation (FAR) and the Department of Energy Acquisition Regulation, proposals were to be evaluated in accordance with the stated technical and business management, cost, and fee evaluation criteria. Award was to be made to the offeror whose proposal was the best value to the government considering these criteria. RFP § M.1.(a).

Technical and business management proposals were to be evaluated to determine the offeror's understanding of and capability to perform the SOW's requirements. These proposals were to be point-scored and evaluated in accordance with six criteria and various subcriteria. The technology/design criterion, worth 30 percent of the available points, was comprised of two sub-criteria, DUF_6 conversion and waste and conversion product disposition. The project management criterion, worth 25 percent of the available points, was comprised of two sub-criteria, method of accomplishment and project management systems. The remaining criteria were business management and environment, safety, and health (ES&H), each worth 15 percent of the available points; experience, worth 10 percent of the available points; and past performance, worth 5 percent of the available points.

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[2] The DUF_6 stored at Oak Ridge will be transported to Portsmouth for conversion and disposition. SOW § IV.A.

[3] Offerors were to propose facilities to convert all of the DUF_6 within 25 years, but the contractor would only be responsible for performing the operations for the first 5 years. SOW § IV.A.1.

[4] "Heel cylinders" refers to residual amounts of nonvolatile material left in a cylinder after the removal of the DUF_6. DOE's Depleted UF_6 Management Program Glossary, <web.ead.anl.gov/uranium/glossacro/index.cfm?init=H>.

Each offeror's cost proposal for the contract period and cost estimate for the post-contract life-cycle period was to be evaluated for cost reasonableness and realism. DOE was to determine a most probable cost for the contract period, and to evaluate the most probable net present value (NPV) cost of the post-contract life-cycle period. RFP § M.2(b)(1), amend. No. 2, rev. No. 29. Both of these were also to be compared with the technical and business management proposal for consistency and understanding of the SOW. DOE stated it was not seeking offers that minimized contract costs by raising total life-cycle project costs, and that proposals were to be evaluated accordingly. RFP § M.2(b)(2), amend. No. 2, rev. No. 29. The amount of the proposed fee was also to be evaluated. RFP § M.2(c). The technical and business management proposal was to be significantly more important than the evaluated most probable contract cost and fee and the evaluated most probable NPV life-cycle cost estimate, but both were a substantial element of the evaluation, with the contract cost and fee being more important than the life-cycle cost. RFP § M.3(b), amend. No. 2, rev. No. 30.

Selection of the "best value" proposal was to be achieved by evaluating the strengths and weaknesses of each proposal in accordance with the evaluation criteria. DOE was more concerned with obtaining superior technical and business management performance than with making award at the lowest evaluated most probable cost and fee or selecting the proposal with the lowest evaluated post-contract life-cycle cost estimate, but would not make an award at a cost and fee premium that was disproportionate to the benefits associated with the evaluated superiority of one technical and business management proposal over another. As a result, DOE was to assess whether the strengths and weaknesses between or among competing technical and business management proposals indicated a superiority from the standpoint of what the evaluated most probable contract cost and fee and evaluated most probable NPV post-contract life-cycle cost estimate to the government would be to take advantage of the difference. RFP § M.4, amend. No. 2, rev. No. 31.

DOE received proposals from five firms by March 1, 2001. The agency evaluated initial proposals and established a competitive range of three, including JC and UDS, on August 3.[5] Extensive written and face-to-face discussions were conducted later that month and offerors submitted revised proposals. After reviewing the revised proposals, DOE sent letters providing additional issues for offerors to address and held additional face-to-face meetings for this purpose. The SEB subsequently requested the submission of final proposal revisions (FPR) and sent a list of issues for each offeror to consider. FPRs were submitted on November 5. The SEB evaluated the FPRs and prepared a report reflecting the following consensus scores:

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[5] JC is a limited liability company (LLC) formed by Jacobs Engineering Group and COGEMA, Inc. UDS is an LLC formed by Framatome ANP, Inc., Duratek Federal Services, and Burns & Roe Enterprises.

	JC	UDS
Technical and Business Management Proposal (1,000 points)	**899**	**888**
Technology/Design		
i. DUF_6 Conversion (200 points)	188	192
ii. Waste and Conversion Product Disposition (100 points)	83	84
Project Management		
i. Method of Accomplishment (150 points)	141	134
ii. Project Management Systems (100 points)	92	87
Business Management (150 points)	137	132
Environment, Safety, and Health (150 points)	125	119
Experience (100 points)	98	94
Past Performance (50 points)	35	46
Cost, Fee, and Revenue Evaluation (millions)		
Contract Period		
Total Estimated Probable Costs	$506.7	$493.7
Proposed Maximum Fee	$ 60.6	$ 63.3
Total Probable Costs and Maximum Fee	$567.3	$557.0
Probable Revenue	$ 51.0	$ 24.7
Post-Contract Period		
Total Estimated Probable NPV Cost	$768.1	$712.3
Probable NPV Revenue	$114.6	$ 75.1

The SEB's extensive report included a summary of its conclusions regarding each proposal under each area of evaluation, supported by a more detailed discussion of the strengths and weaknesses of each proposal. The source selection official (SSO) discussed the evaluation with the five members of the SEB and requested additional comparative analyses and information in several areas, which came in the form of 20 "white papers." The SEB report did not include a specific recommendation for award but, when asked by the SSO for individual recommendations, one SEB member recommended JC and three recommended UDS.

The selection of the successful offeror and award of the contract was planned for January 15, 2002 but, around that time, DOE decided to consider alternatives in the number and location of conversion facilities before continuing with the procurement. Offerors in the competitive range were advised of this decision and of DOE's intent to amend the RFP to permit them to provide revised offers; during the course of DOE's consideration of its alternatives, all offers expired.

On August 2, the president signed into law the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Acts on the United States (the Act). Pub. L. No. 107-206, 116 Stat. 820 (2002). Section 502 of the Act required the Secretary of Energy to, "notwithstanding any other provision of law," within 10 days of enactment, ask offerors whose proposals were in the competitive range in this procurement to confirm or reinstate their offers, and select for award of a contract "the best value of proposals" confirmed or reinstated and award a contract for the scope of work stated in the RFP, including the design, construction, and

operation of facilities in Paducah and Portsmouth, within 30 days of enactment. Pub. L. No. 107-206, 116 Stat. 851-52, § 502(c)(1). The Act also required the Secretary of Energy to, "notwithstanding any other provision of law," negotiate with the awardee to modify the contract awarded to, among other things, require that groundbreaking for construction occur not later than July 31, 2004, and that construction proceed expeditiously thereafter. Id. § 502(c)(2).

In response to DOE's request, all three offerors in the competitive range confirmed or reinstated their offers by August 12. Subsequently, "for purposes of determining the best value as required by the Act," Source Selection Statement (SSS) at 2, the SSO considered the RFP's evaluation criteria and the evaluation process carried out prior to the passage of the Act. He reviewed the SEB report in its entirety, as well as portions of each offeror's proposal, and had "substantive interaction and discussions with the SEB" in the process of making his source selection decision. Id. at 6. The SSO explained that both proposals received high scores and that, in assessing their relative merits, he reviewed their strengths and weaknesses to determine the discriminators that existed between them. The SSO agreed with the SEB's findings concerning the offerors' respective strengths, but did not agree with their relative scoring of certain aspects of the proposals. He concluded that there were more discriminators favoring the UDS proposal than the JC proposal, and that there was a "discernible advantage" to the UDS technical and business management proposal. Id. at 7.

Specifically, as discussed further below, the SSO found the technology and design subcriteria to be major and minor discriminators, respectively, in favor of the UDS proposal; the business management and past performance criteria to be major discriminators in favor of the UDS proposal; and the project management criterion subcriteria to be slight and minor discriminators, respectively, in favor of the JC proposal. The SSO supported his conclusions with detailed narrative findings. The SSO also found that UDS had a lower probable cost than JC for both the contract and post-contract periods. Based upon the SEB's evaluation and his independent review and judgment, the SSO concluded that UDS's proposal represented the superior technical and business management proposal at a lower cost, and provided the highest probability of success in performance of the contract and for the long-term completion of the project. SSS at 12. UDS was selected for award and these protests followed.[6]

THRESHOLD ISSUES

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[6] Although we do not here specifically address all of JC's complaints about the evaluation of the technical and cost proposals, we have fully considered all of them and find that they afford no basis to find the evaluation unreasonable.

The statutory authority for our Office to decide bid protests is set out in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), and provides for consideration of a written objection by an interested party to a solicitation by a federal agency for offers for a contract for the procurement of property or services, as well as an award or proposed award of such a contract. 31 U.S.C. § 3551(1). The parties agree that DOE is a federal agency; that JC is an interested party; that the protest concerns the award of a contract for services; and that the solicitation was issued, and proposals evaluated, with the understanding that the procurement was governed by all applicable procurement laws and regulations, including CICA and the FAR, and subject to a protest reviewable by our Office. The views of the parties diverge when it comes to the question whether the Act's provision that the award was to be made "notwithstanding any other provision of law" placed the procurement outside of the coverage of these ordinarily applicable procurement laws and regulations.

In 1998, Congress passed, and the president signed, legislation directing DOE to prepare a plan to construct and operate two facilities to treat and recycle DUF_6, one at Paducah and one at Portsmouth. Pub. L. No. 105-204, supra. DOE's plan is consistent with that direction; that is, the plan provides that conversion of the DUF_6 inventory will take place in plants on each of the Paducah and Portsmouth sites. DOE's "Final Plan for the Conversion of Depleted Uranium Hexafluoride" at 2. Accordingly, the instant solicitation asked offerors to design, construct, and operate facilities in both Paducah and Portsmouth, RFP § C.I, and offerors submitted proposals consistent with this requirement. However, in January 2002, DOE put the procurement on hold so it could consider alternatives in the number and location of conversion facilities before continuing with the procurement. During DOE's consideration of this matter, all offers expired, and the statutory language at issue here was inserted into a supplemental appropriations bill. Section 502 of the Act amends section 1 of Public Law No. 105-204 by striking subsection (c) and inserting the following replacement language:

> (c) CONTRACTING REQUIREMENTS.--
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> "(1) IN GENERAL.--Notwithstanding any other provision of law (except section 1341 of title 31, United States Code), the Secretary of Energy shall--
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> "(A) not later than 10 days after the date of enactment of this paragraph, request offerors whose proposals in response to Request for Proposals No. DE-RP05-010R22717 ('Acquisition of Facilities and Services for Depleted Uranium Hexalfluoride (DUF6) Conversion Project') were included in the competitive range as of January 15, 2002, to confirm or reinstate the offers in accordance with this paragraph, with a deadline for offerors to deliver reinstatement or confirmation to the Secretary of Energy not later than 20 days after the date of enactment of this paragraph; and
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> "(B) not later than 30 days after the date of enactment of this paragraph, select for award of a contract the best value of proposals confirmed or reinstated under subparagraph (A), and award a contract for the

> scope of work stated in the Request for Proposals, including the design, construction, and operation of--
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> "(i) a facility described in subsection (a) on the site of the gaseous diffusion plant at Paducah, Kentucky; and
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> "(ii) a facility described in subsection (a) on the site of the gaseous diffusion plant at Portsmouth, Ohio.
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> "(2) CONTRACT TERMS.--Notwithstanding any other provision of law (except section 1341 of title 31, United States Code) the Secretary of Energy shall negotiate with the awardee to modify the contract awarded under paragraph (1) to--
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> "(A) require, as a mandatory item, that groundbreaking for construction occur not later than July 31, 2004, and that construction proceed expeditiously thereafter;
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> "(B) include as an item of performance the transportation, conversion, and disposition of depleted uranium contained in cylinders located at the Oak Ridge K-25 uranium enrichment facility located in the East Tennessee Technology Park at Oak Ridge, Tennessee, consistent with environmental agreements between the State of Tennessee and the Secretary of Energy; and
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> "(C) specify that the contractor shall not proceed to perform any part of the contract unless sufficient funds have been appropriated, in advance, specifically to pay for that part of the contract.
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> "(3) CERTIFICATION OF GROUNDBREAKING.--Not later than 5 days after the date of groundbreaking for each facility, the Secretary of Energy shall submit to Congress a certification that groundbreaking has occurred.

Pub L. No. 107-206, § 502(c), supra.

DOE and the intervenor argue that the plain language of the Act--that DOE was to award the contract "notwithstanding any other provision of law"--means that the award is not subject to 31 U.S.C. § 3552, which provides for GAO review of protests of contract awards, or to the requirements of the CICA and the FAR, which form the legal underpinning for the protest allegations. JC contends that DOE's reading of the Act is unduly expansive and that, in the absence of any inconsistency between the Act's provisions, on the one hand, and the ordinarily applicable procurement statutes and regulations, on the other, the procurement is subject to the relevant requirements of CICA and the FAR and GAO has jurisdiction to hear its protests.

In ascertaining the plain meaning of the statute, we necessarily look to the particular statutory language at issue, as well as the language and design of the statute as a whole. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). If the phrase "notwithstanding any other provision of law" is read in complete isolation from its context, the agency's interpretation is possible. However, "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Maestro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956), quoting United States v. Boisdore's Heirs, 8 How. 113, 12 L.Ed. 1009 (1850). Based upon our review of the

Act, the relevant procurement laws and regulations, and the arguments of the parties, we conclude that the language of the Act does not remove the procurement from our jurisdiction or from the coverage of relevant portions of CICA and the FAR.

The "notwithstanding any other provision of law" language must be read together with the three specific tasks the agency is required to perform pursuant to the Act's direction. First, within 10 days of enactment, DOE is required to ask the offerors in the competitive range to confirm or reinstate their offers. Second, within 30 days of enactment, DOE is required to select the "best value" of these proposals and award a contract for the scope of work stated in the RFP, including construction and operation of two facilities at two locations. Third, DOE is required to negotiate certain contract modifications with the awardee. Unlike in the cases cited by DOE in support of its position, RJO Enters., Inc., B-252232, June 9, 1993, 93-1 CPD ¶ 446, citing Liberty Maritime Corp. v. United States, 928 F.2d 413 (D.C.Cir. 1991), and TLM Marine, Inc., B-226968, July 29, 1987, 87-2 CPD ¶ 111, the statutory language here does not give the agency unfettered discretion, but limits the agency's discretion by directing it to perform these specific acts even if some other law would ordinarily prevent it from doing so[7] and even if some other law would ordinarily permit it to act in another fashion. The Act is silent on the applicability of laws that would not prevent the agency from performing these specified tasks.

Courts have interpreted similar "notwithstanding" language to mean that the new federal statute "supersedes" or "trumps" other statutes that are inconsistent. See, e.g., Liberty Maritime Corp. v. United States, supra, at 416; Saco River Cellular, Inc. v. Federal Communications Comm., 133 F.3d 25, 30 (D.C.Cir. 1998); Illinois Nat'l Guard v. Federal Labor Relations Authority, 854 F.2d 1396, 1403 (D.C.Cir. 1988), quoting New Jersey Air National Guard v. FLRA, 677 F.2d 276, 283 (3d Cir. 1982). Neither DOE nor the intervenor have shown that the procurement laws and regulations that govern our jurisdiction and supply the ground rules for the conduct of a federal procurement are inconsistent with the Act's requirements. The only legislative history for this provision, a statement in the conference report indicating that the conference agreement "includes a provision proposed by the Senate requiring the Secretary of Energy to award a contract for two depleted uranium hexafluoride facilities," H.R. Conf. Rep. No. 107-593, at 144 (2002), indicates no intent on the part of Congress to do anything more than ensure that the contract was awarded expeditiously for the design, construction, and operation of two, not one, depleted uranium hexafluoride facilities.[8]

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[7] The Anti-Deficiency Act, 31 U.S.C. § 1341 (2000), which prohibits federal expenditures in excess of appropriations, is expressly excepted from the coverage of the Act's "notwithstanding any other provision of law" language.

[8] Contemporaneous news accounts indicate that members of Congress were concerned about both the delay in the procurement and the prospect that a contract might be awarded for only one facility. See, e.g., Malia Rulon, "Energy Department

(continued...)

As support for its argument that there can be no review of DOE's actions, UDS cites National Coalition to Save Our Mall v. Norton, 161 F.Supp. 2d 14 (D.C.Cir. 2001), a case in which the court held that Congress intended to preclude all judicial review of the design and location of the World War II Memorial. In that case, the statutory provision at issue specifically stated that such decisions "shall not be subject to judicial review"; there is no such language here. UDS's argument that the protest process itself impinges upon DOE's authority to award the contract overlooks the fact that the contract was awarded prior to the filing of any protest; the mere fact that a post-award protest was filed has no effect upon the actual award of the contract, which is currently being performed. UDS also cites National Coalition to Save Our Mall v. Norton to support its argument that the protest process might be inconsistent with the Act's requirement that groundbreaking for construction occur not later than July 31, 2004. However, unlike in that decision, which discussed the prospect of delay caused by lengthy court proceedings, the protest process is statutorily limited to a time period of only 100 calendar days. See 31 U.S.C. § 3554(a)(1). Even if the protest were to be sustained with a recommendation for corrective action, there is no basis to conclude that any resulting delay would have a negative impact on the groundbreaking deadline. Since we find no inconsistency between the Act's provisions and the law governing our jurisdiction, we find that we do, in fact, have jurisdiction to resolve these protests.

We also conclude that the legal standards set forth in CICA and the FAR apply to this procurement. The provisions of the Act are silent as to the applicability of laws that would not prevent DOE from performing the directed tasks, and there is a legal presumption that CICA's competition requirements apply "except in the case of procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 253(a)(1) (1994). Moreover, we do not see any inconsistency between the tasks DOE was required to perform under the Act and the procurement statutes and regulations underlying the protest allegations. DOE issued the solicitation and evaluated proposals with the understanding that the ordinarily applicable procurement statutes and regulations applied to this procurement long before the Act was passed, and the Act does not address any aspect of the evaluation process. With respect to the only part of the procurement conducted after the Act's passage, the source selection decision, the SSO stated that, for purposes of determining the best value as required by the Act, he considered the RFP's evaluation criteria and the evaluation process carried out prior to the passage of the Act. SSS at 2. Since the laws governing the selection of the RFP's evaluation criteria and the conduct of the evaluation were not inconsistent with the Act's requirements, there is no basis to

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(...continued)
May Choose Between Ohio and Kentucky Plants," Associated Press, Mar. 1, 2002; Nancy Zuckerbrod, "Measure Requires Conversion of Uranium at Sites in Kentucky, Ohio," Associated Press, July 18, 2002.

conclude that these or any other procurement laws were inconsistent with the source selection and award process.

In this regard, the SSO's responsibility to select for award of a contract the "best value" proposal, as required by the Act, is not without meaning in the world of federal procurement law. The phrase "best value" is drawn directly from the FAR, which defines the objective of a source selection in a competitive negotiated acquisition as selecting the proposal that represents the "best value." FAR §§ 15.302, 15.303(b)(6), citing 41 U.S.C. § 253b(d)(3) (agencies are to award contracts to the source whose proposal is most advantageous to the government, considering only cost or price and the other factors included in the solicitation). We agree with JC that, by invoking the phrase "best value," Congress appears to have signaled its intent that the source selection decision be made consistent with the underlying policy of awarding contracts to the entity whose proposal offers the "best value" as set forth in the FAR. See Russell v. Landrieu, 621 F.2d 1037 (9th Cir. 1980) (in exercising discretion to dispose of property acquired through foreclosure of mortgage on low-income housing project, Secretary of Housing and Urban Development must act, whenever possible, in a manner which is consistent with objectives and priorities of National Housing Act, and actions taken without consideration of those policies, or in unnecessary conflict with them, will not stand). DOE is correct that the FAR merely provides for a best value "continuum" without defining best value for any particular procurement, FAR § 15.101, but the solicitation itself, which was expressly referenced by the Act's provisions, provides the definition of "best value" applicable to this procurement. Under the circumstances, we see no basis to conclude that the Act's provisions placed the procurement outside of the coverage of the ordinarily applicable provisions of CICA and the FAR.[9]

Finally, citing the exchange of letters surrounding DOE's request that offerors confirm or reinstate their offers, DOE and UDS argue that JC "waived" its right to protest. We do not agree.

After the Act was signed into law, DOE gave offerors two options in the form of draft letters that would be sent requesting the confirmation or reinstatement of their proposals. The first option referenced the passage of the Act and stated that, due to the provisions of the Act, CICA, the FAR, and other provisions of law "do not apply

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[9] In any event, for the purposes of our protest jurisdiction, the extent to which the procurement statutes and regulations may apply does not matter. Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 5-6; TLM Marine, Inc., supra; Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121 at 5. In cases where the basic procurement statutes are not applicable to a procurement that is within our protest jurisdiction, we review the record to determine if the agency's actions were reasonable. Gino Morena Enters., supra.

to the process described below." The only process "described below" was the confirmation or reinstatement of proposals by a date certain, with the understanding that any awarded contract would be modified after award to revise the start date for construction. The second option contained similar introductory language, but described a process that permitted the confirmation or reinstatement of proposals by a date certain, the revision of proposals to account for certain post-contract modifications, DOE's evaluation of these modifications, and DOE's award of a contract without any additional interaction with offerors. In the attached draft agreement, offerors were to agree to these terms and waive any future challenge of the award process and selection decision in any judicial or administrative litigation or proceedings in any forum. The offerors did not unanimously accept the second option, and DOE issued letters consistent with the first option. We agree with JC that its acceptance of the first option did not waive its right to protest. The letter expressly stated DOE's view that CICA and the FAR did not apply to "the process described below," and expressly limited that process to the confirmation or reinstatement of proposals, the propriety of which is not at issue here.

EVALUATION OF TECHNICAL AND BUSINESS MANAGEMENT PROPOSALS

JC argues that DOE's evaluation of both proposals under the technology and design criterion, and of its own proposal under the past performance criterion, was irrational and unsupported.

An agency's method for evaluating the relative merits of competing proposals is a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method for accommodating them. NLX Corp., B-288785, B-288785.2, Dec. 7, 2001, 2001 CPD ¶ 198 at 4. Where an evaluation is challenged, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Lear Siegler Servs., Inc., B-280834, B-280834.2, Nov. 25, 1998, 98-2 CPD ¶ 136 at 7. The fact that the protester disagrees with the agency does not render the evaluation unreasonable. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Our review of the record, including written proposals, the pleadings, and testimony taken during a hearing in this matter, provides us no basis to find the evaluation unreasonable. We preface our discussion by briefly describing each offeror's approach to performing the requirements.

UDS proposed to use a simplified version of the process that Framatome has used in Lingen, Germany since 1994 and in Richland, Washington since 1997 to produce nuclear reactor fuel. Both facilities were designed, constructed, and operated by Framatome; the Richland facility is a second-generation design representing improvements over the German facility. UDS Sept. 28 Revised Proposal, Vol. II, at C-1. UDS proposes to load the cylinders into [DELETED] autoclaves to vaporize the DUF_6, and to feed the resulting vaporous DUF_6 into a [DELETED] fluidized bed reactor. The DUF_6 vapor will be reacted with steam and hydrogen, resulting in

uranium oxide powder (as U_30_8) and gaseous aqueous HF. The reactor will pass the HF to a recovery process for eventual sale or neutralization. The reactor will discharge the U_30_8 by [DELETED] and move it to a container fill station. UDS will fill [DELETED] with the U_30_8, and ship these [DELETED] to a disposal site. UDS will [DELETED] for disposal at a disposal site. Id. at C-24-C-35.

JC proposed to replicate the COGEMA DUF_6 conversion process that has been used for more than 16 years in commercial-scale operation at its "W" plants in France. The firm's W-2 plant, designed, constructed and operated by COGEMA since 1993, is a second-generation facility with design and equipment improvements resulting from experience operating the W-1 plant. JC Oct. 1, 2001 Revised Proposal, Vol. II, at II-21. JC proposes to load the cylinders into steam-heated autoclaves to vaporize the DUF_6, and to feed the resulting vaporous DUF_6 into the first part of an electrically-heated rotary conversion kiln together with superheated steam to produce UO_2F_2 as a solid powder that falls to the bottom of the rotating kiln. The UO_2F_2 will be conveyed into the second part of the conversion kiln by [DELETED], where it will react with superheated steam to create U_30_8 and HF. The HF will be discharged and processed for sale or neutralization. [DELETED]. Empty cylinders that have been washed and modified will be reused to the extent possible as the disposal containers for the U_3O_8 powder and for cut-up sections of cylinders that are not suitable for reuse. The filled containers will be shipped offsite for disposal or reuse. Id. at II-28-II-31. Cylinder heels will be washed out of the cylinders, and the wash liquids containing the heel materials will be sent to an offsite subcontractor for treatment and disposal. Id. at II-32c.

Technology and Design--DUF_6 Conversion

Section M of the RFP advised offerors that their DUF_6 conversion technology and design concept, from retrieval of cylinders through packaging of final end products/wastes, would be evaluated on its "ability to accomplish DUF_6 conversion, and whether it represents a mature, efficient, safe, integrated technical approach." RFP § M.2(a)(1), amend. No. 2, rev. 27. The RFP stated that the agency would evaluate such areas as simplicity of design; constructability; system operability; reliability; maintainability; management of trace contaminants; minimization of life cycle costs; design that facilitates efficient and economical decontamination decommissioning, and demolition; the extent that viable end product use/reuse is proposed; and the effectiveness and thoroughness of the proposed approach to transporting the ETTP cylinders to Portsmouth and compliance with certain regulations. Id.

Section L of the RFP detailed the numerous items to be provided by offerors for evaluation. One of these items was

> a description of the maturity of the proposed technology/process, including a description of the scale of the proposed technology, whether it is demonstrated or currently in production, and the production level achieved. Describe approach to scaling up to the required production level and indicate any anticipated scaling problems and/or risks that might be encountered.

RFP § L.23(c)(1)(iii).

The SEB evaluated both proposals as "outstanding" and assigned 192 points to the UDS proposal and 188 points to the JC proposal. The strengths and weaknesses identified by the SEB for both proposals were similar in nature. Both were evaluated as having significant strengths for the maturity of their technologies, the safety of their approaches, and the integration of their technical approaches. UDS's proposal was evaluated as having significant strengths for the efficiency of its approach and for its operability, as compared with JC's strengths in these same areas. Both proposals were evaluated as having strengths for their management of trace contaminants, their end product use/reuse, and their approach to transporting ETTP cylinders. Finally, both proposals were evaluated has having weaknesses for certain aspects of their end product use/reuse.

The SEB rated the UDS proposal highest based on the "proven technical approach" of its technology, noting that the Richland facility was a second-generation design representing improvements to the process; the design was modular, facilitating duplication at the two plants; and the design represented successful technology transfer from European systems and standards. SEB Report at 33. The SEB explained that UDS's approach would convert the DUF_6 to U_3O_8 and aqueous HF using a [DELETED] fluidized bed reactor with no moving parts, and UDS would market the HF and transfer the uranium oxide product solids for volume reduction and packaging. The SEB explained that the Richland facility, which was designed to produce nuclear reactor fuel, used reactors of slab geometry for nuclear criticality safety, but that UDS proposed to use reactors that would be of cylindrical geometry, which simplified the operation of the fluidized bed. To achieve plant throughput, the reactors would require scale-up by a factor of [DELETED] compared with those operating at the Richland facility. The SEB stated that, based on Framatome's extensive operating experience, the proposed facilities would be designed for [DELETED] percent plant operating availability, which the SEB deemed conservative compared with the experience at Richland; the SEB noted that this provided significant assurance of achieving production goals. The SEB finally stated that the UDS proposal demonstrated a sound understanding of conversion process chemistry, integrated engineered process systems, and plant operation, and that it

completed transporting ETTP cylinders to Portsmouth 24 months before the compliance date. Id. at 33-34.

The SEB stated that the JC proposal was rated nearly as high as that of UDS based on its technical approach, explaining that COGEMA's W-2 plant was a second-generation facility representing improvements to the process, and that the design was modular, facilitating replication and duplication at the two plants, but also noting that the design and operation required transfer of the technology from European systems and standards. The SEB explained that, like the technology proposed by UDS, JC's approach would convert DUF_6 to U_30_8 and aqueous HF, but its reactor was a two-stage, rotary kiln with more maintenance requirements than the fluidized bed reactor proposed by UDS. JC proposed to market the HF and to transfer the uranium oxide product for [DELETED] and packaging. Based on COGEMA's extensive operating experience at the W plants, the SEB found that the proposal demonstrated sound understanding of conversion process chemistry, integrated engineering process systems, and plant operation. The SEB said the design basis of [DELETED] percent operating availability was based on W plant experience, but the scheduling of planned maintenance and outages was less conservative than that of COGEMA's W plant. The SEB concluded that JC proposed a sound overall approach to transportation of ETTP cylinders to Portsmouth; the proposed completion date was 6 days before the required compliance date. Id. at 34.

The SSO concurred with the SEB, finding that the UDS proposal was clearly superior to the JC proposal and that this aspect was a major discriminator. The SSO's conclusions were supported by a detailed narrative.

JC argues that DOE improperly evaluated UDS's design as "mature" because it improperly concluded that the UDS process currently produces U_30_8, failed to consider the risks associated with UDS's proposal to scale-up its current design, and failed to consider the risks of UDS's proposed design changes.

Specifically, JC contends that, while UDS proposes to produce U_30_8 using the Framatome design, the Framatome design in use in Germany and in Richland does not produce U_30_8 but, instead, produces UO_2. JC asserts that there is no information that UDS ever demonstrated that its design could produce U_3O_8, so all the steps in its proposed processes are unproven steps for production of U_30_8. We do not agree.

In its proposal, UDS states that the "cornerstone" of its approach is Framatome's "proven commercial process and facilities in operation today that convert UF_6 to uranium oxide material," citing the facilities in Richland and Lingen that produce nuclear-grade uranium oxide powder for nuclear fuel fabrication. UDS. Sept. 28, 2001 Revised Proposal, Vol. II, at C-1. UDS explains that a "simplified version of the [Framatome] patented dry conversion process will be used to convert the DUF_6 inventory from UF_6 solid in cylinders to a stable uranium oxide powder, and that "[a]ll steps in the conversion of the depleted UF_6 to oxide, and significant portions of

the byproduct handling operations, use technology that is in daily use at these plants." Id. at C-6. Uranium oxide is the chemical form of uranium most often used for nuclear fuel; the most common forms of uranium oxide are U_3O_8 and UO_2. Depleted UF_6 Management Information Network Web Site, "Chemical Forms of Uranium," at <http://web.ead.anl.gov/uranium/guide/ucompound/forms>.

UDS proposed to use a simplified version of Framatome's patented process in operation at the Richland facility for the production of nuclear fuel. As the SEB's technical adviser explains, that process produces reactor grade fuel with UO_2 as its end product. This pure, ceramic-grade UO_2 is produced by reacting the output from the fluidized bed reactor (a stable mixture of UO_2 and U_3O_8) with hydrogen in a separate secondary reactor. [DELETED]. Technical Adviser Declaration ¶ 8; Hearing Transcript (Tr.) at 10-11, 13-14 (Technical Adviser). The adviser states that this adjustment does not require the introduction of any additional or unproven technology.[10] Technical Adviser Declaration ¶ 8.

The technical adviser testified that, during oral discussions, UDS confirmed that its process produces a mixture of UO_2 and U_30_8 from the fluidized bed reactor.[11] Tr. at 8-9. That the existing UDS technology currently produces U_3O_8 is confirmed in other portions of the UDS proposal. UDS advised DOE that its process and facility designs were "reproductions" of Framatome's "full-scale commercial plant in Richland, Washington that utilizes patented dry conversion technology for processing UF_6 to U_3O_8 for the nuclear power industry." UDS Mar. 1, 2001 Initial Proposal, Vol. II, Cover Letter at 1. The proposal explains that "[Framatome's] DUF_6 dry conversion is a continuous process in which DUF_6 is vaporized and converted to uranium oxide (U_3O_8) in a fluidized bed reactor"; it will use the "same technology and plant design used in [Framatome's] commercial nuclear fuel conversion facilities in Richland and Lingen"; and the process for DUF_6 processing is "essentially identical to that used in the commercial plants." UDS Sept. 28 Revised Proposal, Vol. II, at C-6, B-3, C-24. The process chemistry reactions contained in the proposal, which are also found in the patent for this process, also confirm that the process produces U_30_8. Id. at C-17; Tr. at 10-11 (Technical Adviser).

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[10] JC's argument that DOE failed to consider differences that might have resulted from this adjustment in the level of hydrogen is untimely, since it was not raised within 10 days of JC's receipt of the agency report containing the technical adviser's declaration. 4 C.F.R. § 21.2(a)(2). JC's generalized arguments that DOE failed to consider potential hazards that might result from UDS's production of U_30_8 are untimely for the same reason and, moreover, are not tied to any specific part of the process actually proposed by UDS.

[11] The SEB's technical adviser states that his post-award visit to the Richland facility confirmed what he knew from evaluating the UDS proposal. Tr. at 15.

In our view, the SEB's conclusion that UDS's Richland facility produces U_30_8 is supported by the record. JC is correct that the end product of the Richland facility is not U_30_8. However, there is no requirement that end products of the existing and proposed facilities be identical; the RFP did not make replication of an existing facility a precondition for a finding of maturity. The RFP merely stated that DOE would evaluate the technology and design concept an offeror proposed to produce a stable oxide. RFP § M.2(a)(1), amend. No. 2, rev. 27, SOW § C.I. The UDS technology currently produces U_3O_8 as an interim product in a [DELETED], and the [DELETED] means that the U_3O_8 will become the end product in the DUF_6 conversion facilities. In our view, the agency reasonably found that the UDS technology nonetheless produces U_30_8.

We are unpersuaded by JC's contention that DOE failed to consider the risks associated with the UDS proposal to "scale-up" its current design, and that these risks should have led the SEB to downgrade UDS's proposal in the area of maturity.

The fact that an offeror might have to "scale-up" its technology did not preclude DOE from considering that technology to be mature. The requirement to describe the maturity of the process asked offerors to describe the "scale of the proposed technology"; "whether it was demonstrated or currently in production, and the production level achieved"; the approach to scaling up to the required production level"; and "any anticipated scaling problems and/or risks that might be encountered." RFP § L.23(c)(1)(iii). Offerors would not have been asked to provide this information if they had been prohibited from scaling-up their proposed technologies.

The UDS proposal explained, in detail, its proposed scale-up by a factor of [DELETED], its prior scale-up experience, and its plan to reduce any associated risks. UDS Sept. 28, 2001 Revised Proposal, Vol. II, at C-48 to C-48d. The SEB made specific findings that the proposal provided "a comprehensive discussion of equipment components that would be replicated from current operations as well as the rationale for scale-up or other redesign of other components," SEB Report at 42, and provided specific examples to illustrate this conclusion. Id. at 42-43. Among other things, the UDS proposal explains that UDS has significant successful experience with far greater scale-up of the Framatome dry conversion technology than that proposed here and, as discussed below, key design features of the conversion process and other processes will not require any scale-up. UDS Sept. 28, 2001 Revised Proposal, Vol. II, at C-48-C-48d. An SEB white paper further indicates that the scale-up risk for UDS's reactor vessels was low, citing specific reasons for this conclusion, and that the firm's proposal to build a prototype would minimize the risk even further. White Paper, "Piloting/Preoperational Testing Planned"; see also White Paper, "Risk."

JC argues that each reactor used at the Richland facility processes only [DELETED] metric tons per year, and that this level of throughput does not meet the agency's

internal guidelines for evaluating maturity. These internal guidelines list numerous "attributes" for consideration of a mature approach, including whether the technology has been used in commercial or government production at substantial scales (at least [DELETED] metric tons per year) for longer than 1 year and, if not, whether the technology scale-up factor was [DELETED] or less for major process operations (reaction vessels). Citing these guidelines, JC argues there is no information showing that UDS has used its design to produce U_3O_8 at substantial scales or for longer than 1 year.

As an initial matter, these internal guidelines were not part of the solicitation, and any alleged failure to comply with them is a matter of consideration within the agency itself, rather than through the bid protest process. Interaction Research Inst., Inc., B-234141.7, June 30, 1989, 89-2 CPD ¶ 15 at 7. In any event, the SEB's white paper shows that the Richland facility produces [DELETED] metric tons per year for each of its six reactors, for a nominal plant capacity of more than [DELETED] metric tons per year. Even if the "substantial scale" consideration were to be limited to an individual reactor, the internal guidelines also permit consideration of whether the scale-up factor is less than [DELETED]. The scale-up factor here of [DELETED] falls well within this range, even if U_3O_8 comprises a small portion of the uranium oxide resulting from UDS's current fluidized bed reactors. The SEB and SSO were clearly aware of the throughput of the Richland facility and nonetheless found little or no risk to UDS's scale-up based upon the information in its proposal. JC has pointed to no specific component of UDS's proposal that casts doubt on DOE's conclusion, and no persuasive reason why the SEB should have downgraded UDS's proposal.

JC finally asserts that UDS proposed numerous untested design changes to the Richland design and that DOE failed to evaluate the risk of these changes. JC is incorrect. After evaluating UDS's initial proposal, DOE asked the firm for additional information on the components or operations that would be replicated from the existing facilities, and the components or operations that would be newly designed or redesigned for scale-up. This subject was addressed during oral discussions, and expanded upon in UDS's revised proposal, where the firm discussed each component or process that would be newly designed or redesigned, and its rationale for concluding that any attendant risk was low. UDS Sept. 28, 2001 Revised Proposal, Vol. II, at C-48-C-48d. The SEB clearly considered these issues, noting that UDS's proposal provided a "comprehensive discussion of equipment components that would be replicated from current operations as well as the rationale for scale-up or other redesign of other components," and commenting favorably upon UDS's specific design improvements and technical descriptions of its operations. SEB

Report at 42-43. Again, JC has cited to no portion of the UDS proposal that casts doubt upon the SEB's conclusion, which we find reasonable.[12]

JC objects to the SSO's statement that its design requires conversion to United States codes and standards, "creating a risk to the design and construction aspects of the project." SSS at 9. JC argues that this statement is inconsistent with the SEB's evaluation of its proposal as having a significant strength for the maturity of its technology, with no mention of technology transfer risks, and with its proposal's list of numerous examples of its successful international transfer of technology and its characterization of the risk of transfer as low based on the fact that it routinely transfers process technology internationally using its standard work processes.

During discussions, the SEB asked JC to elaborate on its process for technology transfer from the COGEMA W plants with respect to cost, schedule, French versus United States standards, commercial equipment designs, and spare parts. In response, as JC notes, it provided a detailed discussion in its revised proposal and FPR. This information was provided as an attachment to an SEB white paper concerning JC's technology transfer process at the SSO's request; this white paper includes the favorable information cited by the protester. In its proposal's discussion of risk management, JC included a table listing various risk elements, their potential consequences and pre-mitigation risk rank, mitigating actions and post-mitigation risk rank, and contingency actions to support mitigations. JC Oct. 1, 2001 Revised Proposal, Vol. II, at II-183a/184a to II-183j/184j. One risk element was the prospect that the [DELETED]. JC identified various mitigating actions that, if taken, would result in reducing the risk of this occurrence from high to low. Id. at II-183g/184g. Hence, JC acknowledges that technology transfer issues pose a risk.

This risk did not go unnoticed by the SEB. In summarizing the firm's approach, the SEB report notes that "the COGEMA plant design is modular which facilitates replication and duplication at the two plants, but the design and operation require transfer of the technology from European systems and standards to those of the United States." SEB Report at 34. JC has not shown any reason why the SEB could not reasonably think highly of its technology transfer process, and still acknowledge the risk of its failure, and has given us no basis to find that the SSO's notation of this issue as a risk--not a high risk, or a weakness, but a risk--was reasonable.

JC finally argues that the SSO irrationally concluded that its design was not as simple to operate as UDS's proposed design, and improperly limited his consideration regarding simplicity and maintainability to the conversion reactor while ignoring UDS's other systems and components.

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[12] Since we do not agree with JC that DOE failed to consider the risks associated with UDS's proposal to scale-up its current design or the risks of UDS's proposed design changes, we do not discuss JC's cost arguments premised upon these allegations.

The record provides ample evidence that the SEB and SSO fully considered the numerous systems and components of the UDS process, all of which were fully described in its proposal. In addition to its commentary on UDS's reactor, the SEB refers to the proposal's "comprehensive discussion of equipment components," citing various examples; its technical description of the off-gas processing and product solids vacuum transfer operations; its modular process trains; its proposed overall site layout; and such processes as cylinder handling, autoclave operations, conversion reactor operation, oxide handling, HF recovery and processing, and waste management. SEB Report at 42-43, 33-34. Comments submitted by individual SEB members contain additional considerations of various UDS components and systems. In making his source selection decision, the SSO reviewed the SEB's detailed findings. He, too, remarked upon the finding that UDS's "multiple, equal-sized, modular process trains . . . will provide efficiency of design, construction, and maintenance"; that the "UDS conversion reactor design is a relatively simple [DELETED] fluidized bed reactor with no moving parts thereby providing a low maintenance reactor train"; and that "the proposal . . . included specific, detailed safety considerations in the descriptions of each of the major conversion facility operations." SSS at 8.

As the contemporaneous documentation highlights, there were few distinctions between the two proposals in this area. One distinction was the technology transfer issue noted above, and another was UDS's use of a [DELETED] fluidized bed reactor with no moving parts, in contrast with JC's two-stage, rotary kiln with more maintenance requirements than the fluidized bed reactor. SEB Report at 33-34. It is no mystery that the SSO focused on these distinctions in making his source selection decision. According to the white paper on this issue, the contents of which are unrefuted by JC, the rotary kiln has a number of moving parts that are maintained and/or replaced as part of a scheduled maintenance program that requires major shutdown of the line for maintenance on moving parts. The SEB found that average availability of the W-2 plant has been [DELETED] percent since start-up, and that, in 1999, the W plant's downtime for forced outages due to [DELETED] was [DELETED] days, with the [DELETED] responsible for [DELETED] percent of all forced outages that year. White Paper, "Maintenance on Reactor Moving Parts." In contrast, the SEB found that UDS's fluidized bed reactor has no moving parts that require maintenance, and that over a 4-year period of operations at Richland, there was no unscheduled reactor downtime and the actual availability was more than [DELETED] percent. Id. JC has given us no basis to conclude that DOE should have placed more emphasis on the number of moving parts or simplicity of any other of UDS's systems, and its assertion that fluidized bed reactors in general have failure modes that were not evaluated is not tied to any feature of the fluidized bed reactor actually proposed by UDS. As a result, we have no basis to find the conclusions of the SEB or the SSO unreasonable.

Technology and Design--Waste and Conversion Product Disposition

The SEB rated both proposals "good" under the waste and conversion product disposition subcriterion, assigning the UDS proposal 84 points and the JC proposal 83 points. The SEB evaluated JC's proposal as having a significant strength, and UDS's proposal a strength, for the soundness of their approaches, and evaluated UDS's proposal as having a significant strength, and JC's proposal a strength, for their approaches to waste minimization. SEB Report at 47-48. The SEB explained that UDS had an excellent approach to waste minimization, a comprehensive description of expected waste streams, achieved waste minimization by avoiding generating liquid process waste effluents, and would make a single waste disposal package from the heels and heel cylinders. The SEB concluded that UDS had the fewest waste streams of all the offerors. Id. at 46. The SEB found that the JC proposal provided an excellent and comprehensive identification of waste streams, clear descriptions of waste properties, characteristics, and management requirements, and an approach to waste material compaction that should reduce the costs of disposal. Id.

The SSO acknowledged that the SEB rated the UDS proposal higher than the JC proposal, and agreed with this relative rating, finding that this aspect of the evaluation was a minor discriminator in favor of UDS. The SSO supported his conclusion by emphasizing that the UDS approach was more heavily based on the principle of waste minimization that would be achieved by avoiding the generation of certain significant waste streams. Specifically, the SSO stated that UDS's design would not produce any liquid process waste effluents, and that it had the fewest waste streams of the offerors. SSS at 9.

JC contends that DOE erred by crediting UDS with an approach that resulted in no liquid waste effluents, citing notes of the SEB's technical advisers, based upon their evaluation of initial proposals, in which they express skepticism regarding UDS's ability to eliminate liquid waste effluents. JC claims that there is no evidence the SEB ever addressed these concerns. This claim is not supported by the record.

After the evaluation of initial proposals, and after the technical advisers made their notes, the topic of waste and conversion product disposition was the subject of a 2-hour exchange during oral discussions, and UDS provided additional related information in its revised proposal. The SEB's consideration of this matter is reflected in one of the white papers, in which the SEB states that, in the FPRs, each offeror "had an extensive analysis of waste streams that include the identification, properties, and characteristics of all of the significant waste streams expected by each different approach." White Paper, "Waste Stream Identification." The SEB explained that "UDS has substantially fewer waste streams because they have gone to great lengths to minimize the generation of waste streams to simplify operations and reduce costs. The ones avoided . . . have been noted along with the means by which they would avoid them. . ." Id. The SEB clearly considered the details of

UDS's proposal in this regard, and expressed no concerns about its ability to eliminate liquid waste effluents. On the contrary, in their individual comments, two SEB members specifically noted that the UDS approach "eliminates a liquid waste stream," and that its process "has no liquid effluents." SEB Member Comments at 5, 9. JC has not cited to any portion of the UDS proposal that undercuts the agency's conclusions, which we find reasonable.

JC also argues that the SSO failed to give it credit for its waste minimization, its reduced amount of U_30_8, or its reuse of materials, citing the strength the SEB assigned to its proposal for its approach to waste minimization, the fact that UDS's oxide volume was significantly greater than that of JC for converting a similar quantity of DUF_6, and the fact that JC's waste disposal costs were slightly less than that of UDS. See SEB Report at 48 and 88-89.

There is no requirement that a source selection official restate each of an offeror's strengths when comparing proposals, and nothing unreasonable about the decision to not elevate any of these strengths to the selection decision. Medical Dev. Int'l, B-281484.2, Mar. 29, 1999, 99-1 CPD ¶ 68 at 14. Here, the record shows that, in considering whether the differences between the two proposals amounted to discriminators, the SSO reviewed the entire SEB report, which described all of the aspects of JC's proposal to which the protester refers. The fact that he did not specifically mention these features does not mean he did not consider them, and there is no requirement that he give them the credit JC apparently believes it was due. While the SEB evaluated the JC proposal as having a strength for its approach to waste minimization, it evaluated the UDS proposal as having a significant strength for its approach; given the offerors' differing approaches, the protester has given us no basis to question the finding that the UDS approach was stronger. In addition, the SEB found that the advantage to the [DELETED] was offset by efficiencies inherent in the UDS approach to transporting its conversion product. SEB Report at 89. JC has given us no basis to find unreasonable the SSO's consideration of this matter, which extended to all of the information in the SEB report, and no reason to question his conclusion that the issue warranted a minor discriminator in favor of the UDS proposal.

Past Performance

The SEB assigned the UDS proposal 91 points and the JC proposal 69 points under the past performance criterion. The SEB evaluated the UDS proposal as having a significant strength for its client performance ratings since the overall references for two of its team members ranged from above average to excellent; one of these members was rated excellent in adherence to cost, schedule and performance, and environment, safety, and health (ES&H); and two members were rated above average in the same categories. The SEB also evaluated UDS's proposal as having a strength based on its overall safety statistics, and as having a strength for its ES&H compliance because none of the members reported having received any notices of

violation (NOV);[13] Framatome received only two Nuclear Regulatory Commission (NRC) infractions in the past 5 years, and these resulted in no fines or penalties. SEB Report at 77. In contrast, the SEB evaluated the JC proposal as having only a strength (rather than a significant strength) for its client performance ratings since the client responses for both team members were overall above average; one was rated above average for adherence to cost, schedule and performance; and both were rated well above average in ES&H. The SEB evaluated JC's proposal as having a significant weakness for its NOVs, finding that, in 1999-2001, the Bechtel Jacobs Company (BJC) received 14 NOVs at the ETTP, Paducah, and Portsmouth sites. The BJC holds DOE's Oak Ridge Environmental Management and Integration contract. Jacobs performs under that contract as member of the BJC, and JC relied upon this experience in its proposal.

The SEB stated that UDS was rated highest because of the favorable report on all of its members with regard to their client performance ratings, their overall safety statistics, and their ES&H compliance status. The SEB stated that JC was rated significantly lower than UDS, and that its score reflected both a positive report of above average responses for past clients of Jacobs and COGEMA and reports regarding several NOVs received by the BJC. Id. at 75.

JC argues that the SEB's evaluation of these NOVs was irrational. Citing the only portion of the written record addressing the matter--the SEB report's statement that the BJC received 14 NOVs between 1999 and 2001--the protester asserts that the SEB engaged in a simple number-counting exercise without examining the content or context of the violations. In contrast, JC asserts, the SEB did examine the context and "explained away" UDS's NRC infractions. Protester's Comments at 57. JC also asserts that the SSO repeated the SEB's error and magnified it by declaring UDS's past performance to be a major discriminator in favor of UDS.

Our Office will examine an agency's past performance evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the contracting agency's discretion. OSI Collection Servs, Inc.; C.B.Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 5. However, we will question the agency's conclusions where they are not reasonably based or are undocumented, and, in some cases, we have found it irrational to focus only on the number of performance problems. See Green Valley Transp., Inc., B-285283, Aug. 9, 2000, 2000 CPD ¶ 133 at 4.

During discussions, DOE notified JC that its proposal was considered to have a weakness for eight NOVs received by the BJC in 2000. In response, JC explained

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[13] An NOV is a notice of noncompliance with regulatory requirements issued by a state or federal agency to the owner and/or operator of a facility. AR at 51.

that, in analyzing these events, it had emphasized determining the root cause, implementing corrective actions, preventing future occurrences, and understanding the current regulatory environment. The firm explained that it takes each NOV very seriously and committed to a disciplined and organized approach toward avoiding real and perceived compliance problems that might result in NOVs. These explanations were followed by a detailed summary of each of 12 NOVs received by the BJC in 2000 and 2001. In response to the SEB chair's subsequent request, JC provided information on two NOVs the BJC had received in 1999.

Since the only contemporaneous analysis of these NOVs is the sentence contained in the SEB report indicating their number, our Office conducted a hearing to ascertain the nature of the agency's evaluation of the NOVs. The SEB chair explained that the SEB members held conversations among themselves about all of the NOVs, based upon the summaries in JC's proposal and upon the personal experience of several SEB members, including one whose home base was the Paducah site, the subject of most of the NOVs. The SEB chair stated the SEB considered the substance and nature of the NOVs, the fact that some were more serious than others, the fact that none of them involved fines or penalties, and the total number of NOVs. Considering all of these factors together, the SEB concluded it had sufficient concern to find the matter a significant weakness.[14] Tr. at 61-63, 65-67, 91, 77-80 (SEB Chair).

JC argues that if DOE had conducted further review, it would have learned that some NOVs were issued because DOE declined to fund the activities required to avoid them and were for conditions that preexisted the BJC's assumption of responsibility; several were issued to DOE and not to the BJC; and at least one is an NOV that DOE is challenging.

DOE is correct that, in its extensive summary of these NOVs, JC itself made no effort to apprise the agency of any of this allegedly mitigating information. JC, on the other hand, has raised questions about whether this mitigating information on a DOE contract was too close at hand for the agency to ignore. See International Business Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. We conclude, however, that we need not discuss this issue further because the record shows that, even if the SEB had not evaluated JC's proposal as having any weakness at all for these NOVs, the UDS proposal's evaluated superiority would remain. UDS's proposal was evaluated as having a significant strength for its client performance ratings, as opposed to JC's strength in this area, and the UDS proposal was also evaluated as having a strength for its overall safety statistics. The SSO read the summary of the

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[14] Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, as is the case here, simply fill in previously unrecorded details, and will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. Jason Assocs. Corp., B-278689 et al., Mar. 2, 1998, 98-1 CPD ¶ 67 at 6.

NOVs provided in JC's revised proposal and considered their relative severity, Tr. at 87 (SSO), but made no reference to the issue of NOVs in his source selection statement. Instead, he focused on the differences between the offerors' client performance ratings in finding that the past performance criterion was a major discriminator in favor of the UDS proposal. SSS at 11. Moreover, even if the SSO had not found this criterion to be a discriminator at all, given the weight of the other discriminators in favor of the UDS proposal, and the relative insignificance of this criterion (worth 5 percent of the total technical and business management evaluation score), we cannot conclude that JC was prejudiced by any impropriety on the agency's part. Competitive prejudice is an essential element of every viable protest. Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5.

JC finally argues that DOE improperly failed to give it an opportunity to respond to adverse past performance information concerning COGEMA's performance of one of its contracts, citing the requirement that contracting officers point out deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3).

One of the past performance questionnaires DOE evaluated concerned COGEMA's performance as a member of the team awarded a DOE contract to design, construct, and operate a fuel fabrication facility. The response included no narrative, but rated COGEMA between average and exceptional in its performance, with [DELETED] ratings for the firm's [DELETED]. Citing this project, the SEB's technical advisers found that COGEMA had performed in a manner that met or exceeded expectations in all areas, including budget and schedule performance. Again, the SEB evaluated JC's proposal as having a strength for its client ratings and noted that its members had, overall, above average ratings. SEB Report at 76. In response to the SSO's request, the SEB contacted two additional DOE personnel associated with the project for their impressions of COGEMA's performance. One of these personnel stated that COGEMA was "highly" or "extremely" capable for various reasons, and another stated that the project had undergone notable overruns in cost and schedule due to [DELETED], but that COGEMA had been very cooperative, positive, and straightforward in working to resolve these problems. White Paper, "Summary Information Concerning the MOX Project at Savannah River."

We agree with DOE that there was no need to raise this information with JC because the agency did not consider it to be adverse. The SEB report does not even mention this contract and the SEB evaluated the proposal as having a strength for the responses received from its clients, including this response.[15] In any event, JC's

[15] There is no evidence to support JC's assertion that the SSO's comment regarding the risk of its technology transfer process must be related to this matter since, as discussed above, there was an independent basis for that conclusion.

statement that it "may have explained its past performance to demonstrate that the agency's view was unreasonable," Supplemental Protest at 24, is insufficient to show that its standing might have improved even if DOE had raised this matter with the firm.

EVALUATION OF COST PROPOSALS

JC argues that DOE arbitrarily added $[DELETED] million in disposal costs to its cost proposal and improperly discounted its proposed revenue streams.

Where an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs of performance are not dispositive, since, regardless of the costs proposed, the government is required to pay the contractor its actual and allowable costs. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 3. Accordingly, a cost realism analysis must be performed when a cost-reimbursement contract is contemplated in order to determine the probable cost of performance for each offeror. FAR § 15.404-1(d)(2). A cost realism analysis is the process of independently reviewing and evaluating elements of each offeror's proposed cost estimate to determine whether the proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the methods of performance and materials described in the offeror's technical proposal. FAR § 15.404-1(d)(1). Our review is limited to determining whether an agency's cost realism analysis was reasonably based and not arbitrary. NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 7.

Disposal Costs

If neither DOE nor the contractor identified a market for the DUF_6 conversion products or the empty cylinders, these materials were to be processed, packaged, and certified to meet the waste acceptance criteria at the federal disposal facility or at another licensed low-level waste (LLW) repository. SOW § IX.7. If the federal disposal facility was chosen, the contractor was to transport the material to that site and transfer the material to the operating contractor. If another licensed LLW facility was chosen, the contractor was to be responsible for all disposition actions. Id. The federal disposal facility is at DOE's Nevada Test Site (NTS) and, currently, the only viable commercially licensed private disposal facility is Envirocare of Utah. "Assessment of Preferred Depleted Uranium Disposal Forms" at 8, RFP web site at <www.oro.gov/duf6disposition.htm>.

Offerors were to provide proposed costs for the waste packaging, transportation, and disposal for each conversion product and waste. RFP § L.24(g)(4)(iv). For the sake of uniformity, DOE required offerors proposing to use NTS as the disposal site to use a disposal fee of $9 per cubic foot ($9/ft^3). Id.

In its proposal, JC stated that its options for LLW disposal included [DELETED] and [DELETED]. The firm explained that it had examined the life-cycle costs of disposal at each facility and, based on its analyses, "plan[ned] to dispose of LLW at [DELETED]" based on the substantial savings that could be achieved based on its [DELETED]. JC Oct. 1, 2001 Revised Proposal, Vol. II, at II-91. JC stated it was aware of activities at [DELETED] that might decrease transportation and disposal costs at that site, and would reevaluate its disposal options upon award and at the start of conversion operations to determine the most cost-effective disposal option. Id. at II-89a, II-91, II-107. Notwithstanding its stated "plan to dispose of LLW at [DELETED]," the firm's cost proposal stated that it would use the rate reflected in [DELETED]. JC Oct. 1, 2001 Revised Cost Proposal, Book 1, at III(g).1-33. Again, this rate was provided for offerors opting for [DELETED] as the disposal site.

By letter dated October 19, DOE acknowledged JC's proposal to use [DELETED] and stated, "The tipping fee in the revised proposal is $[DELETED], which is the [DELETED] rate. The 'debris' tipping fee for [DELETED] is $[DELETED], which is the rate charged in [DELETED]. Why is the [DELETED] rate used?" Oct. 19, 2001 Discussions Letter at 2, Question No. 8.

In response, JC said it elected not to enter into a contract for disposal with [DELETED]. The firm explained that [DELETED] had indicated it would provide a disposal price that, when combined with [DELETED] costs, would be less than the price to transport to and dispose at [DELETED], assuming the [DELETED] rate was $[DELETED]. JC asserted its belief that [DELETED] would be willing to provide a more viable price as [DELETED] rates continued to decrease or remain low, and that it would be in DOE's best interest for it to establish disposal contracts at both sites. JC said it used the disposal rate in the RFP as its basis for estimate for disposal at either site. The firm added that waste disposed of at [DELETED] would not be designated as "debris," but would be placed, in its container, within the [DELETED]. JC Oct. 26, 2001 Responses to Discussions at 14. The protester provided no evidence of [DELETED] indication of a more favorable price; no evidence that its waste would be placed in [DELETED] designation; and no rate of any kind from [DELETED], including one associated with this [DELETED] designation. In addition, JC answered DOE's question regarding its transportation costs to dispose of the waste by providing a cost based on [DELETED]. Id. at 18.

The protester's FPR said that it had approved profiles for disposal of $U_3 0_8$ at [DELETED] and that [DELETED] had reviewed its profiles and approved the waste for disposal. JC FPR, Vol. II, at II-82c. However, while the firm reiterated its plan to reevaluate its disposal options upon award and at the start of conversion operations, the firm specifically stated that its "chosen LLW disposal site" was [DELETED]. Id. at II-106, II-107. Notwithstanding the fact that its "chosen LLW disposal site" was [DELETED], the firm's cost proposal based its estimated disposal cost on the RFP's estimate of $[DELETED] for the use of [DELETED]. Id. at III(g).1-24.

The SEB report contained an extensive discussion of the different approaches offerors took for disposing of the material resulting from conversion operations and other miscellaneous wastes and of the impact of these differences on their relative costs. SEB Report at 87-90. Again, JC proposed to wash the empty cylinders, modify them, and reuse them as product packaging containers for both the conversion product solids and the cut-up pieces of other cylinders for disposition at its "chosen LLW disposal site," [DELETED]. In contrast, UDS proposed to [DELETED], to compact the cylinders [DELETED], and to dispose of the resulting material at [DELETED]; UDS proposed to ship the conversion product solids in [DELETED] to [DELETED].

The SEB stated that disposal costs for both offerors were based on [DELETED] rates for "soil-like" wastes and "debris," respectively. The proposed disposal rate for UDS's [DELETED] was that applicable to "soil-like material," and UDS would be charged the higher "debris" rate for disposal of the [DELETED]. The SEB stated that the disposal rate for the conversion product at [DELETED] proposed by JC was $[DELETED] based on [DELETED] rates, and noted that DOE had questioned the rate during discussions but the firm responded by stating it believed it could obtain a rate comparable to the [DELETED] rate from [DELETED]. SEB Report at 89. DOE evaluated this rate as being too low, and estimated the probable disposal cost for JC using the higher "debris" rate, for an upward adjustment of $[DELETED] million. Id. at 89-90.

JC argues that DOE arbitrarily rejected its cost strategy and, instead, irrationally used the highest cost option--the "debris" rate from [DELETED]--as its probable disposal rate. The protester asserts that it was irrational to use the debris rate when it stated that its waste would not be designated as debris but would be placed within [DELETED] designation.

The record does not show that DOE rejected JC's approach but, rather, that the firm did not provide sufficient information to permit the agency to evaluate its proposed disposal costs as its most probable disposal costs.[16] JC's "chosen LLW site" was [DELETED], but it used the rate provided for [DELETED] without providing any support for its assumption that [DELETED] would provide a comparable rate and, in fact, without providing any rate at all for disposal at [DELETED]. JC stated its waste would not be treated as "debris" but would be placed within [DELETED], but the firm provided no supporting documentation of this new designation, no evidence that its waste would fall within that designation, and no corresponding rate for that

[16] In our view, DOE's October 19 discussions question put the firm on notice that DOE was concerned about its "strategy" to use [DELETED] as its disposal site while providing a disposal rate applicable to the use of [DELETED].

designation.[17] Under the circumstances, we cannot fault DOE for its decision not to rely upon the firm's proposed disposal costs.

We are not persuaded by JC's argument that DOE's choice to base its adjustment of its costs on the Envirocare rates was irrational when there was an available lower cost alternative, NTS, whose use would be consistent with its strategy to minimize costs associated with waste disposal. JC specifically stated that its "chosen LLW site" was Envirocare, and provided transportation costs based upon that site. DOE correctly asserts that it would have been inappropriate to rewrite JC's proposal to shift disposal sites. Any methodology used by an agency to analyze costs must only be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency from its own and outside sources. See Radian, Inc., B-256313.2, B-256313.4, June 27, 1994, 94-2 CPD ¶ 104 at 7. Under the circumstances, we find DOE's actions to be reasonable.

JC finally argues that DOE arbitrarily used the higher "debris" rate when evaluating its proposal but used the lower "soil-like" rate when evaluating the UDS proposal. We do not agree. As noted above, the offerors used different approaches. UDS proposed to dispose of its conversion product in [DELETED] at the "soil-like" rate, and JC proposed to dispose of its conversion product in the steel cylinders themselves, without providing any rate. [DELETED] waste acceptance guidelines define compactable soil as having a graded material that will pass through a 4-inch size-grading device and as having a specified bulk density. [DELETED]. The guidelines define "debris" as any radioactive waste for disposal other than soil, including such things as metal. Id. JC, which proposed to dispose of its waste within large, modified steel cylinders, has made no persuasive argument that these steel cylinders fall under the definition of "soil-like" materials and, in fact, did not propose to use the lower "soil-like" rate.[18] JC's assertion that UDS's conversion product does not qualify for the "soil-like" rate is unaccompanied by any dispute of the part of UDS's proposal analyzing the firm's proposed disposal costs in support of its position.[19] As a result, we have no basis to question DOE's adjustment to JC's proposed disposal costs or its acceptance of UDS's proposed disposal costs.

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[17] JC's provision, in its comments, of information dated November 2002 concerning this new designation was not provided in its proposal and contains none of the information, such as rates, that DOE required for a proper evaluation.

[18] Another offeror who planned to reuse the cylinders as conversion product containers negotiated a contract with [DELETED] for disposal at the "debris" rate.

[19] The main difference between the two forms of material is how they are handled in the disposal cell, since "soil" can be disposed of directly by placing it into [DELETED] and [DELETED] it, whereas debris requires additional processing before disposal. [DELETED]. UDS proposed to place the U_3O_8 product in the [DELETED]

(continued...)

Proposed Revenue Stream

JC argues that DOE arbitrarily reduced its proposed revenue stream from the sale of natural feed equivalent UF_6. The firm's proposal included [DELETED], the process of [DELETED] with assays of a certain concentration and selling the [DELETED] materials to [DELETED]. DOE found that JC had a "soft commitment," as opposed to a signed contract, for these purchases and, based on the speculative nature of the transaction, assessed the probability of success at 30 percent and reduced the proposed revenue accordingly. SEB Report at 92-93.

The RFP required offerors to provide "sufficient detail for proposed revenue from sale of byproduct to permit DOE to evaluate the reasonableness and cost realism of the proposed revenue," and indicated that "consideration [would] be given to the extent that viable end product use/reuse [was] proposed by the offeror" in connection with the technical proposal.[20] RFP §§ M.2(a)(1), L.24(g)(4)(v). However, the RFP did not provide that proposed revenue streams would be deducted from an offeror's proposed costs. AR at 79; see SSS at 11. Moreover, JC's own proposal supports DOE's conclusion that the proposed revenue was speculative. The firm explained that the economics associated with the reuse of [DELETED] for [DELETED] has changed and "will continue to change over time," JC FPR, Vol. II, at II-72a, and goes on to discuss various conditions under which the [DELETED] could be sold, including a scenario where zero revenue would result. Id. Under the circumstances, JC has given us no basis to find DOE's evaluation unreasonable.

SOURCE SELECTION DECISION

JC argues that the SSO improperly "overturned" several of the SEB's conclusions and that his source selection decision was otherwise irrational.[21]

(...continued)
and [DELETED] it to a specified density. UDS Sept. 28, 2001 Revised Proposal, Vol. II, at C-90.

[20] JC's proposal was evaluated as having a strength for its approach to end product use/reuse. SEB Report at 41.

[21] JC's argument that the SSO's assignment and use of discriminators always favored UDS and always diminished JC relies upon mere point-score differentials. As noted below and as evident throughout this decision, point scores do not mandate automatic selection of a particular proposal. Grey Adver., Inc., B-184825, May 14, 1976, 76-1 CPD ¶ 325 at 9. Here, the SSO properly relied not upon mere point scores, but upon the written narrative justification underlying those point scores in making his source selection decision.

Citing the scant point differences between the two proposals, JC argues that the SSO improperly eliminated its evaluated advantages under the business management, ES&H, and experience criteria by "overturning" the SEB's findings and concluding that the UDS proposal was superior to its proposal under the business management criterion, and that the two proposals were substantially equal under the ES&H and experience criteria.

Point scores and adjectival ratings are only guides to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12; Grey Adver., Inc., supra. Those officials have broad discretion in determining the manner and extent to which they will make use of not just the point scores or adjectival ratings, but the written narrative justification underlying those technical results, subject only to the tests of rationality and consistency with the evaluation criteria. Development Alternatives, Inc., B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54 at 9; Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364 at 4. Where, as here, higher-level officials determine that the lower-level evaluators' ratings do not reflect the actual technical differences in proposals and the award is protested, the agency must show that its ultimate determination is reasonable, with sufficient detail to permit our Office to review the determination for reasonableness. KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ __ at 11; Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6. A source selection official's failure to specifically discuss every detail regarding the relative merit of the proposals in the selection decision document does not affect the validity of the decision if the record shows that the agency's award decision was reasonable. Development Alternatives, Inc., supra.

The SSO provided a detailed written analysis supporting his findings based, not on the offerors' point scores, but on the SEB's narrative discussion supporting those point scores, additional written and oral information provided by the SEB, and both offerors' technical and business management proposals. While JC argues that this analysis ignored certain strengths in its proposal identified by the SEB, it largely points to certain areas where its proposal received an additional or different strength not shared by UDS, or to certain areas where its proposal received slightly higher point scores, without persuasively explaining why these differences represent actual technical superiority; in our view, this amounts to mere disagreement with the agency's evaluation which does not render it unreasonable. KPMG Consulting LLP, supra. By way of example, we discuss below JC's arguments concerning the business management and experience criteria.

Under the business management criterion, the SEB rated JC's proposal "outstanding," with a score of 137, and rated UDS's proposal "good," with a score of 132. SEB Report at 63. Each proposal was evaluated as having a significant strength for certain key personnel and a strength for certain other key personnel; both proposals were evaluated as having a strength for their organizational structures.

The SEB rated JC's proposal highest based primarily on its strong key personnel, which included a strong [DELETED] with combined relevant experience considered to be good in large project delivery and excellent in uranium processing operations. The SEB also noted that the firm's proposed team included several other strong key personnel, most notably the process integrity manager and process engineering manager, who together would be responsible for the transfer of technology, and the three-site cylinder integration manager, who is performing this role in his current position. SEB Report at 63. The SEB rated the UDS proposal only slightly lower, and noted that it displayed strengths in several strong key personnel and a notably straightforward and efficient organization. The SEB found that UDS's proposed design/engineering manager was exceptionally strong in uranium processing and conversion design; its proposed project manager was also strong, with broad-based, good experience in large project delivery, operations, uranium processing, and demonstrated project leadership; and that several other key personnel were also strong and particularly well-suited for their roles. Id. at 64.

The SSO acknowledged the distinction drawn by the SEB but disagreed with its relative ratings. The SSO found the overall team of UDS key personnel to be the strongest, with particular strengths in its proposed project manager, design/engineering manager, and operations and maintenance manager. The SSO stated that the UDS project manager had "the best overall relevant experience to enable him to manage all aspects of the project, with good experience in the design and construction of large processing facilities, broad program management experience focusing on waste management systems, good experience in uranium processing, and demonstrated good leadership capability." SSS at 9. The SSO also stated that UDS's design/engineering manager had "excellent relevant experience as the inventor and designer of the proposed dry conversion process used in all of Framatome's currently operating conversion plants." Id. at 9-10. The SSO noted that JC proposed a [DELETED] with complementary areas of expertise. He stated that this was a reasonable approach to matching their skills, but found it to be less favorable than the streamlined management and accountability provided by UDS's [DELETED]. He explained that, in addition to the strength of the UDS key personnel team, UDS's proposed organization was more effective than JC's, permitting better accountability for the project. As a result of these distinctions, the SSO explained, he found that UDS was stronger than JC under this criterion and concluded that it was a major discriminator between the two proposals. Id. at 10

JC argues that the SSO's praise of UDS's project manager, design/engineering manager, and operations and maintenance manager improperly failed to analyze its equivalent key personnel, whom the SEB evaluated at least as favorably as their UDS counterparts. The protester complains that the SSO did not even mention the SEB's evaluation of its [DELETED], which was evaluated as superior to the UDS [DELETED], and ignored its process engineering manager, who was evaluated as having a significant strength.

Again, there is no requirement that a source selection official restate each of an offeror's strengths when comparing proposals, and nothing unreasonable about the decision to not elevate any of these strengths to the selection decision. Medical Dev. Int'l, supra. The SSO reviewed the SEB's findings in full as to both offerors' key personnel, and concluded that UDS had the stronger team, placing particular emphasis on its leadership team. Since the offerors had different approaches to staffing key personnel positions, and different numbers of key personnel, a mere count of how many key personnel received strengths or significant strengths has little meaning. In any event, outside of leadership positions, both offerors had three key personnel evaluated as having significant strengths.

The SEB evaluated each offeror's leadership personnel for project leadership and for three considerations bearing on their relevant experience: large project delivery, operations, and uranium processing. SEB Report at 112-114. JC proposed a [DELETED] comprised of a [DELETED]. The [DELETED] was considered to have acceptable project leadership, operations experience, and uranium processing experience, and was considered a strength for his large project delivery experience and overall. The [DELETED] was considered to be a significant strength for his project leadership, operations experience, and uranium processing experience; a weakness for his large project delivery experience; and a strength overall. On the other hand, UDS proposed a [DELETED], who was considered to be a strength in every area of consideration and overall. After considering the SEB's findings as to each of these personnel, the SSO clearly found the UDS key personnel team to be the strongest and provided his rationale to support this finding. JC has not shown that the SSO's judgment was unreasonable.[22]

JC also argues that the SSO's consideration of the relative effectiveness of the two offerors' management structures failed to consider the SEB's finding that its organizational structure was "direct, efficient, and appropriate for accomplishing the SOW, with unambiguous areas of authority and roles and responsibilities well defined." SEB Report at 66. There is no evidence that the SSO did not consider this strength in the firm's proposal. However, the SSO also considered the SEB's evaluated strength for UDS's organizational structure in which the SEB stated that the firm's organization was "straightforward, flat, and efficient, and should be effective in accomplishing the SOW." Id. Moreover, in summarizing its views, the SEB took care to highlight a distinction between the two proposals, noting that UDS had a "a notably straightforward and efficient organization." Id. Under the circumstances, JC has given us no basis to conclude that the SSO unreasonably

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[22] The SSO's conclusions are also consistent with the SEB's views. One SEB member said that UDS's project manager seemed to be closest to the "ideal 'all-in-one' all-around solid 'done-it-all' well project manager who is well experienced in the project delivery and operational areas," SEB Member Comments at 9, and three members expressed concern that JC's program manager was not really in charge. Id. at 1, 6, 9.

judged that the UDS proposal was superior and that the differences between the two proposals amounted to a major discriminator in favor of the UDS proposal.

Under the experience criterion, the SEB rated both proposals "outstanding," assigning the UDS proposal 94 points and the Jacobs COGEMA proposal 98 points; both proposals were evaluated as having a significant strength for the collective experience of the members of their respective LLCs. The SEB explained that both offerors demonstrated outstanding strength in relevant experience for accomplishing the SOW, and that, while each offeror brought different experience to its proposal, there were no major distinctions between the proposals with regard to government and commercial experience. SEB Report at 71. The SEB scored the JC proposal highest based on the 16-year experience of COGEMA in the design, construction, and operation of its DUF_6 conversion W plant in France and Jacobs' outstanding experience in the delivery of major projects including design, construction, and project management. Id. The SEB rated the UDS proposal "somewhat lower" but also outstanding, explaining that its team brought the outstanding UF_6 conversion technology transfer experience of Framatome, including design, construction, and conversion operations; the waste management and disposition experience of Duratek, and the engineering, procurement, and construction experience of Burns and Roe. Id.

The SSO acknowledged the SEB's slightly higher score for the JC proposal, but found the proposals to be "substantially equal." SSS at 10. The SSO went on to discuss, in detail, the "excellent" experience of the UDS team and the "extensive" experience of the JC teaming partners. Id. JC's argument that the SSO ignored the reason for its higher score--its 16 years of experience with the W plant--is without basis. The SSO did not ignore this experience but specifically referenced it in finding the two proposals substantially equal. The SSO's conclusion is in consonance with the SEB's statement that, "[w]hile each offeror brings different experience to its proposal, there are no major distinctions among proposals with regard to government and commercial experience." SEB Report at 71.

The record does not support JC's remaining allegations regarding the source selection decision. We have found that the SSO reasonably concluded that UDS submitted the superior technical proposal, based upon his consideration of the proposals' relative merits. The SSO also found that UDS's probable cost and its combined probable cost and maximum fee for the contract period were lower than those of JC, and that, for the post-contract period, UDS's NPV probable cost was also lower than that of JC.[23] He acknowledged that the offerors proposed potential

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[23] Citing an analysis performed by the SEB based on a cost-per-kilogram of DUF_6 processed, JC asserts that its proposal was equal to or lower in cost than the UDS proposal, depending on the scenario used, and that the SSO failed to conduct a cost/technical tradeoff analysis. While the SEB may have performed this analysis,
(continued...)

revenues from the sale of conversion products and by-products, but stated that there was uncertainty associated with obtaining these revenues for reasons external to the offerors, and that the RFP's evaluation criteria did not indicate that potential revenues would be deducted from probable costs. Further, he explained that, if probable revenues were considered as an offset to total probable cost and fee for the contract period, UDS's costs would be slightly higher than those of JC, but if probable revenues were considered as an offset to total probable NPV cost for the post-contract period, UDS's costs would be lower than those of JC. In any event, the SSO concluded that "[i]f probable revenues are considered as an offset to probable cost, I find that the potential savings in the contract period do not sufficiently offset the advantage of the overall superior proposal of UDS." SSS at 11-12. Considering this specific finding, and the RFP's emphasis on superior technical and business management performance over lower costs, we find that the SSO's rationale for not giving more weight to offerors' proposed revenues was sufficient.

The protests are denied.

Anthony H. Gamboa
General Counsel

(...continued)
the RFP's requirement to arrive at a most probable cost for each proposal is not premised upon this type of analysis. The fact that the SSO did not rely upon this analysis is unobjectionable.