



Comptroller General
of the United States

45486

Washington, D.C. 20548

Decision

Matter of: EER Systems Corporation

File: B-256383; B-256383.2; B-256383.3

Date: June 7, 1994

David R. Hazelton, Esq., and Minh N. Vu, Esq., Latham & Watkins, for the protester,
Arthur I. Leaderman, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Swales & Associates, Inc., an interested party,
Walker L. Evey, Esq., National Aeronautics and Space Administration, for the agency,
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) denies access to protective order to three experts, even though it is not clear that granting these experts access would pose a major risk of inadvertent disclosure of protected material, where the protected material is undeniably very valuable, such that any inadvertent disclosure might cause competitive harm to the awardee, and where GAO can fairly and reasonably resolve the specific protest issues without the need for the protester's experts.
2. An agency reasonably established a competitive range of one proposal where the excluded proposal was substantially inferior in demonstrating an understanding of the solicitation's technical requirements and where there was no appreciable cost difference between the two proposals to justify the inclusion of the technically inferior proposal in the competitive range.
3. There is no obligation to conduct discussions with an offeror whose proposal was reasonably eliminated from the competitive range.

DECISION

EER Systems Corporation protests the proposed award of a contract to Swales & Associates, Inc. under request for proposals (RFP) No. 5-33386/229, issued by the National Aeronautics and Space Administration (NASA), for mechanical

systems engineering support services for the Mechanical Systems Division of the Goddard Space Flight Center. EER contends that its proposal was improperly eliminated from the competitive range.

We deny the protest.

I. BACKGROUND

The RFP, which was set aside for small business concerns, contemplated the award of a cost-plus-award fee, level-of-effort contract for a 5-year base period, plus two 1-year options. The RFP basically required mechanical engineering systems services for the simulation, research, and development of spacecraft mechanical systems. The types of tasks encompassed by this effort were defined with particularity in the RFP statement of work (SOW) in 13 separate job categories. These job categories were: (1) Structural Design and Analysis; (2) Thermal and Contamination Control Engineering; (3) Optical Design and Analysis; (4) Attitude and Control Design and Analyses; (5) Electrical Engineering; (6) Systems Analyses; (7) System Safety Analyses; (8) Documentation and Configuration Control; (9) Training; (10) Hardware Fabrication and Testing, Inspection, Assembly and Integration; (11) Parts Program; (12) Performance Assurance Requirements; and (13) Communications. Each of the systems engineering job categories contained several subcategories, and the SOW described in detail the analytical, research, or development endeavors required by each. The SOW emphasized that the performance of all tasks depended upon a complete knowledge and understanding of spacecraft systems.

The RFP established a best value evaluation scheme based upon the application of four evaluation criteria: Mission Suitability, Cost/Price, Relevant Experience and Past Performance,¹ and Other Considerations.² Under the

¹The Relevant Experience and Past Performance factor included four subfactors: Experience, Technical Performance, Schedule Performance, and Cost Performance. The evaluation was based upon relevant prior contract information furnished by the offeror, and any other information that might be available within NASA, other governmental agencies and non-governmental organizations.

²The Other Considerations factor was a residual category for concerns not encompassed by the other evaluation factors. There were 9 "Other Considerations" stated in the RFP: (1) Financial Condition and Capability, (2) Business Systems, (3) Scope and Impact of Deviations and Exceptions
(continued...)

evaluation scheme, Mission Suitability and Cost/Price were of essentially equal importance and were more important than the other two criteria, which were also of essentially equal importance.

The Mission Suitability factor measured the offeror's technical ability and management resources, and was to be addressed in a 150-page technical proposal. The RFP provided for a 1000-point proposal evaluation under the Mission Suitability factor, as divided between the following subfactors and elements:

<u>Mission Suitability</u>	<u>Points</u>
Subfactor A) Understanding the Requirements	500
Element A-1 Overall Understanding	(150)
Element A-2 Sample Problems/ Demonstration Tasks	(250)
Element A-3 Professional Compensation	(100)
Subfactor B) Project Management & Resources	500
Element B-1 Overall Capability	(150)
Element B-2 Personnel	(350)
	<u>1,000</u>

Two Mission Suitability elements--Overall Understanding and Sample Problems--tested the offeror's comprehension of the RFP technical requirements. The Overall Understanding element required the offeror to demonstrate its comprehension of each discipline described in the SOW job categories and subcategories, and to discuss its proposed approach to performing the tasks encompassed by each. The Sample Problems element required the offeror to respond to each of four demonstration tasks described in Section L of the RFP. The demonstration tasks were designed around a particular astronautics problem to gauge the offeror's comprehension of thermal and contamination engineering, mechanical/structural analysis, systems analysis of a scientific instrument, and mechanism control and electronics development. The RFP advised that the demonstration tasks were hypothetical in nature, but typical of what the offeror might expect under this contract. A demonstration of the offeror's ability to perform such typical tasks was "mandatory" under the terms of the RFP. The required

²(...continued)

to Contract Terms, (4) Compliance with RFP, (5) Incentive Approach to Award Fee, (6) Phase-In Plan, (7) Labor Management Relations, (8) Stability of Work Force, and (9) Pension Program Requirements.

response was to include a detailed work plan that stated all the necessary engineering activities, analyses, and technical descriptions, and was to clearly convey the offeror's ability to understand the problem and to perform the task.

The remaining Mission Suitability elements probed the offeror's ability to obtain and retain qualified personnel (Element A-3, Professional Compensation), the offeror's ability to manage the contract (Element B-1, Overall Capability), and the qualifications and experience of the offeror's proposed personnel (Element B-2, Personnel). With respect to the personnel evaluation, the RFP asked the offeror to identify the employees it was proposing to fill the positions required under 21 personnel categories, and to furnish those employees' resumes. The agency would determine whether the proposed employees were qualified to perform by comparing their resumes against the applicable position qualifications set forth in the RFP.

The RFP advised that point scores would not apply to the remaining evaluation criteria. Specifically, the agency used an adjectival rating scheme to evaluate offerors' Business Management proposals under the Relevant Experience and Past Performance and Other Considerations factors. For the Cost/Price evaluation, the RFP required the agency to evaluate cost proposals to determine the realism of the proposed costs and to determine the probable cost to the government.

The RFP requested proposals by September 13, 1993, and stated that the government intended to conduct discussions with all offerors submitting proposals within the competitive range. Two offerors, EER and Swales, submitted initial proposals by the proposal receipt date. EER's proposed cost was approximately \$258 million, 6 percent lower than Swales's proposed cost of approximately \$275 million. The two proposals were forwarded to a technical evaluation panel (TEP) and a business management panel (BEP). The TEP evaluated the offerors' Mission Suitability proposals, the BEP evaluated the Cost/Price proposals, and both panels jointly evaluated the Business Management proposals.

The panels used the evaluation methodology contained in NASA's Streamlined Acquisition Handbook and Mini-Source Evaluation Board Handbook, which established adjectival ratings of "excellent," "very good," "good," "fair," or

"poor" to measure a proposal's merit.' For the Mission Suitability evaluation, the TEP was also to agree on a numerical score within a given adjectival rating's point spread. Under the NASA handbook, a "poor" rating corresponded with no more than 30 percent of the points available under a Mission Suitability element; a "fair" rating, with no more than 50 percent of the points; a "good" rating, with no more than 70 percent of the points; a "very good" rating, with no more than 90 percent of the points; and an "excellent" rating, with better than 90 percent of the points.

Following its evaluation of initial proposals, the TEP assigned EER and Swales the following scores under the Mission Suitability factor:

	<u>Swales</u>	<u>EER</u>
Understanding the Requirements		
A-1 Overall Understanding	143	30
A-2 Sample Problems/ Demonstration Tasks	225	75
A-3 Professional Compensation	<u>60</u>	<u>60</u>
	(428)	(165)
Project Management & Resources		
B-1 Overall Capability	120	60
B-2 Personnel	<u>315</u>	<u>210</u>
	(435)	(270)
TOTAL	863	435

As illustrated by the point scores, the most marked difference between the two proposals occurred under those elements testing the offeror's comprehension of the RFP technical requirements, Overall Understanding and Sample Problems. Under both elements, EER's proposal was considered "poor," whereas Swales's overall understanding was considered "excellent" and its response to the sample problems was considered "very good." Under the two Project Management elements, Overall Capability and Personnel, Swales's proposal was considered "very good," as compared to EER's "fair" rating for overall capability and its "good" rating for personnel; both proposals were considered "good" under the Professional Compensation element. In terms of their consolidated Mission Suitability scores, EER's proposal was in the "fair" range overall (435 points), and Swales's was in the "very good" range overall (863 points). Both proposals were considered acceptable.

³NASA does not include an "unacceptable" rating in its evaluation handbook; thus, the lowest rating that the TEP could assign a proposal under any evaluation element was "poor."

The TEP generated proposed discussion questions for both offerors to address those proposal weaknesses deemed susceptible to correction, and forecasted the likely increase to the offerors' scores, assuming a satisfactory response to the proposed discussion questions. The TEP predicted that Swales might be able to improve its overall Mission Suitability score to 899 points, just below the "excellent" range, and that EER might be able to improve its score to 528 points, within the "good" range. However, the TEP doubted that EER could meaningfully improve its proposal under those elements testing the firm's understanding of the RFP technical requirements (Overall Understanding and Sample Problems); no more than a 13-point increase was expected overall. The TEP anticipated that discussions would mainly benefit EER under the Overall Capability element, where a 45-point increase was projected, and under the Personnel element, where a 35-point increase was projected.

Swales enjoyed only a slight advantage over EER under the Relevant Experience and Past Performance⁴ and the Other Considerations⁵ factors. EER surpassed Swales only under the Cost/Price factor, with an evaluated probable cost approximately 3 percent lower than Swales's. EER's probable cost was evaluated as approximately \$272 million, representing an upward adjustment of \$14 million from its proposed cost of \$258 million.⁶ Swales's probable cost was

⁴Swales's overall rating for Relevant Experience and Past Performance was very good, which represented, at the subfactor level, 2 excellent ratings, 1 very good rating, and 1 good rating. In contrast, EER's rating for each subfactor was good--hence, an overall good rating.

⁵Swales received an overall very good rating under the Other Considerations factor, as compared to EER's overall good rating. At the subfactor level, Swales received 2 excellent ratings, 2 very good ratings, and 4 good ratings; EER received 1 excellent rating, 1 very good rating, 2 good ratings, and 3 fair ratings. One subfactor, Labor Management Relations, was deemed inapplicable, since neither offeror was using unionized personnel.

⁶On January 12, 1994, 3 weeks after the BEP completed its probable cost evaluation and 4 months after the initial proposal receipt date, EER notified the contracting officer that it intended to submit a revised cost proposal reducing its proposed cost by more than \$13 million "in the next few days." The contracting officer advised EER on January 13 not to submit the revised cost proposal, since the late proposal rules of Federal Acquisition Regulation (FAR) § 52.215-10 precluded the agency from considering a proposal
(continued...)

evaluated as approximately \$281 million, an upward adjustment of about \$6 million from its proposed cost.

The initial evaluation results were forwarded to the source selection official (SSO) for this procurement, who met with the Chairman of the BEP and the TEP, and other key personnel involved in the procurement on December 22. The purpose of this meeting was to determine the competitive range for this procurement, "recognizing that elimination of one offeror from the competitive range would be tantamount to selection of the remaining offeror." After reviewing and discussing the initial evaluation results, the SSO concluded that EER's proposal did not have a reasonable chance of being selected for award, stating:

"[t]he EER proposal's moderate cost advantage did not offset the very significant technical superiority of the Swales proposal. This technical advantage could not be overcome through discussions and best and final offers as evidenced by the great differences of the projected scores."

The SSO considered Swales's technical proposal to enjoy a "decisive advantage" over EER's technical proposal, in that it possessed many more strengths and far fewer weaknesses, and earned appreciably higher scores under four of the five Mission Suitability elements. Even if given an opportunity for discussions, EER could not correct this imbalance unless it "completely rewrote the Overall Understanding and Demonstration Tasks sections of [its] proposal."

The SSO observed that EER's proposed cost was "moderately lower" than Swales's, but that EER's probable cost, though it remained lower than Swales's following the respective probable cost adjustments (which the SSO blessed), did not amount to a "significantly discriminating" advantage. Nor did the SSO consider the proposals significantly distinguishable under the Relevant Experience and Past Performance factor or the Other Considerations factor. Because the two proposals were more or less equally rated

6 (...continued)

revision submitted after the initial proposal receipt date. EER did not protest this determination within 10 days of receiving the contracting officer's January 13 notification, but waited until it filed its comments on the agency report some 3-1/2 months later. Accordingly, EER's protest that the agency should have considered this anticipated cost reduction in making its competitive range determination is untimely under our Bid Protest Regulations and will not be considered. 4 C.F.R. § 21.2(a)(2) (1994).

under all evaluated factors, except for Mission Suitability, and because EER was not expected to approach Swales's significant technical superiority for that criterion, even with discussions, the SSO eliminated EER's proposal from the competitive range. This protest followed.

II. PROCEDURAL ISSUES

On February 18, 1994, during the course of this protest, our Office issued a protective order pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(d), which covered material designated as protected, including the offerors' proposals and the agency's evaluation documentation. Counsel for Swales and counsel for EER requested, and were granted, admission to the protective order on February 23 and received all protected material, including the proposals and the evaluation documentation.

On April 7, counsel for EER requested the admission of experts to assist in reviewing the technical evaluation of EER's and Swales's proposals, and furnished the applications and affidavits of three University of Maryland professors. We reviewed the applications and affidavits of the experts, Swales's arguments opposing the experts' admission, and EER's arguments supporting their admission, and concluded that we would not grant admission to these experts based upon the record before us. Of particular concern, two applicants were vice presidents of an engineering firm whose marketing activities Swales had shown coincided with its own, including in some of the disciplines encompassed by the RFP. The third applicant was currently conducting research at the Goddard Space Flight Center, where this contract will be performed, in a technology specified by this RFP. We invited counsel for EER to assuage our concerns, if possible, through the submission of additional arguments in support of these experts, or to propose new experts to assist in the preparation of its case.

On May 5, EER submitted protective order applications and supporting affidavits on behalf of three new experts, Dr. Wijesuriya P. Dayawansa, Dr. Yogendra Kumar Joshi, and Dr. Balakumar Balachandran, each of whom is a professor at the University of Maryland.⁷ In their affidavits, each

⁷The filing of these applications prompted Swales to file a request for injunctive relief in the United States District Court for the District of Columbia (Civil Action No. 94-1036). The court entered an order in this matter, which recognized Swales's and GAO's agreement that the proprietary information would not be disclosed to the experts until the lawsuit was resolved, although the GAO's consideration of the protest would otherwise continue.

expert furnished a list of academic research grants awarded through the University with which he had been involved in the last 2 years, and attested that these grants funded the only work performed by the expert other than his University teaching responsibilities. Counsel for EER designated each expert's grant list as protected material, and our Office invited Swales's counsel to provide written objections, citing appropriate legal authority, advising us why the grant lists should not be designated as protected. Swales's counsel failed to do so, and the grant lists remained subject to protective order coverage."

We received objections to each expert's admission from Swales, and a rebuttal to these objections from EER, as supplemented by further affidavits by the experts. Based upon our review of the experts' applications and affidavits, as well as the arguments by the parties, our Office denied the applications on May 26.

The denial reflected our policy of not providing individuals access to information protected by a protective order where the individuals are involved in competitive decision-making or where there is an unacceptable risk of inadvertent disclosure of the protected material. See U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). In considering the applications of experts to a protective order, our Office will consider and balance a variety of factors, including our Office's need for expert assistance to resolve the specific issues of the protest, the protester's need for experts to pursue its protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant, expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. See Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227; Matsushita Elec. Indus. Co., Ltd. v. United States, 929 F.2d 1577 (Fed. Cir. 1991); U.S. Steel Corp. v. United States, supra.

In this case, Swales objected to allowing the experts access to its proposal and the agency's evaluation of that proposal, including Swales's particular engineering approach to meeting NASA's requirements and its responses to sample engineering problems. Swales asserted, without rebuttal, that this material is highly proprietary and discloses Swales's unique engineering solutions and approaches, which it has developed in supporting NASA's needs. Swales

"Swales requested that we revoke the protective order privileges of EER's counsel because, among other things, counsel allegedly "embargoed" the experts' grant lists. We found no basis for doing so.

asserted that the disclosure of its highly sensitive and proprietary engineering approaches and solutions would be invaluable to any practicing engineer, including these University of Maryland professors, and thereby opposed each expert applicant. Swales stated that, while these expert applicants have not contracted to provide services to the federal government, they have received a variety of research grants, and their employer, the University of Maryland, has cooperated with Swales on various NASA engineering projects in a highly specialized competitive environment. Presumably, therefore, the University and these individuals may also work with firms that compete with Swales for contracts with NASA, which raised the risk of inadvertent disclosure of information learned from Swales's proposal.

From our review of the experts' applications and accompanying affidavits as well as Swales's and EER's arguments, it was not clear that granting these experts access to Swales's proprietary data posed a major risk of inadvertent disclosure. We were persuaded, however, that Swales's proprietary data is indeed very valuable and that any inadvertent disclosure might cause competitive harm to that firm, such that, on balance, we would only grant access to this data under our protective order if necessary to reach a fair and reasonable decision of the protest or if Swales did not object to the data's release. Our review of the protest record, including the pleadings of the parties and the agency, the evaluation documentation and the offerors' proposals, persuaded us that we could fairly and reasonably resolve the specific issues protested to our Office by EER without the need for the protester's experts. The technical issues raised by EER in its submissions basically concerned the significance attached to the weaknesses identified in its own and Swales's proposal-- issues that, in our view, could be reasonably addressed by the protester and reasonably resolved by our Office without testimony from the protester's experts. Consequently, we denied the applications of Drs. Dayawansa, Joshi, and Balachandran for access to the protective order.

III. DISCUSSION

This protest concerns the propriety of NASA's competitive range determination. EER generally protests that its proposal should have been included in the competitive range and been the subject of discussions because it was technically acceptable and offered the lowest cost. EER claims that, under such circumstances, NASA acted improperly in establishing a competitive range limited to a single proposal.

In a negotiated procurement, the purpose of a competitive range determination is to select those offerors with whom the contracting agency will hold written or oral discussions. FAR § 15.609(a); Everpure, Inc., B-226395.2; B-226395.3, Sept. 20, 1988, 88-2 CPD ¶ 264. The competitive range is to be "determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award." FAR § 15.609(a). Hence, even a proposal that is technically acceptable as submitted need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. Wordpro, Inc., B-242100.2, Apr. 24, 1991, 91-1 CPD ¶ 404; see Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. This "relative" approach to determining the competitive range, that is, comparing one offeror's proposal to those of other offerors, may be used even where it results in a competitive range of one. Everpure, Inc., *supra*; Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114. The evaluation of proposals and the determination of whether a proposal is in the competitive range are principally matters within the contracting agency's discretion, since agencies are responsible for defining their needs and for deciding the best method of meeting them. Advanced Sys. Technology, Inc.; Eng'g and Prof. Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153. Thus, it is not the function of our Office to evaluate proposals *de novo*, and while we closely scrutinize an agency decision which results, as in this case, in a competitive range of one, we will not disturb that determination absent a showing that it was unreasonable or in violation of procurement laws or regulations. Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273.

In this case, the major discriminator between the two proposals was in the demonstrated comprehension of the RFP technical requirements, as evaluated under the Overall Understanding and Sample Problems elements, where Swales's proposal was found to enjoy a decisive advantage that EER could not overcome even given the benefit of discussions. For the Overall Understanding element, under which EER's proposal was rated as poor, the TEP documented 20 major weaknesses, which it defined as weaknesses "so serious as to jeopardize performance of the contract." These major weaknesses--none of which the TEP believed could be corrected--derived from the fact that EER failed to discuss various explicit SOW work requirements, or included a response that was considered superficial, inaccurate,

obsolete, or impractical.⁹ For this element, there were also 21 minor weaknesses of a similar nature, only 2 of which the TEP believed were correctable. Against this array of weaknesses, EER's proposal admitted only one major strength, an approved Quality Assurance system, and 10 minor strengths, which reflected a fair understanding of a limited number of SOW technical requirements, but which did not offset EER's recurrent failure to convey an adequate understanding of the technical effort contemplated by the RFP. The TEP summarized that, "EER's lack of in-depth, detailed discussion of how they would perform the work, relying instead on a paraphrasing of the requirements, was a theme through this section of [EER's] proposal." In contrast, the TEP evaluated 25 major strengths, 21 minor strengths, no major weaknesses, and 7 minor weaknesses in Swales's "excellent" proposal under the Overall Understanding element.

Similarly, under the Sample Problems element, the TEP judged EER's proposal to suffer from 13 major weaknesses, only 1 of which was considered correctable, and 5 minor weaknesses, none of which was considered correctable. Again, EER's weaknesses stemmed from its omission of several major elements elicited by the sample problems, poor treatment of others, and from erroneous assumptions underlying its solutions.¹⁰ There were no major strengths and only 4 minor strengths in EER's response to the sample problems. As a result, the TEP concluded that the protester's

⁹By way of illustration, the TEP noted the following major weaknesses in EER's response to the SOW requirements: (1) under the Structural Design and Analyses job category, "[t]here was no narrative discussion on Mechanical Design and Mechanical Drawing Checking . . . [t]he information presented in the tables was cryptic and did not convey a strong understanding of how these areas relate to analysis"; and, (2) under the Electrical Engineering job category, "[EER] lumped instrument control system design with the spacecraft control system design as if they were the same problem."

¹⁰For example, the TEP noted the following major weakness in EER's response to the third demonstration task, entitled Systems Analysis of a Scientific Instrument:

"EER missed most systems analysis issues entirely. They provided a general description of systems engineering and project management for a typical instrument with very few specifics directed to this problem. Their description of what they would do in the various development phases was often incorrect."

demonstrated ability to perform some of the more typical tasks contemplated by the contract was poor. In contrast, the TEP evaluated 10 major strengths, 8 minor strengths, no major weaknesses, and 6 minor weaknesses in Swales's "very good" response to the sample problems.

EER has not specifically contested the substantive findings of the evaluation panel with respect to its sample problems responses or overall understanding responses. Rather, the protester characterizes the numerous weaknesses attributed to its proposal under these elements as informational deficiencies that it could have corrected through discussions. According to the protester, "[b]ecause NASA's priorities with regard to the various topics of discussion were not evident in the RFP, EER was unsure as to which topics should have been discussed more extensively." The protester claims that, "[i]f NASA had conducted discussions and had indicated which areas of EER's proposal required amplification," it would have been able to furnish any information that was omitted and to amplify any information that was deficient.

At the outset, we question EER's characterization of the weaknesses found in its proposal as "informational deficiencies." Under this RFP, proposals that merely discussed each required task, but did not provide a holistic approach to performing these tasks, could reasonably be found to reflect the offeror's lack of understanding of the complex and interrelated SOW technical requirements. A proposal like Swales's, which gave integrated, comprehensive responses to the specific tasks encompassed by these elements and thereby manifested a holistic and realistic engineering approach, would understandably receive much more credit than a proposal like EER's, whose multitudinous omissions in detail and analysis could logically be viewed as not reflecting a meaningful understanding of NASA's requirements.¹¹ Moreover, given that this contract primarily requires the contractor to grapple with the difficult engineering problems that emerge in the development and operation of spacecraft mechanical systems and to provide NASA with expert advice and alternate

¹¹For example, the TEP found that Swales's proposal for producing an integrated system design "provided a clear and concise overview of Project systems level development activities," whereas EER's proposal "offered no discussion of how each discipline affects and interacts with each other." Similarly, Swales's response to the first sample problem "provided an excellent, realistic approach to developing a packaging concept and conceptual thermal design approach," while EER's "conceptual thermal design was weak," and resulted in a response that was considered unrealistic.

solutions to resolve these problems, NASA could reasonably discount a proposal, such as EER's, that did not demonstrate insight and understanding in meeting the SOW requirements or in solving the sample problems. See Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16.

Notwithstanding that EER might have improved its Sample Problem and Overall Understanding responses if NASA had pointed out any erroneous, superficial, or omitted information, what was being evaluated under these elements was not whether the offeror could improve the problem areas in its proposal, but whether the offeror independently appreciated the technical requirements of the RFP. Had NASA discussed the numerous "informational" deficiencies and omissions in EER's technical discussion, NASA still would have had little assurance that EER could independently comprehend and satisfy the RFP technical requirements, thus defeating the primary purpose of the Sample Problems and Overall Understanding evaluation elements. Inasmuch as EER concedes that it was "unsure as to which topics should have been discussed more extensively," and would have been assisted had NASA "indicated which areas of EER's proposal required amplification," we think that the protester's initial proposal response was probably the most telling measure of EER's technical understanding. While the protester blames an alleged lack of guidance in the RFP for its deficiencies, we find the RFP most explicit as to the disciplines that must be addressed and the analyses that must be performed to convey the offeror's understanding of the requirements. Under the circumstances, we find that the agency reasonably determined that the weaknesses evident in EER's Sample Problem and Overall Understanding responses reflected a poor comprehension of NASA's requirements that could not be dramatically improved, even if discussions were conducted. See Modern Technologies Corp.; Scientific Sys. Co., B-236961.4; B-236961.5, Mar. 19, 1990, 90-1 CPD ¶ 301, recon. denied, B-236961.6, Aug. 15, 1990, 90-2 CPD ¶ 125; Syscon Servs., Inc., 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258.¹²

¹²In addition to its evaluation under the Overall Understanding and Sample Problems elements, EER has also protested its evaluation under the Personnel element, arguing that the TEP improperly relied upon outside information in assuming that three proposed EER employees had left EER's employment and were unavailable for performance of this contract. In our view, the TEP was reasonably concerned about the availability of these individuals, and would have directed a discussion question to EER to address this issue, had EER's proposal been included in the competitive range. However, since the

(continued...)

With respect to the evaluation of its cost proposal, EER protests that NASA improperly adjusted its proposed labor rates. The cost adjustments to EER's labor rates were made by the Defense Contract Audit Agency (DCAA), and adopted by NASA in its probable cost analysis. EER's proposed labor rates for each RFP labor category were based upon category average rates (standardized salaries that individuals in that labor category would earn). DCAA questioned these category average rates because they did not account for the actual salaries being earned by the named personnel in EER's proposal, and so adjusted EER's proposed labor rates. While EER protests that it was improper to assimilate the actual salaries into its proposed rates, EER has not alleged that the adjusted rates do not reflect the labor costs that it will actually incur by employing the named personnel in its proposal. Accordingly, we have no basis for concluding that the probable cost evaluation here was unreasonable. See NSI Technology Servs. Corp., B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344.

The protester asserts that NASA established the competitive range without accounting for EER's cost advantage, which it portrays as "substantial." In fact, EER's probable cost was only 3 percent lower than Swales's, and the SSO did consider it in establishing the competitive range, stating that "the relative cost position of each offeror with regard to the other was not significantly discriminating." We find this determination reasonable. Consequently, we have no basis to object to the agency's determination to compose a competitive range limited to a single proposal, since that proposal enjoyed a decisive technical advantage over the excluded proposal and did not appreciably differ from a cost standpoint. See American Sys. Corp., B-247923.3, Sept. 8, 1992, 92-2 CPD ¶ 158; StaffAll, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195.

EER protests that NASA should have rejected Swales's proposal as technically unacceptable because its discussion of the SOW technical requirements--for which the firm's proposal earned 143 of the available 150 points and an "excellent" rating--contained some informational omissions, as were noted by the TEP.

¹²(...continued)

exclusion of EER's proposal from the competitive range primarily stemmed from its poor technical comprehension, not its proposed personnel, we find that the alleged evaluation impropriety was immaterial. Similarly, the alleged miscalculation of EER's proposal under one of the Other Considerations subfactors (Business Systems) was not material to the competitive range determination, and need not be considered.

Swales's discussion of the SOW technical requirements contained 25 evaluated major strengths and 21 minor strengths, distributed among each of the 13 evaluated job categories. There were no major weaknesses noted in any of its responses, and only seven minor weaknesses, among them, the two informational omissions protested. Under the System Safety Analysis job category, the TEP found that Swales did not discuss all of the required structural safety documents, though its discussion fully satisfied the other System Safety Analysis requirements. Similarly, under the Hardware Fabrication job category, Swales did not discuss the special test and evaluation equipment needed to support the operation of the required mechanical hardware, although its discussion did satisfy the numerous other Hardware Fabrication requirements and, in fact, evinced two major strengths in doing so. In characterizing Swales's overall response to the SOW requirements, the TEP noted that the "minor weaknesses were of insignificant importance when compared with the overall requirement," which Swales had demonstrably mastered.

EER argues that, by omitting information relative to a negligible portion of the contract work, Swales's proposal violated the RFP requirement that offerors "individually address each element of the SOW," and should have been found technically unacceptable. This argument not only contradicts EER's defense of its own proposal, which contained far more omissions, but mischaracterizes the RFP as establishing a series of minimum requirements for evaluation purposes. In fact, the RFP contemplates a qualitative evaluation of the offeror's comprehension of the overall technical requirement, and allows the agency to consider the magnitude and significance of some shortcoming in the offeror's proposal. In this case, the limited omissions in Swales's proposal provided no basis for its rejection as technically unacceptable as the proposal otherwise addressed the extensive SOW requirements in a thorough and comprehensive fashion.

EER makes a related argument that Swales's proposal should have been found technically unacceptable because not all of its proposed personnel met the position qualifications set forth in the RFP. Of the 31 employees proposed by Swales for the 21 designated personnel categories, the TEP found that 7 employees did not fully meet the RFP experience requirements. EER argues that the position qualifications set forth in the RFP are mandatory minimum requirements that require the rejection of a proposal as technically unacceptable if one or more proposed employees fall short of such requirements.

Contrary to EER's allegations, we believe that the RFP gave offerors the latitude to propose individuals who did not precisely meet the position qualifications, and the agency the latitude to consider the significance of some deviation in a proposed employee's experience. The RFP states that the agency will evaluate the proposed personnel on their "technical capability and experience . . . as compared to the applicable position descriptions." The RFP notes that,

"[i]f a proposed individual does not meet all of the requirements set forth in the applicable position descriptions, the compensating factor(s) that make(s) the individual the 'right person for the job' will also be evaluated."¹³

This language invites offerors to exercise their best judgment in selecting suitable individuals for a designated position, and we do not believe that the agency could thereafter reject a proposal because an offeror did just that. In our view, NASA's personnel evaluation, which considered the appropriateness of an employee's experience "as compared to the applicable position descriptions," comported with the RFP evaluation scheme.

In this case, the TEP considered the deviations in the experience of seven proposed Swales's employees, concluded that the deviations amounted to minor weaknesses, and reduced the firm's personnel score accordingly. The TEP also considered the fact that Swales had proposed 17 individuals who exceeded the RFP education requirements and 7 employees who exceeded the RFP experience requirements. On balance, the TEP found that Swales had submitted a "very good" personnel proposal,¹⁴ and we have no basis to disagree with that conclusion. In addition, we note that, while EER has protested that Swales's proposal should have been rejected as technically unacceptable for personnel weaknesses, EER's proposal suffered from even more weaknesses in this regard, i.e., 11 of its 31 proposed

¹³Similarly, while Section H of the RFP requires contractor personnel to "satisfy, as a minimum, the applicable labor category qualifications," it conditions this requirement, "whenever in the opinion of the [c]ontractor it may be necessary to employ personnel who do not meet personnel qualifications and experience requirements." Under such circumstances, the contractor may be granted a waiver of the position qualifications by the contracting officer.

¹⁴The RFP also permitted the agency to evaluate "[t]he collective ability of the key personnel to operate as a team."

employees were found to possess experience "that was not relevant and did not meet RFP requirements."¹⁵

In any case, the record reasonably supports the agency's determination that Swales's proposal, notwithstanding its weaknesses, was substantially technically superior to EER's proposal, which displayed considerably less comprehension of NASA's requirements and would have required substantial revisions to be improved. The fact that Swales's proposal still contained some weaknesses or deficiencies that had to be corrected before award was consummated does not undermine the agency's determination to eliminate EER's proposal from the competitive range and to conduct discussions only with Swales.¹⁶ See FAR § 15.609(a), (b).

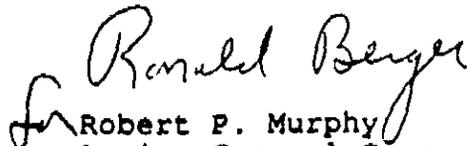
EER finally contends that the agency should have conducted cost discussions before making any adjustments to its cost proposal, and technical discussions with regard to the "informational" weaknesses in its technical proposal. However, FAR § 15.610(b) provides that the contracting officer shall conduct discussions with only those offerors who submit proposals within the competitive range. Since

¹⁵EER has protested that NASA underrated EER's proposed personnel and overrated Swales's proposed personnel, and that EER deserved a higher personnel score than Swales. The protester raised this specific issue in its comments on the agency report, which were filed more than 10 days after EER received the report and all the accompanying evaluation documentation necessary to establish this protest basis. Accordingly, the issue is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

¹⁶For the same reason, there is no merit to EER's contention that NASA was precluded from conducting discussions with regard to Swales's failure to include any subcontract cost information in its cost proposal, which the RFP required for any subcontracts expected to exceed \$500,000. Swales's technical proposal states that the firm has access to several "on-call specialty subcontractors . . . when and if needed," but the cost proposal omits any subcontract cost information because, "[a]ll proposed effort is attributable to the prime contractor, with no priced subcontracts." As EER notes, the TEP was "unclear as to whether [Swales] would in fact provide all the services required by the RFP." This ambiguity could properly be clarified during discussions--as the agency intends to do--and did not invalidate the probable cost evaluation, as Swales completed all RFP cost schedules.

EER's proposal was properly eliminated from the competitive range, there was no duty to conduct discussions with the protester. Dehler Mfg. Co., B-250850, Feb. 17, 1993, 93-1 CPD ¶ 152.

The protest is denied.


Robert P. Murphy
Acting General Counsel