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Comptroller General
of the United States

82683

Washington, D.C. 20548

Decision

Matter of: ABB Environmental Services, Inc.

File: B-258258.2

Date: March 3, 1995

C. Stanley Dees, Esq., E. Sanderson Hoe, Esq., and Susan Heck Lent, Esq., McKenna & Cuneo, for the protester.
Marcia G. Madsen, Esq., John E. Daniel, Esq., and Andrew D. Ness, Esq., Morgan, Lewis & Bockius, for Brown & Root Environmental, of Brown & Root, Inc., an interested party.
Cynthia S. Guill, Esq., Department of the Navy, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that source selection official for architect-engineer services failed to follow applicable source selection procedures is denied where the alleged violation--that after he determined that the source selection report was inadequate, he requested the evaluation board to withdraw it and explained orally the revisions he expected rather than rejecting the report outright and providing his reasons for doing so in writing--are deficiencies of form which do not effect the validity of the selection decision.

2. Protest that agency improperly determined that protester and awardee are equally qualified to perform architect-engineer contract is denied where the protester has only demonstrated his disagreement with the agency's conclusions and has not shown that those conclusions are unreasonable.

3. Procuring agency improperly used a factor that was not provided for in the solicitation--equitable distribution of work--to resolve a tie between offerors on an architect-engineer competition. Nevertheless, since the factor was applied equally to all offerors that were being considered for cost negotiations, and since it is implausible to believe that protester would not have competed if it had known that equitable distribution of work was to be used, but only to break a tie, the protest is denied because the protester was not prejudiced.

4. In determining the dollar volume of contract awards to be attributed to offeror for purposes of determining equitable distribution of architect-engineer (A-E) work, procuring agency reasonably considered only A-E contracts that had been awarded by the Department of Defense (DOD) to the offering entities, rather than all DOD contracts of any kind that had been awarded to all firms on which the offering entities relied to demonstrate their capability to perform the contract.

DECISION

ABB Environmental Services, Inc. protests the selection of Brown & Root Environmental, for negotiation of an architect-engineer (A-E) contract to provide comprehensive long-term environmental action for the Navy's (CLEAN) southern division under solicitation No. N62467-94-R-0888, issued by the Naval Facilities Engineering Command (NAVFAC). ABB asserts that the Navy failed to follow applicable selection procedures, improperly determined that ABB was not the most qualified offeror, used an unstated evaluation criterion to select Brown & Root, and improperly applied that unstated criterion.

We deny the protest.

BACKGROUND

Under the selection procedures set forth in the Brooks Act, as amended, 40 U.S.C. § 541 et seq. (1988) and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6, the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board established by the agency evaluates the A-E performance data and statements of qualifications on file as well as those submitted in response to the announcement of the particular project, and selects at least three firms for discussions. The evaluation board recommends to the selection official, in order of preference, the firms most qualified to perform the required work. Price/cost negotiations are held with the firm ranked first. If the agency and the firm are unable to agree on a fair and reasonable fee, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. See generally FAR subpart 36.6; ConCeCo Eng'g, Inc., B-250666, Feb. 3, 1993, 93-1 CPD ¶ 98.

The solicitation for CLEAN III services[1] for Naval and Marine Corps sites in 26 states in the Navy's southern division was synopsized in the Commerce Business Daily (CBD) on March 17, 1994. The synopsis set forth the Navy's intent to award an indefinite quantity, cost-plus-award-fee contract, for a base year with 9 option years. The synopsis invited interested offerors to submit a completed standard form (SF) 254 (A-E and Related Services Questionnaire) and SF 255 (A-E and Related Services for Specific Project Questionnaire) on which firms provide their qualifications. The CBD notice stated that firms submitting qualification statements would be evaluated under the following criteria, listed in descending order of importance:

1. Qualifications and Technical Competence
2. Experience
3. Performance
4. Capacity
5. Location

Nineteen firms responded to the announcement. The information submitted by the firms was reviewed and five firms, including ABB, IT Corporation, and Brown & Root Environmental were selected to be interviewed and ranked by the evaluation board. After the evaluation board reviewed the data submitted by the five firms and interviewed them, it prepared a report for approval by the source selection official (SSO), in this case the Commander of NAVFAC, in which it ranked ABB first, IT second, and Brown & Root Environmental third. The report was sent to the SSO through the executive director of the southern division and the head of contracts for the southern division. The head of contracts briefed the SSO and indicated his uncertainty about the evaluation results. More specifically, based on his review of the evaluation narratives, he indicated that the three firms appeared to be equally qualified under the stated evaluation factors to perform the contract. The SSO agreed with the head of contracts and subsequently contacted the southern division executive officer to express his concern with the recommendation and to give the executive officer the opportunity to withdraw the report. The executive officer agreed to withdraw the report and the SSO returned it without further action.

The executive officer sent the report back to the evaluation board for reconsideration. He specifically advised the evaluation board to review the evaluations of the offerors' small business/small disadvantaged business (SDB) utilization programs, and to closely consider whether there

[1]This is the third contract for CLEAN services that has been issued for the Navy's southern division.

were any significant technical differences between the three firms. He further advised the evaluation board that it could use equitable distribution of work to discriminate among the firms if it found that they were substantially technically equal.[2] Finally, he advised the evaluation board to give particular emphasis to the southern division area of responsibility in reviewing the firms' capacity, including such considerations as the need for a large active competitive base and sufficient capacity for urgent requirements.

Upon reconsideration, the evaluation board determined that ABB, IT, and Brown & Root were equally qualified to perform the contract. The evaluation board then used equitable distribution of work as a tie breaker and recommended Brown & Root for cost negotiations based on its finding that Brown & Root had been awarded the lowest dollar volume of contracts within the previous 12 months. The recommendation was submitted to the SSO and approved. Subsequently, ABB filed this protest with our Office.

PROTEST OVERVIEW

ABB protests that the SSO improperly requested the evaluation board to withdraw its initial report and improperly influenced the evaluation board's selection decision. ABB also protests that the evaluation board improperly found that the three firms were equally qualified to perform the contract following the second evaluation. In addition, ABB argues that the Navy improperly used an unstated evaluation factor--equitable distribution of work--as a basis to select Brown & Root as the firm with which to hold cost negotiations. Finally, ABB asserts that, even if the Navy was allowed to use equitable distribution of work as a tie breaker, it improperly determined that Brown & Root had a lower dollar volume of Department of Defense (DOD) contracts in the previous 12 months than ABB. As discussed below, we find that the SSO did not exert undue influence over the evaluation board or improperly fail to follow applicable selection procedures; the evaluation board reasonably determined that ABB and Brown & Root were equally qualified to perform the contract; ABB was not harmed by the agency's decision to use equitable distribution of work as a tie breaker; and, the Navy reasonably determined that

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[2]Using the concept of equitable distribution of work, the evaluation board was essentially advised to consider the dollar volume of contracts awarded in a 12-month period to each of the firms being considered and recommend that negotiations be held with the firm which had been awarded the smallest dollar volume of contracts.

Brown & Root had the lowest dollar volume of DOD contracts in the relevant 12-month period.

IMPROPER SELECTION PROCEDURES AND UNDUE INFLUENCE

The acquisition of A-E services is covered by FAR subpart 36.6. Under FAR § 36.602-4, after the SSO reviews the report that is submitted by the evaluation board, the SSO:

1. Can adopt the board's recommended ranking of the firms;

2. Determine a different ranking of the recommended firms; or

3. Determine that the recommended firms are not qualified or that the report is inadequate and return the report for further revision.

If the SSO does not adopt the evaluation board's recommendation, he must provide a written explanation.

ABB argues that the SSO did not follow the regulations governing source selection and exerted undue influence over the evaluation board's deliberations. ABB asserts that under the FAR if the SSO disagreed with the evaluation board's recommendation he could not request the evaluation board to withdraw its report. Rather, argues ABB, he was required to reject the recommendation and set forth his reasons for doing so in writing. ABB also argues that the SSO and other officials of the southern division improperly influenced the outcome of the evaluation by dictating to the evaluation board the evaluation criteria that the board was required to consider in making its recommendations.

In our view, the SSO did not abrogate the FAR requirement in any meaningful way that warrants sustaining the protest. Under the FAR, where the SSO finds the evaluation report inadequate for any reason, he may rerank the firms or return the report through appropriate channels for revision. We see no meaningful difference in the SSO providing the evaluation board with the opportunity to withdraw the report before taking either of these actions. Also, while the FAR requires the SSO to provide a written explanation of his reasons for not adopting the evaluation board's recommendation, there is no indication in the record that any offeror was harmed by the SSO providing an oral as opposed to a written explanation to the executive officer. In addition, while ABB asserts that the SSO may not instruct the evaluation board as to the factors it must consider when it is reevaluating the report, FAR § 36.602-4 gives the SSO ultimate responsibility for choosing the firm with which to

hold negotiations. Moreover, the FAR provides for the SSO to return the report for revision when he considers it inadequate for any reason and to provide an explanation of why he is not accepting the evaluation board's recommendations. These provisions contemplate that the evaluation board will revise the report in accordance with the SSO's explanation and guidance regarding his reasons for rejecting the report. In this regard, contrary to ABB's assertions, we find nothing in the record to indicate that the SSO, the executive officer or any other NAVFAC official improperly dictated the outcome of the reevaluation or exerted undue influence over the evaluation board's reevaluation. Rather, the record only demonstrates that the SSO did not believe that the initial recommendation was supported by the record and, based on that concern, asked the evaluation board to reconsider the recommendation.

MOST HIGHLY QUALIFIED FIRM

ABB also argues that the evaluation board improperly determined that ABB, Brown & Root, and IT were equally qualified to perform the CLEAN III contract.

In reviewing a protest of an agency's selection of a contractor for A-E services, our function is not to reevaluate the offeror's capabilities or to make our own determination of the relative merits of competing firms. Rather, procuring officials enjoy a reasonable degree of discretion in evaluating the submissions, and our review examines whether the agency's selection was reasonable and in accordance with published criteria. A protester's mere disagreement with the agency's evaluation does not show that the evaluation is unreasonable. ConCeCo Eng'g, Inc., supra. Here, based on our review of the record, we do not agree that the Navy's decision finding the firms equally qualified to perform the contract was unreasonable.

After reevaluating the information provided by ABB, IT, and Brown & Root, the evaluation board concluded that the three firms were equally qualified to perform the services required by the solicitation.[3] Regarding ABB, under the qualification factor, the evaluation board found that the firm proposed an extremely well-qualified deputy project manager, had approved procurement and accounting systems, and despite failing to meet its SDB subcontracting goals on its CLEAN I contract, had a keen awareness of the importance of small business/SDB subcontract awards. Under the

[3]While the evaluation board found that all three offerors were equally qualified to perform the CLEAN III contract, we discuss only Brown & Root and ABB since the protest concern only these two offerors.

experience factor, the evaluation board noted that ABB gained significant experience with the Navy's activities and regulators in the area of consideration through their work on CLEAN I and that they had experience in all facets of performance. Under the performance factor, the evaluation board noted ratings of high and excellent in the last year and a trend of increasing ratings on the CLEAN I contract. Under the capacity factor, the evaluation board found that ABB presented capacity within its available corporate resources to accomplish the volume of work anticipated for the contract and, under the location factor, the evaluation board found that ABB had offices in high Navy work areas.

With respect to Brown & Root, under the qualifications factor, the evaluation board found that the firm presented technically and professionally qualified individuals and a well-qualified program manager. The evaluation board also noted that Brown & Root's accounting system was compliant, that final approval of the firm's procurement system was pending, and that the firm had evidenced its commitment to SDB concerns. Under the experience factor, the evaluation board noted that under a northern division CLEAN contract Brown & Root had gained experience with the environmental work of the Navy's activities and regulators in the northern part of the geographical area where the CLEAN III contract would be performed. Under the performance factor, the evaluation board found that based on an overall performance rating of 80 percent and a project management office rating of 85 percent on its CLEAN I contract and four consecutive awards from the Department of Energy's (DOE) office in Savannah, Georgia, Brown & Root exceeded requirements. Under the capacity factor, the evaluation board found that based on its performance during the Hurricane Hugo disaster, Brown & Root demonstrated the ability to bring together staff in a coordinated effort to support required tasks and also that Brown & Root could obtain additional needed resources from other parts of Brown & Root. Finally, under the location factor, the evaluation board found Brown & Root had offices in high Navy work areas. Based on these findings, the evaluation board concluded that Brown & Root and ABB were equally qualified to perform the contract.

ABB argues that it is more qualified because of its experience performing the CLEAN I contract in the southern division. This argument does not demonstrate that the evaluation board's conclusion finding the firms equally qualified to perform the contract is unreasonable. The evaluation board did consider ABB's performance of the southern division CLEAN I contract when it evaluated ABB's offer under the experience and qualifications factors. The evaluation board, however, did not, and was not obligated to reach the conclusion that ABB argues it was required to

reach--that this performance made ABB the most qualified to perform the CLEAN III contract.

ABB also argues that the second evaluation report contains superficial and unexplained changes from the first report and does not support reversing the original conclusion that ABB was the most technically qualified offeror to perform the contract. Specifically, ABB complains that, in the revised evaluation, the evaluation board deleted the detailed discussion of ABB's experience from the initial evaluation, found that ABB had capacity to perform the contract rather than "sufficient capacity," as stated in the initial report, and changed its position regarding ABB's compliance with its SDB subcontracting goals in performing the southern division CLEAN I contract. ABB suggests that if these changes in its evaluation were not made, the evaluation board still would have ranked it first and recommended it for cost negotiations.

ABB's arguments do not demonstrate that the evaluation board's conclusion that the firms were equally qualified to perform the work is unreasonable. There is no substantive difference between stating a firm has the capacity to perform and stating that it has "sufficient capacity" to perform. Likewise, while the evaluation board deleted some of the discussion of ABB's specific experience in the revised report, this did not constitute a substantive change to the evaluation board's evaluation of ABB's experience since the evaluation board still found that ABB's experience on the CLEAN I contract was significant. Regarding the evaluation board's revised conclusion that ABB did not meet its SDB subcontracting goals on the CLEAN I contract, the agency has explained that by the time the evaluation board performed the second evaluation, updated records show that ABB in fact did not meet its goals. In any case, the evaluation board still recognized that ABB understood the importance of SDB subcontracting to the government and the fact that it did not meet its SDB goals played at most a very minor part in the evaluation board's conclusions that the firms were equally qualified to perform the contract.[4]

With respect to the reevaluation of Brown & Root's proposal, ABB argues that the evaluation board should not have revised

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[4]ABB also argues that in preparing its revised report, the evaluation board did not explain changes it made in the evaluations of the firms from the initial report. The evaluation board was reevaluating the firms against the evaluation criteria based on their qualification statements and interviews. The evaluation board was not obligated to use verbatim language in the revised report or to explain each change that it made in its reevaluations.

its conclusions regarding Brown & Root's capacity. Rather, argues ABB, the evaluation board was correct in its initial conclusion that Brown & Root had substantially exhausted its capacity in the CLEAN I contract it was performing in the northern division. In our view, however, the evaluation board reasonably concluded that it had originally underrated Brown & Root's capacity based on a specific example of Brown & Root's ability to bring together staff in a coordinated effort to support required tasks and its recognition that Brown & Root, the offeror, could rely on other Brown & Root companies for additional resources. ABB also argues that in its revised evaluation of Brown & Root, under the performance factor, the evaluation board did not mention, as it had in its initial report, that it had no performance data for Brown & Root in the southern division. There was no requirement, however, for the agency to consider performance data in the southern division. Therefore, there was nothing unreasonable in the evaluation board's conclusion that Brown & Root exceeded the requirements of this factor based on high ratings for performance on the northern division CLEAN contract and four consecutive awards from DOE in Savannah, Georgia which the evaluation board concluded demonstrated a satisfied customer. Accordingly, since we find that the agency's evaluation in the challenged areas was reasonable or had no impact on the award decision, we have no basis to conclude that the Navy unreasonably found that ABB and Brown & Root were equally qualified to perform the contract.

UNSTATED EVALUATION CRITERION

After the evaluation board determined that ABB, IT, and Brown & Root were equally qualified to perform the contract, it used equitable distribution of work to break the tie, recommending Brown & Root for negotiations because Brown & Root had been awarded the smallest dollar amount of DOD contracts within the previous 12 months.[5] ABB protests that since equitable distribution of work was not listed as an evaluation factor in the CBD notice, the agency could not use it as the basis on which to select a firm for negotiations. ABB points out that, prior to responding to the current solicitation, it asked the Navy if a firm's previous volume of work would be used as an evaluation factor and was told no. ABB explains that it requested this information so that it could decide whether to compete for

[5]The Navy actually considered contract actions awarded to the offerors which resulted in payment for services performed rather than contract awards. Thus, for example, although the CLEAN contracts were awarded before the relevant time period, the Navy considered each order placed under the CLEAN contracts in the relevant time period.

the current contract. According to ABB, since it had been awarded the southern division CLEAN I contract, it knew that if previous volume of work was used as an evaluation factor, it would be at a substantial disadvantage if it competed for the award.

The Navy responds that the equitable distribution of work is properly considered as a subfactor of the capacity evaluation factor because the amount of work that a firm is performing will impact on its ability to respond to work required under the current solicitation. The Navy further asserts that under Defense Federal Acquisition Regulation Supplement (DFARS) § 236.602-1(6), it is authorized to consider equitable distribution of work in selecting a firm to recommend for negotiation of an A-E contract. Finally, the Navy asserts that the factor was applied equally to each firm and therefore ABB was not prejudiced even if equitable distribution of work was an unstated evaluation factor that it should not have considered.

Generally, a procuring agency may consider an unstated evaluation subfactor that is reasonably related to a stated factor. AWD Technologies, Inc., B-250081.2; B-250081.3, Feb. 1, 1993, 93-1 CPD ¶ 83. However, in this case, capacity was defined in the CBD as the firm's ability to handle the volume of work described in the solicitation. While the total volume of work that an offeror is currently performing is logically related to that offeror's capacity to perform additional work, the evaluators were not considering each offeror's volume of previous DOD work to ascertain the offeror's ability to handle additional work. Rather, when the agency considered equitable distribution of work, it separately considered the volume of DOD work that the offerors had been awarded in the previous 12 months solely to ascertain which offeror had received the smallest dollar volume of DOD work. Accordingly, in this context, volume of DOD work performed was not reasonably related to the capacity evaluation factor.

We also disagree with the Navy that it properly considered equitable distribution of work because it is authorized to do so by DFARS § 236.602-1(6). In Ninneman Eng'g, B-184770, May 11, 1976, 76-1 CPD ¶ 307, we considered whether in determining what contractor to recommend for negotiation of an A-E contract, the Forest Service could consider that a firm had a specialty in cadastral surveys and had not recently been awarded any Forest Service contracts--factors which the agency was permitted to consider under its procurement regulations, but which were not stated in the published selection criteria for the procurement in issue. We found that although these factors were established by the agency's regulations, since they were not included in the published evaluation criteria, the agency's use of the

factors violated 40 U.S.C. § 543, which requires A-E contractors to be selected based upon established and published criteria. Here, too, while the DFARS authorize the Navy to use equitable distribution of work as an evaluation factor, 40 U.S.C. § 543 continues to require that A-E firms be selected based upon published criteria. Accordingly, the Navy should not have used equitable distribution of work as a factor since it was not listed in the published criteria in the CBD.

While we conclude that the Navy improperly used equitable distribution of work to break the tie, our Office will sustain a protest only where we find that a protester was prejudiced by an agency's improper actions. See PacOrd, Inc., B-253690, Oct. 8, 1993, 93-2 CPD ¶ 211. If the equitable distribution of work tie breaker was applied equally to all offerors being considered for negotiation,[6] the only possible prejudice to ABB would be that it was unfairly induced to compete by relying on the Navy's assurances that the volume of previous contracts would not be considered in the selection of a contractor for negotiations. We accept ABB's argument that it decided to compete only after the Navy assured it that the amount of previous contract awards would not be used as an evaluation factor and that it would not have competed if it learned otherwise. Nonetheless, equitable distribution of work--or the volume of previous contracts--was used only to discriminate between equally qualified firms, not as an evaluation factor. Given the unpredictability of the outcome that three firms in an A-E competition would be found equally qualified to perform, and given ABB's substantial experience with the program in issue, we do not believe that ABB would have chosen not to compete for the award if it had known that equitable distribution of work would be considered solely as a tie breaker. Accordingly, we find that ABB was not prejudiced by being misled to compete based on the Navy's representation that the volume of previous work would not be considered as an evaluation factor.

APPLICATION OF THE TIE BREAKER PROVISION

While equitable distribution of work should not have been used as a tie breaker because it was not listed in the published criteria, the only possible prejudice that could have occurred here is if the tie breaker was not applied in a consistent manner to all offerors. Accordingly, we now consider whether the agency considered equitable distribution of work in a consistent manner.

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[6]We address this issue below.

After determining that ABB, Brown & Root, and IT were equally qualified to perform the contract, the evaluation board recommended that Brown & Root be selected for cost negotiations because, in the 12-month period between February 17, 1993, and February 17, 1994, Brown & Root had the smallest dollar amount of DOD contracts. In determining how much work each firm had been awarded in that period, the evaluation board relied on data extracted from the Defense Contracting Action Data System (DCADS). The data in this system is compiled from form 350, Individual Contracting Action Reports. The DCADS showed that in the relevant 12-month period, ABB had been authorized to perform contract actions totaling $31,365,000. This figure was based on contract actions by ABB Environmental Services, the offeror on the solicitation, and ABB FLAKT, ABB Environmental Service's parent corporation. Brown & Root Environmental, an unincorporated entity of Brown & Root, Inc., was found to have been awarded contract actions totaling $164,000, based on awards of $99,000 to Brown & Root, Inc. and $65,000 to Brown & Root Services Corporation.

ABB argues that in considering the awards that were made to Brown & Root in the previous 12 months, the Navy did not obtain accurate or complete information. ABB asserts that if the agency had, it would have found that ABB had the lowest dollar volume of work. Specifically, ABB asserts that in considering equitable distribution of work, DFARS § 236.602-1(6) does not state that the Navy should consider only A-E contract awards but rather that it should consider DOD awards to A-E firms. ABB thus asserts that the Navy was required to consider all DOD contract awards made to each offeror in the past 12 months, not just A-E contract awards. ABB also asserts that the agency improperly considered only awards to Brown & Root, Inc. and Brown & Root Services, Corporation. ABB explains that Brown & Root is a successor contractor to Haliburton NUS Corporation, which was awarded a CLEAN I contract valued in the millions of dollars. ABB asserts that Brown & Root is currently performing that contract but that in determining the dollar amount of work which Brown & Root had been awarded by DOD in the previous 12 months, the Navy did not consider awards to Haliburton NUS Corporation. Finally, ABB argues that on the SF 254 and 255 it submitted, Brown & Root relied on the experience and qualifications of other family members of the Brown & Root and Haliburton Companies. ABB argues that in considering the dollar volume of work awarded to Brown & Root Environmental, the agency was required to include the dollar value of contracts awarded to each of these other Brown & Root companies.

In responding to ABB's protest, the Navy acknowledges that it made a number of errors in determining the dollar volume of contract awards that should be attributed to Brown & Root

Environmental, Inc. and to ABB Environmental Services Corporation. Specifically, the agency reports that DFARS § 236.602-1(6)(A)(2) instructs that in determining the dollar volume of work awarded to a firm:

> "Do not consider awards to a subsidiary if the subsidiary is not normally subject to management decisions, bookkeeping and policies of a holding or parent company or an incorporated subsidiary that operates under a firm name different from the parent company. This allows greater competition."

In addition, the Navy cites a memorandum from the Assistant Secretary of Defense which states that:

> "Awards to A-E subsidiaries not normally subject to management decisions, bookkeeping, and policies of a holding or parent company are treated as individual firms rather than attributed to the parent company for equitable distribution [of work] under DOD FAR Supplement § 236.602. It is assumed that incorporated subsidiaries that operate under a firm name different from the parent company are in this category. This allows greater competition and avoids removing capable local subsidiaries from consideration due to awards made to the holding company or its other subordinate entities in different locations."

The Navy thus now asserts that, contrary to ABB's arguments, based on the guidance in this regulation and memorandum, not only would it be improper to consider contracts awarded to every firm on which Brown & Root relied to demonstrate its qualifications in its SF 254 and 255, it also should not have considered awards to ABB FLAKT, the parent company of ABB Environmental Services or Brown & Root Service Corporation, a corporation whose only relationship to Brown & Root Environmental is that it is a subsidiary of Brown & Root, Inc. Rather, the Navy asserts it should have considered only awards to the firms that submitted offers, ABB Environmental Services, Inc., Brown & Root Environmental, and Brown & Root, Inc. since Brown & Root Environmental is an unincorporated entity of Brown & Root, Inc. The agency also acknowledges that it should have considered awards made to Haliburton NUS Corporation, Brown & Root Environmental Corporation's predecessor, to the extent that Brown & Root Environmental is performing Haliburton's A-E contracts. The agency concludes that it

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[7]Brown & Root Environmental was created on January 1, 1993, with some assets of Haliburton NUS Corporation and it is (continued...)

should have attributed $16 million in contract awards to Brown & Root Environmental[8] and approximately $38 million in contract awards to ABB Environmental Services Corporation.[9] The Navy also argues that it properly considered only A-E contracts that were awarded to the firms since this is an A-E procurement.

With respect to whether the Navy should have considered the dollar value of all DOD contract awards, or only the dollar value of A-E contract awards, ABB is correct that the DFARS does not specifically direct the agency to consider only A-E awards. Nevertheless, A-E contracts under the Brooks Act are a separate and distinct subset of government contracts with FAR and DFARS provisions that are applicable only to them. Thus, DFARS § 236.602(1)(6), which discusses equitable distribution of work, is specifically concerned with awards to A-E firms under procedures that were designed for and are applicable only to A-E procurements. In view of this, we believe the Navy reasonably interpreted the DFARS provision to require it to consider only A-E contracts in evaluating equitable distribution of work.

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[7](...continued)
performing at least the CLEAN contract that Haliburton was performing in NAVFAC's northern division. Haliburton NUS Corporation is also still in existence as a separate entity.

[8]There is some confusion in the record on this point. In its protest, ABB states that it is aware of over $13 million in work of Haliburton NUS Corporation under its CLEAN I contract that should be attributed to Brown & Root Environmental. In explaining its error, the agency refers to over $15 million in contract awards that should have been attributed to Brown & Root but were not because they were not properly coded as A-E contracts in the DCADS. ABB thus concludes that the Navy improperly failed to attribute over $28 million in awards to Brown & Root. The Navy has explained however that part of the $15 million it referred to is the same $13 million that ABB refers to as having been awarded to Haliburton NUS under its CLEAN I contract. Thus, according to the Navy, the total amount of contracts that should have been attributed to Brown & Root Environmental Corporation, including performance under the CLEAN I contract, is approximately $15 million. The Navy later changed this to $16 million after learning of two additional A-E contracts that had been improperly coded.

[9]The agency cannot explain why these contracts did not appear on the first report it obtained from the DCADS for ABB Environmental Services.

We also agree with the Navy that in determining the dollar volume of contracts awarded to each firm in order to determine equitable distribution of work, it was not required to consider awards to every firm that Brown & Root relied on to demonstrate its capability, but instead properly considered awards only to Brown & Root, Inc., Brown & Root Environmental, and Haliburton NUS Corporation to the extent that Brown & Root Environmental was performing contracts that had been awarded to Haliburton NUS Corporation. In our view, there is nothing improper when evaluating a firm's capability and capacity to perform, in considering the experience and resources of other companies as a result of the firm's affiliation with those companies, but in not including the dollar volume of contracts awarded to those other firms when considering equitable distribution of work. The two purposes are entirely different, one is to assess a firm's capability and the second is to determine a firm's particular share of government contracts. It is reasonable to find that a firm is capable of performing a contract because it can rely on the resources of other firms. However, if the agency was required to consider the dollar volume of work awarded to each firm relied on to demonstrate an offeror's capability, the agency would have to consider the entire volume of work awarded to the other firm despite the fact that the offering firm's reliance on the other firm might be minimal or contingent. This in turn could eliminate firms from consideration for award based on their affiliation with very large firms and defeat the intent of the regulation to provide equitable distribution of government A-E contracts, while allowing for the maximum amount of competition possible.

Since, based on consideration of only A-E contract awards to the offering entities, Brown & Root had the smallest dollar volume of DOD contract awards in the relevant period, we find this basis of protest without merit.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel