



Comptroller General
of the United States

Washington, D.C. 20548

colh
REDACTED VERSION

Decision

Matter of: Prospect Associates, Inc.

File: B-260696

Date: July 7, 1995

William W. Goodrich, Jr., Esq., Richard J. Webber, Esq., and Craig S. King, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.

Philip J. Davis, Esq., Phillip H. Harrington, Esq., and William E. Smith, Esq., Wiley, Rein & Fielding, for Porter/Novelli, Inc., an interested party.

Terrence J. Tychan and Michael Colvin, Department of Health and Human Services, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee materially misrepresented the availability and status within the firm of its proposed project director is denied where contention is based on erroneous interpretation of the solicitation as requiring the project director to be physically available within 2 hours notice; absent this erroneous interpretation, the fact that the firm did not disclose to the agency the proposed project director's plans to spend much of his time outside of the area is not a misrepresentation of his availability. In addition, the firm's nondisclosure of the proposed project director's plans to step aside as general manager while retaining significant managerial authority is not a misrepresentation of his status within the firm.

2. Protest that contracting agency improperly evaluated the awardee's technical proposal with respect to a mandatory qualification criterion and a technical evaluation factor is denied where the record shows that, as to the former, the protester's argument is based upon a misinterpretation of the criterion and, as to the latter, the protester's allegation is unsupported.

*The decision issued on July 7, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

064361/154972

3. Protest that contracting agency's cost realism analysis of the awardee's proposal is flawed is denied where, while certain aspects of the analysis were unreasonable, and the awardee's proposed costs should have been adjusted upward accordingly, certain other aspects of the analysis were not unreasonable, and the net effect does not change the offerors' relative standing vis-a-vis proposed costs.

4. Protest that contracting agency improperly conducted post-best and final offer negotiations with the awardee is denied where the contracting agency acted in accordance with its regulations providing for limited negotiations with only one offeror to definitize the final agreement.

5. Protest that contracting agency improperly revised the contract's base/option period mix from that stated in the solicitation is denied where the solicitation's requirements were unchanged and no offeror was given the opportunity to revise its proposal as a result of this revision.

DECISION

Prospect Associates, Inc. protests the award of a contract to Porter/Novelli, Inc. (P/N) under request for proposals (RFP) No. NCI-CO-50503, issued by the Department of Health and Human Services (HHS), National Cancer Institute (NCI), for technical services to support NCI's Office of Cancer Communications (OCC). Prospect primarily argues that the awardee materially misrepresented the availability of its proposed project director, affecting both the technical evaluation and the source selection decision.

We deny the protest.

The solicitation, issued April 28, 1994, anticipated the award of a cost-plus-fixed-fee, level-of-effort contract to provide technical services in support of the planning, development, implementation, promotion, and assessment of current and future education and information efforts for OCC. OCC's primary purpose is keeping the public, patients, and health professionals informed on cancer-related issues. Prospect held the predecessor contract for these services, and P/N was one of its subcontractors. The solicitation stated that the resulting contract would have a base term of 3 years, with up to 2 option years.

The RFP stated that award would be made to the best advantage of the government, cost and other factors considered. While technical proposals would receive paramount consideration, if two or more offerors were approximately equal in technical ability, cost might become a significant factor in determining award. The RFP's

technical evaluation scheme was set up in two parts, mandatory qualification criteria and technical evaluation factors.

The mandatory qualification criteria established conditions that must be met for the proposal to be considered. The first criterion required the contractor to meet with the project officer in his Bethesda, Maryland office on 2 hours notice, and the second criterion required the contractor to support the interchange of electronic mail. Technical proposals would be evaluated in accordance with four technical evaluation factors, listed in descending order of importance: technical approach; capabilities and resources of the firm; competence and availability of personnel; and creative approach. The maximum available technical score was 1,000 points.

Prospect and P/N were the only firms submitting proposals by the June 13 extended closing date. The agency's cost analysis section (CAS) audited the cost proposals during the summer; a technical evaluation group (TEG) reviewed the proposals on September 26; and the source evaluation group (SEG) recommended that both technically acceptable proposals be included in the competitive range. After discussions were conducted, both offerors submitted best and final offers (BAFO) on December 19. The second SEG reviewed these on January 6, 1995, with the following results:

	<u>Technical</u>	<u>Proposed Costs</u>
P/N	847	\$12,777,640
Prospect	827	\$13,834,546

On January 25, the SEG recommended that award be made to P/N, as it offered the highest technically rated proposal at the lowest cost. Pursuant to its internal regulations, NCI conducted limited negotiations with P/N and negotiated a total cost of \$12,764,888. Award was made on February 28, and this protest followed. Although the agency was notified of the protest within 10 calendar days of the date of award, it authorized performance of P/N's contract notwithstanding the protest, based upon its determination that performance was in the government's best interest. See 31 U.S.C. § 3553(d) (1988).

Prospect argues that P/N materially misrepresented the availability and status within the firm of its proposed project director, affecting both the technical evaluation and the source selection decision. Prospect also asserts that NCI improperly evaluated P/N's technical proposal on other grounds; improperly conducted the cost realism analysis of P/N's proposal; engaged in improper post-BAFO

negotiations with the awardee; and improperly altered the period of performance from that listed in the solicitation.

AVAILABILITY OF PROPOSED PROJECT DIRECTOR

Prospect argues that P/N's proposal misrepresented the availability and status within the firm of its proposed project director, Mr. Steve Rabin. Specifically, Prospect complains that P/N's proposal stated that Mr. Rabin was the general manager of the firm's Washington office and implied that he would be available to the agency from that location when in fact the firm knew, prior to the submission of BAFOs, that Mr. Rabin would soon relocate to New York and step down as general manager of the Washington office, and failed to notify the agency of these facts. In support of its position, Prospect has provided us with the affidavit of a private investigator and with telephone transcripts purporting to trace Mr. Rabin's whereabouts during this procurement and protest. Prospect argues that this alleged misrepresentation materially affected NCI's evaluation with respect to both the qualification criterion concerning meetings with the project officer and its rating of P/N under the personnel factor, and that this improper evaluation materially affected the selection decision.

P/N denies that the firm made any misrepresentations in its proposal and contends that neither Mr. Rabin's purchase of a residence in New York nor his stepping down as general manager of the firm's Washington office affects the representations made in its proposal. In support of its position, P/N has provided us with affidavits from Mr. Rabin and from Mr. Robert T. Druckenmiller, the firm's president, outlining Mr. Rabin's availability to perform his responsibilities under this contract as well as his status within the firm. P/N asserts that the representations made in its proposal were and remain true, and that the allegations made by Prospect have no effect on those representations.

An offeror's misrepresentation concerning personnel that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. See CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308; Informatics, Inc., 57 Comp. Gen. 217 (1978); ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326; ManTech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309, aff'd, B-245886.5, Aug. 7, 1992, 92-2 CPD ¶ 89. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the

evaluation. Informatics, Inc., supra; ManTech Advanced Sys. Int'l, Inc., supra; Harris Corp.; PRC Inc., B-247440.5; B-247440.6, Aug. 13, 1992, 92-2 CPD ¶ 171.

Our review of the record shows that P/N has not misrepresented the availability or status within the firm of Mr. Rabin either through its proposal statements or the nondisclosure of his purchase of a New York residence and his stepping down as general manager of the firm's Washington office. Moreover, our review of the record shows that even if we concluded that P/N had so misrepresented Mr. Rabin's availability and status, such misrepresentation would not be material, as it would not likely have had a significant impact on the evaluation here.

P/N's proposal contains several statements germane to this matter. The cover letter states:

"To underscore [P/N's] commitment we are allocating [DELETED] of the time of one of the company's most senior officers--Steve Rabin, the General Manager of the Washington office--to the role of Project Director. Steve's accomplishments in the field of public health--especially in the challenging area of multicultural communications--place him in the leadership of social marketing in the U.S. today."

Elsewhere, the proposal states that "[t]he new head of our Washington office, Steve Rabin, brings widely respected experience in public service communication to our team," and that his relevant background includes corporate monitor for task order support contracts for various health-related federal agencies, including the Centers for Disease Control and Prevention (CDCP) and OCC; corporate monitor for all P/N subcontracting; project director for the CDCP's National AIDS Information and Education support contract; and executive vice president of P/N and a member of the firm's executive committee, providing him with management authority over the Washington operation and access to the highest levels of support from other P/N offices.

In addition, Mr. Rabin's resume lists him as executive vice president and general manager at P/N, and states that he is "responsible for managing the Washington office of [P/N]." The firm's BAFO commits Mr. Rabin to spending [DELETED] hours per year to this contract, or [DELETED] percent of his time. P/N's proposal states that it meets the mandatory qualifications, and that its "offices are twelve minutes from the [OCC location] and staff will always be available within two hours of notification of a meeting." Mr. Rabin signed P/N's December 19 BAFO.

The relevant facts as set out in the submissions of the parties, in particular the affidavits of Prospect's private investigator and Mr. Rabin, are as follows.

Mr. Rabin owned a Washington residence when he signed P/N's BAFO, but states that prior to that time he began to consider purchasing a second residence in New York because he prefers to spend his personal time there. He purchased a residence in New York in January 1995, around the time he began teaching a 1-day-per-week course at Columbia University. Mr. Rabin has access to office space at P/N's New York location, but, countering Prospect's assertion that he spends most of his time there, Mr. Rabin states that his principal office is in Washington--his administrative assistant is there, his client and business files are there, and that office handles his benefits and payroll. Mr. Rabin states he has spent 70 percent of his workdays there since December 19, 1994. Mr. Rabin sold his Washington residence in April 1995, but states that he had begun residing in a rented apartment in that city nearly 2 months earlier. He states that, when in Washington, he often resides at his rented apartment; on a number of occasions he has spent the workday in Washington and returned to New York at night.¹

Mr. Rabin states that he asked for relief of administrative duties not related to the performance of this contract after the submission of BAFOs, anticipating that this contract would require most of his time and considering his desire to spend more of his personal time in New York. He cut back on his administrative obligations as general manager on January 3, but remained general manager until March 1. However, both Mr. Rabin and Mr. Druckenmiller state that he remains an executive vice president at P/N and a senior manager in the Washington office with broad managerial authority in that office. He also serves on its board of managers, the group of senior executives that oversees and manages its business functions.

¹Some of the private investigator's statements concerning Mr. Rabin's living arrangements are flatly contradicted by Mr. Rabin, with no response from the protester. For example, in response to the assertion, attributed to his New York doorman, that he leaves the building in the morning and returns at night, Mr. Rabin states that his building has several doormen on different shifts and that he is not greeted by the same one at these times. In addition, in response to the assertions regarding his whereabouts, attributed to the wife of the resident manager at his former Washington residence, Mr. Rabin states that the resident manager lives alone and is unmarried. These unrebutted refutations raise doubt as to the probative value of the private investigator's statement.

Prospect's argument that P/N misrepresented Mr. Rabin's availability is premised on its interpretation of the "Meetings with the Project Officer" mandatory qualification criterion, which states:

"The contractor shall come to the Project Officer's office at the National Institutes of Health, Bethesda, to discuss and review items of work to be assigned or work already assigned but requiring revision. Many times these meetings shall involve the Project Director and several selected contractor staff. The contractor shall be able to meet with the Project Officer within two hours after notification of the required meeting."

Prospect interprets this as requiring Mr. Rabin--the project director--to be in Bethesda on 2 hours notice, and asserts that his "relocation" to New York, his teaching obligation, his office space in New York, and his stepping down as general manager of the Washington office prevented P/N from representing his availability on 2 hours notice with any assurance. This interpretation is unreasonable. The RFP plainly states that "the contractor" shall come to OCC's Bethesda offices and "the contractor" shall be available to meet in Bethesda within 2 hours of notification. "The contractor" refers to P/N and any of its staff proposed to perform this contract. While the project director will be involved in "many" of these meetings, there is no requirement that he be available within 2 hours. Indeed, to require him to be in Bethesda on 2 hours notice at any time during the contract's duration would be unreasonable--he would be unable to utilize any vacation or sick leave and unable to engage in business travel outside of a 2-hour travel time radius, including that referred to in the RFP. We will not read a provision restrictively where it is not clear from the solicitation that such a restrictive interpretation was intended by the agency. See Western Data Entry Sys., Inc., B-255796, Apr. 5, 1994. P/N's statement that it is located only 12 minutes from Bethesda, which does not mention Mr. Rabin, properly indicates that contractor staff is available in a short period of time.

Absent this erroneous interpretation as a foundation, the remainder of Prospect's argument concerning Mr. Rabin's availability falls. P/N committed, in its BAFO, to Mr. Rabin's spending [DELETED] percent of his time on this contract, and there is no evidence that this commitment has changed. While Prospect has gone to a good deal of trouble to show that Mr. Rabin spends much of his time in New York, there is no evidence that this detracts from his availability to fulfill his responsibilities as project

director. Commutes between New York and Washington, even when frequent, are neither unusual nor necessarily logistically inconvenient.²

To the extent that Prospect's argument concerning Mr. Rabin's stepping down as general manager is a separate one, it also has no merit. While the firm's proposal does refer to Mr. Rabin as the general manager, and it is not entirely clear when the firm knew that he would step down from that position, the record shows that this fact is not relevant. The proposal does not emphasize Mr. Rabin's position, but mentions it almost in passing. Further, as Mr. Rabin explains, the position involves general administrative and managerial responsibilities that have nothing to do with performance of this contract, and relief of these responsibilities gives him more time to devote to this contract; Prospect does not dispute this description. Most important, Mr. Rabin remains an executive vice president of P/N, a full-time employee, and a senior level manager with effective managerial control. Prospect has not set forth, and we cannot discern, any reason why P/N should have notified the agency of this internal administrative matter.

In any event, our review of the record shows that even if we were to conclude that P/N's nondisclosure of Mr. Rabin's purchase of a New York residence or his stepping down as general manager constituted a misrepresentation, it was not material. As discussed above, a misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Informatics, Inc., supra; ManTech Advanced Sys. Int'l, Inc., supra.

The evaluation documents show that the evaluators did not view either Mr. Rabin's availability at P/N's nearby location or his position as general manager as a factor. The overriding emphasis is on his qualifications, which are not challenged by the protester; his status as a senior employee at P/N, which has not changed; and the amount of time he has committed to this contract, the time stated in the BAFO.

²Prospect's assertion that this is a "classic" case of bait and switch--"baiting" the agency with Mr. Rabin and "switching" to someone else--is unsupported. For one, there is no evidence of anyone to which P/N would "switch."

For example, the TEG noted as a strength the firm's assignment of the:

"senior staff with demonstrated experience in managing support contract activities for similar health communications efforts to serve as the project director, and the proposed project director . . . [is] highly qualified with excellent qualifications"

The first SEG noted that the firm's high-level commitment to the contract was evidenced by the seniority and education level of key staff, including Rabin, assigned to it for large chunks of time, and noted that Rabin ran a similar program for the CDCP. The SEG noted that Mr. Rabin had relevant experience in directing large social marketing support contracts and had demonstrated ability to manage national media campaigns. The competitive range determination noted that Mr. Rabin was highly qualified.

The only language which suggests relevance is a discussion question which asks P/N to provide additional information on how it "will manage [DELETED] consultants who may be geographically dispersed." The record shows that the agency was concerned that P/N's proposal suggested that [DELETED] consultants located in widely dispersed states. P/N responded by stating that its proposed [DELETED]. Prospect's assertion that this response is evasive, as it does not mention Mr. Rabin's contemplated purchase of a New York residence, misses the point of the question. The agency was concerned with how these widely dispersed consultants would be "managed"--Mr. Rabin is not being managed, but, instead is responsible for managing these consultants.

TECHNICAL EVALUATION

Prospect argues that NCI improperly determined that P/N satisfied the mandatory qualification criterion concerning electronic mail, and improperly viewed it as a scored evaluation subfactor. Prospect also contends that NCI misevaluated P/N's proposal under the capabilities and resources factor.

In reviewing an agency's evaluation of proposals, our Office will only question the agency's evaluation where it lacks a reasonable basis or is inconsistent with the stated evaluation criteria for award. Information Sys. Technology Corp., B-259996, May 3, 1995, 95-1 CPD ¶ 230; DeLima Assocs., B-258278.2, Dec. 20, 1994, 94-2 CPD ¶ 253. Our review of the record shows that the agency's evaluation here was reasonable and consistent with the evaluation criteria.

As an initial matter, Prospect raised its specific allegations concerning the qualification criterion for the first time in its comments on the agency report. Both the agency and P/N contend that these allegations, which they characterize as new and substantively different from those in the initial protest, are untimely, since the comments were filed 11 working days after Prospect received the agency report.³ Under our Bid Protest Regulations, protests of other than apparent solicitation improprieties must be filed within 10 working days of the time the basis of protest is known. 4 C.F.R. § 21.2(a)(2).

The timeliness of specific bases of protest raised after the filing of a timely protest depends upon the relationship the later-raised bases bear to the initial protest. See Kappa Sys., Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD ¶ 412. Where the later bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements. Conversely, where the later contentions merely provide additional support for an earlier, timely raised objection, we consider these additional arguments. Id.; Curtis Center Ltd. Partnership--Recon., B-257863.3, Mar. 20, 1995, 95-1 CPD ¶ 147; GE Gov't. Servs., B-235101, Aug. 11, 1989, 89-2 CPD ¶ 128. Here, there is a nexus between the allegation raised in the initial protest, that NCI "disregarded or misapplied" this criterion, and these later-raised allegations that the agency miscalculated Porter/Novelli under this criterion; the later-raised arguments support the initial protest allegation. As a result, the arguments are timely and will be considered.⁴

³While comments must be filed 10 working days after the report is received, 4 C.F.R. § 21.3(j) (1995), Prospect requested and was granted a 1-day extension. Id. However, it is well settled that the granting of such an extension does not waive the timeliness requirements for filing bid protests. See, e.g., Keci Corp.--Recon., B-255193.2, May 25, 1994, 94-1 CPD ¶ 323.

⁴The cases cited by the agency and the interested party in support of their contention are inapposite. This is not a case where the later-raised allegations are clearly
(continued...)

See Bendix Oceanics, Inc., B-247225.3, July 27, 1992, 92-2 CPD ¶ 54.

On the merits, however, Prospect's argument that P/N did not satisfy this criterion is premised upon an erroneous interpretation of the criterion, which required the contractor to "support the interchange of electronic mail in the Microsoft Mail format with the OCC local area network. NCI staff shall be able to send electronic mail to individual contract staff members." Prospect contends that it requires the contractor to use Microsoft Mail software--to have installed, in its facilities, this particular software package. However, by its very terms, the criterion requires the contractor to support the interchange of electronic mail in the Microsoft Mail format, which means merely that NCI employees utilizing Microsoft Mail software must be able to communicate via that software with contractor personnel--the criterion is silent as to how that is to be accomplished. Again, we will not read a provision restrictively where the solicitation does not clearly show that such an interpretation was intended. See Western Data Entry Sys., Inc., supra.

P/N's proposal stated that its electronic mail system [DELETED]. P/N specifically confirmed that its system supports the interchange of electronic mail in the Microsoft Mail format. While the TEG and SEG found P/N's proposal technically acceptable, the agency asked for additional details, and was provided an extensive response. The record affords us no basis to question the agency's determination that the awardee satisfied this criterion. That Prospect disagrees with the agency's evaluation does not make it unreasonable. See Tritech Field Eng'g, Inc., B-255336.2, Apr. 13, 1994, 94-1 CPD ¶ 261.

Prospect's argument that NCI improperly viewed this criterion as a scored evaluation factor, rather than a mandatory criterion, is also not supported by the record. The evaluators clearly considered P/N to be technically acceptable concerning this mandatory factor at every phase of the procurement; that they asked for more detail does not

⁴(...continued)

unrelated to the earlier-raised allegations, see Keci Corp.--Recon., supra; Clamshell Bldgs., Inc.--Recon., B-250520.2, Apr. 13, 1993, 93-1 CPD ¶ 312, or a case where the protester had access to all of the information supporting its protest contentions but filed a general protest followed by specific comments. See Management Sys. Applications, Inc., B-259628; B-259628.2, Apr. 13, 1995, 95-1 CPD ¶ 216; TAAS-Israel Indus., Inc., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197.

indicate that they misevaluated it. Further, it appears that the agency's references are to the passages in P/N's proposal discussing the firm's plans for accomplishing the RFP task to plan, develop, install, and maintain an electronic communication and information transfer system. This discussion is found in the section of the proposal devoted to the technical approach factor.

Turning to the capabilities and resources factor, one of the subfactors to be considered was:

"evidence of previous and present involvement in similar projects utilizing approximately 3,600 hours of labor in a month to support numerous concurrent national education programs."

Prospect's argument that P/N did not demonstrate involvement in projects utilizing 3,600 labor hours monthly, and that NCI's evaluation did not include this subfactor, is not supported by the record.

P/N's proposal listed numerous national educational programs with which it has been or is currently involved. The firm specifically cited its work in connection with CDCP's "AIDS Communication Support Project," which requires 3,600 labor hours per month, and Mr. Rabin's past involvement as project director for CDCP's "National AIDS Information and Education Program" support contract, which required an annual level of effort of more than 5,000 labor hours monthly. P/N also listed its subcontractor support to Prospect under the current OCC contract.

The record shows that NCI's evaluators did consider this information, and specifically noted those projects involving more than 3,600 labor hours monthly. The TEG stated that P/N had "rich" experience in supporting large-scale health communications programs for federal agencies, and that several of these programs "have needs similar [to OCC's] and "involved similar commitment of hours per month." The first SEG stated that P/N had an "abundance" of similar, applicable, and successful health communications experience, and that the proposed project director ran a "similar program in size and scope for the CDCP." Given the information in the record, that NCI's evaluators did not write the phrase "3,600 hours" in their evaluations does not evidence a failure to consider this subfactor. Since Prospect has addressed neither the information contained in

P/N's proposal nor the evaluation comments cited above, we have no basis to conclude that the agency's evaluation was unreasonable.⁵

COST REALISM ANALYSIS

Prospect argues that the cost realism analysis of P/N's proposal was flawed, citing several alleged errors which it asserts understated the awardee's estimated costs.⁶

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

Prospect objects to the labor escalation rates applied to the awardee's proposal. P/N proposed average direct labor rates with a [DELETED] percent escalation rate for each year, and the CAS approved this rate. In its BAFO, P/N [DELETED].⁷ P/N also stated that after preparing its budget, it was able to reduce its escalation rate to [DELETED] percent per year. Prospect objects that the

⁵While Prospect's arguments focus solely on its contention that the awardee's subcontract to Prospect under the earlier OCC contract is not a similar project under the definition of this subfactor, the record shows that neither the TEG nor the SEG relied upon this subcontract for its conclusions.

⁶Both the agency and the interested party argue that these specific allegations are untimely raised for reasons identical to those addressed in our previous discussion of timeliness. See pages 10-11, supra. We find the allegations to be timely for the same reasons discussed above.

⁷[DELETED]

agency should not have accepted this escalation rate reduction, and also contends that the agency improperly failed to apply the escalation rate to the first year labor rates.

Labor escalation provides for the increase in labor costs due to inflation or other usual salary increases over the life of a contract and is accomplished by the use of a percentage multiplier that is applied to proposed direct labor costs. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183. An agency should adjust cost proposals in its cost realism analysis to reflect the agency's reasonable projection of anticipated escalation in labor rates over the term of the contract. Id.

Here, we have no basis to question the agency's acceptance of P/N's reduced labor escalation rate. While the CAS approved the initially proposed rate, the awardee's lower rate, based upon its finalized budget, is consistent with the CAS's projected Consumer Price Index (CPI) [DELETED] for each contract period--the CAS itself considers an increase factor within plus or minus 1 percentage point of the CPI projections to be reasonable. See Prospect Assocs. Ltd., B-249047, Oct. 20, 1992, 92-2 CPD ¶ 258.

However, the agency's decision not to escalate the direct labor rates for the first year of the contract is unreasonable. The contemporaneous record does not explain this action, and the agency's current defense, that escalation need not be applied to current rates, overlooks the audit report's statement that P/N [DELETED]. These rates would necessarily be escalated [DELETED] year one of the contract. As a result, the direct labor rates for year one should have been escalated at [DELETED] percent. P/N's calculation of this adjustment, with which we agree, is in the amount of \$314,874, which incorporates not only the labor escalation rate, but P/N's proposed fringe/overhead rate, general and administrative (G&A) rate, and fee.

Prospect also objects to P/N's proposal to [DELETED] subcontractors for the life of the contract. Prospect contends that this is a "debatable" tactic that violates Cost Accounting Standard (CAS) § 410-40(b)(1). CAS § 410-40(b)(1) requires that G&A "be allocated to the final cost objective of that cost accounting period by means of a cost input base representing the total activity of a business unit," and P/N's base rate is computed on a total cost input base, including the subcontracts. We have no basis to object to the agency's decision to accept P/N's proposal to [DELETED] associated with subcontract costs on this contract, which is in effect a self-imposed cap, a

legitimate cost control mechanism that should be considered favorably. See Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176. Moreover, Prospect's allegation that this "tactic" poses a risk of mischarging to other government contracts is wholly unsupported and speculative. See Robocom Sys., Inc., B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513.

While Prospect also raises arguments concerning the overhead rate proposed by one of P/N's subcontractors and P/N's proposed fringe benefit rate, even if we were to agree with the protester, by its own calculations P/N's proposed cost would increase by a maximum of \$457,262. When this amount is added to the upward adjustment of \$314,874 noted above, the resulting adjustment of \$772,136 still leaves P/N as the offeror with the lowest cost. Since our finding in favor of the protester on these grounds would not affect its relative standing vis-a-vis proposed costs, the protester would not be prejudiced. Prejudice is an essential element of every protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

POST-BAFO NEGOTIATIONS

Prospect argues that NCI's post-BAFO negotiations with P/N exceeded the permissible scope of "limited negotiations" as defined by agency regulations.

HHS Acquisition Regulation (HHSAR), 48-C.F.R. § 315.670(a) (1994), permits HHS to conduct final contract negotiations with only one offeror where appropriate and necessary. HHS' alternative procedures specify that "[t]he negotiation shall not in any way prejudice the competitive interests or rights of the unsuccessful offerors," and "no factor which could have any effect on the selection process may be introduced into the negotiation after the common cutoff date for receipt of best and final offers." The negotiations "shall be restricted to definitizing the final agreement on terms and conditions" and may "include such topics as labor rates, indirect cost rates, and fees. Id.

The contracting officer determined that minor clarification of P/N's proposal was appropriate, and the February 6 request asked P/N to verify and support certain direct labor rates; verify indirect cost rates in light of the expired rate agreement; and clarify minor issues concerning its subcontracting plan. One of its subcontractors was asked to verify its salary and indirect cost information. The result of these limited negotiations was a net reduction in P/N's proposed cost of \$12,752.

The record of HHS's negotiations with P/N shows that they were conducted only to clarify certain labor rates, indirect

cost rates, and minor issues regarding the firm's subcontracting plan, and that the negotiations resulted in a relatively minor reduction in P/N's BAFO cost. Prospect was clearly not prejudiced by the conduct of the negotiations, on topics that the HHSAR expressly recognizes as appropriate post-selection negotiation topics,⁸ because the subsequent modest reduction in P/N's BAFO cost can only affect on the relative competitive standing by making its otherwise successful proposal more attractive to the government. INFOCUS Communications, B-256244, May 31, 1994, 94-1 CPD ¶ 330. Prospect's claim of prejudice--that it could have lowered its price with the benefit of additional negotiations--fails to recognize that the purpose of these negotiations is to "definitize" terms, as was done here, not to obtain more competitive pricing.

PERIOD OF PERFORMANCE

Prospect's final argument concerns the discrepancy between the solicitation's statement that the contract would be for a 3-year base period with one 2-year option, and the actual contract's provision of a 1-year base period and four 1-year options. Prospect contends that this violated FAR § 15.606(a), which requires the contracting officer to amend the solicitation to notify offerors whenever the government changes, relaxes, increases, or otherwise modifies its requirements. The agency states that it issued the contract with a revised period of performance due to uncertainties resulting from the congressional intent to reduce the federal budget and its potential impact on NCI contracting.

The only difference between the solicitation and the contract is this base/option period mix. The statement of work, evaluation scheme, length of the time for which the contractor is obligated, and the annual level-of-effort hours remain the same. Further, Prospect does not allege, and the record does not show, that P/N was provided any opportunity to revise its prices or otherwise alter its proposal in response to the revision. As a result, in this case, we do not view the government's requirements as having been changed. See Advance Gear & Mach. Corp.--Recon., B-228002.2, Feb. 3, 1988, 88-1 CPD ¶ 102.

⁸Contrary to Prospect's assertions, the fact that these cost-related issues were raised during discussions does not mean that they were involved in the selection process and thus prohibited topics. The regulation prohibits limited negotiations concerning factors having an effect on the selection process. P/N had already been determined the successful offeror by February 6 and these negotiations had no bearing whatsoever on the selection process here.

In any event, despite being given two opportunities to do so, Prospect has not articulated any specific basis upon which we can find that it was prejudiced. Its mere statement that it was denied the opportunity to revise its pricing, terms and conditions overlooks the fact that P/N was also denied this opportunity. Moreover, given that the solicitation's statement of work, evaluation scheme, level of effort, and all other terms and conditions remained the same, it is not clear to us what aspects of its proposal Prospect might have revised. We will not sustain a protest where no prejudice is evident from the record. Lithos Restoration, Ltd., supra.

The protest is denied.

Robert P. Murphy
General Counsel