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Decision

Matter of: ITT Electronic Systems

File: B-406405; B-406405.2

Date: May 21, 2012

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DIGEST

1. Unincorporated division of corporate parent that submitted proposal and filed protest is interested party to protest notwithstanding post-proposal-submission corporate restructuring whereby unincorporated division and assets committed to contract performance were transferred to new, stand-alone corporate entity.
2. Protest that agency imposed unstated evaluation criterion for data reflecting testing under dynamic flight conditions is denied where solicitation for development of missile countermeasure system to be used aboard military aircraft adequately advised offerors that agency would consider performance of proposed systems under dynamic flight conditions.
3. Protest that agency unreasonably evaluated [DELETED] cable component of protester's proposed countermeasure system is denied where content of protester's proposal reasonably supports agency's evaluation criticisms.
4. Protest that agency treated offerors unequally is denied where record reflects reasonable basis for distinction that agency identified between proposals.

DECISION

ITT Electronic Systems, of Clifton, New Jersey, protests the award of two contracts to BAE Systems Information and Electronic Systems Integration Inc., of Nashua, New Hampshire, and Northrop Grumman Systems Corporation, of Rolling Meadows, Illinois, under request for proposals (RFP) No. W58RGZ-10-R-0129, issued by the Department of the Army, Army Materiel Command, for development of a common infrared countermeasure system (CIRCM) to protect rotary-wing aircraft from missile threats. ITT argues that the agency unreasonably evaluated its proposal, the agency's discussions with ITT were not meaningful, the agency treated ITT, BAE, and Northrop unequally, and the agency's best value determination was flawed.

We deny the protest.

BACKGROUND

The solicitation, which was issued on February 16, 2011, provided for the award of two or more contracts with cost-plus-fixed-fee and fixed-price contract line items, and with periods of performance of 21 months from the time of award. RFP at 15-21, 29, 70; Combined Contracting Officer's Statement and Legal Memorandum (CCOSLM) ¶ 8.¹ Under the contemplated contracts, the successful offerors would provide technical development services and produce prototype items for a laser-based CIRCM system to protect rotary-wing aircraft from infrared guided missiles. RFP at 6. The solicitation stated that award would be made on the basis of best value, considering the following evaluation factors (listed in descending order of importance): technical; past performance; cost/price; and small business participation plan. Id. at 70. The technical factor included the following five subfactors (listed in descending order of importance): ability to meet probability of countermeasure (Pcm); integration architecture (IA); system size, weight, and power (SWaP); reliability; and integrated master plan/integrated master schedule (IMP/IMS). Id.

The agency received five proposals by the solicitation's closing date. CCOSLM ¶ 16. A source selection evaluation board (SSEB) evaluated the proposals. Id. The SSEB identified strengths and weaknesses within the proposals and assigned

¹ The solicitation was issued as amendment No. 0010 to a previously-issued draft solicitation. RFP at 6. Following the issuance of several subsequent solicitation amendments, a final, consolidated version of the solicitation was issued as amendment No. 0014 to the draft solicitation. Id. at 2. All citations to the solicitation in this decision refer to the final, consolidated solicitation that was issued as amendment No. 0014 to the draft solicitation.

ratings under each of the evaluation factors and subfactors.² CCOSLM ¶¶ 16-17. A competitive range consisting of four proposals was established. Agency Report (AR), Tab 4, Source Selection Authority (SSA) Debriefing Charts, at 15. The agency conducted discussions with the four competitive range offerors. Id. at 7. At the conclusion of discussions, final proposal revisions (FPR) were requested. Id. Following the SSEB's evaluation of the FPRs, the competitive range offerors' proposal strengths and weaknesses were adjusted, and the proposals were assigned final ratings, which, together with the offerors' total proposed and evaluated costs, are shown in the table below.

	<u>ITT</u>	<u>BAE</u>	<u>NORTHROP</u>	<u>OFFEROR FOUR</u>
Technical (Overall)	Acceptable	Outstanding	Outstanding	Good
Pcm	Acceptable	Outstanding	Outstanding	Good
IA	Acceptable	Outstanding	Outstanding	Good
SWaP	Acceptable	Outstanding	Outstanding	Outstanding
Reliability	Good	Outstanding	Outstanding	Good
IMS/IMP	Outstanding	Outstanding	Outstanding	Outstanding
Technical Risk ³	Moderate-to-High	Low	Low	Moderate
Past Performance	Low Risk	Low Risk	Low Risk	Low Risk
Cost/Price	Low Risk	Low Risk	Low Risk	Low Risk
Small Business Participation Plan	Good	Acceptable	Acceptable	Acceptable
Total Proposed Cost	\$34,208,228	\$41,369,418	\$32,661,283	\$50,877,987
Total Evaluated Cost	\$34,208,228	\$41,369,418	\$32,661,283	\$50,877,987

Id. at 28.

² The agency prepared a source selection plan (SSP) which provided that for the technical factor and subfactors and for the small business participation plan factor, the agency would assign adjectival ratings of outstanding, good, acceptable, susceptible to being made acceptable, or unacceptable. AR, Tab 3, SSP, at 34. The SSP included definitions for each of these ratings. Id. at 34-36. The SSP additionally provided that for the past performance and cost/price factors, the agency would assign adjectival ratings of high risk, moderate risk, low risk, or, for the past performance factor only, neutral risk. Id. at 35. The SSP included definitions for each of these ratings. Id.

³ For each of the technical factor subfactors, the solicitation listed the agency's evaluation considerations. RFP at 71-72. For all five subfactors, risk was one of the evaluation considerations. Id.

Based on the SSEB's evaluation findings, the SSA compared the competitive range proposals and considered their evaluated strengths, weaknesses, and risks. AR, Tab 5, Source Selection Decision Document (SSDD) at 3-16. The SSA observed that under the most important evaluation factor, technical, BAE's and Northrop's proposals were evaluated as superior to Offeror Four's proposal and significantly superior to ITT's proposal. Id. at 4. The SSA determined that because BAE's and Northrop's proposals were technically superior and lower in cost relative to Offeror Four's proposal, Offeror Four's proposal did not represent the best value to the government. Id. at 15. The SSA also determined that because Northrop's proposal offered significant technical merit at the lowest proposed cost, Northrop's proposal was one of the two proposals that represented the best value to the government. Id. at 14. Finally, the SSA found that although ITT offered a lower proposed cost than BAE, BAE's proposal represented a better value to the government because of its significant technical superiority. Id. at 14-15.

Based on the SSA's determinations, the agency awarded contracts to BAE and Northrop on January 31, 2012. CCOSLM ¶ 25. On February 8, ITT received a debriefing. Id. ¶ 27. This protest followed.

JURISDICTION

As an initial matter, the agency and intervenors urge our Office to dismiss the protest, arguing that due to a corporate reorganization that occurred after ITT submitted its proposal, ITT is not an interested party to challenge the agency's actions.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (West 2012), only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2012). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57.

In response to the solicitation connected with this protest, ITT Electronic Systems submitted a proposal. At the time of proposal submission, ITT Electronic Systems was an unincorporated division of ITT Corporation. See Protest, exh. 6, ITT FPR, Vol. VI, Contract Documentation, at 1; Protester Response to GAO Request for Clarification (Mar. 14, 2012) at 5-7. The proposal stated that ITT Corporation was "spinning off"--i.e., restructuring--its businesses into three distinct, stand-alone companies, and that ITT Electronic Systems would become part of a new company, ITT Exelis, Inc. See Protest, exh. 2, ITT FPR, Vol. I, Executive Summary, at 4. The proposal also stated that under the restructuring, all assets that were committed under the proposal to performance of the contract--e.g., financial resources,

employees, subcontracts, materials, and infrastructure support--would be transferred to ITT Exelis, Inc. Protest, exh. 6, ITT FPR, Vol. VI, Contract Documentation, at 1. Several months after proposal submission, the restructuring occurred, and Exelis, Inc. became the complete successor-in-interest to ITT Electronic Systems. See Protester Response to GAO Request for Clarification (Mar. 14, 2012), exh. 6, ITT Corporation 8-K, at 1.

The agency contends that as the complete successor-in-interest, and the entity that owns and controls the assets and resources needed to perform the contract, ITT Exelis, Inc. is the only party with sufficient interest to maintain the protest. Agency Comments on Protester Response to Intervenor BAE's Renewed Request for Dismissal (Mar. 28, 2012) at 2. We disagree.

The entity that submitted the proposal--ITT Electronic Systems--was the same entity that filed the protest. After the time of proposal submission that entity transformed from an unincorporated division of a corporate parent into a new, stand-alone, incorporated entity with a new name. Nevertheless, the entity that submitted the proposal is in essence the same entity that would enter into a contract with the government if the government determines to make an award on the basis of the proposal.⁴ Under these circumstances, we do not view the corporate restructuring to have precluded ITT Electronic Systems--the entity that submitted the proposal--from filing a protest and qualifying as an interested party under our Bid Protest Regulations.⁵

⁴ We recognize that had the corporate restructuring not occurred, and had the government determined to make an award on the basis of the ITT Electronic Systems proposal, the legal entity with which the government would have entered into a contract would have been ITT Corporation. We also recognize that had the government determined to make award on the basis of the ITT Electronic Systems proposal following the corporate restructuring, the government would have entered into a contract with ITT Exelis, Inc.

⁵ The agency's and intervenors' arguments that ITT Electronic Systems is not an interested party rely on our decision in Integral Systems, Inc., B-405303, Aug. 13, 2011, 2011 CPD ¶ 161. The circumstances in Integral, however, materially differ from the circumstances here. In particular, in Integral, unlike here, the entity that submitted the proposal was not the entity that filed the protest. Integral Systems, Inc., *supra*, at 3. Rather, in Integral, the proposal was submitted by a firm that was a separate corporation from the protester, and the protester acknowledged that there would be no privity between itself and the government if an award were made on the basis of the proposal. Id. at 4. The agency and intervenors also rely on the United States Court of Federal Claims's decision in L-3 Communications Integrated Systems, L.P. v. United States, 84 Fed. Cl. 768 (2008). Like Integral, L-3 is inapposite. In L-3, the court held that a complete

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DISCUSSION OF THE MERITS

ITT asserts that the agency's evaluation of its proposal was unreasonable in several respects; the agency's discussions with ITT were not meaningful; the agency treated ITT, BAE, and Northrop unequally; and the agency's best value determination was flawed. We have considered all of ITT's arguments, and we conclude that none of them has merit. Below we discuss ITT's principal contentions.

Evaluation of ITT's Proposal

ITT challenges several aspects of the agency's evaluation of the firm's technical proposal. In the context of these allegations, we note that in reviewing a protest against an agency's evaluation of proposals, our Office will not substitute our (or the protester's) judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In this regard, the evaluation of an offeror's proposal is a matter within an agency's broad discretion, since the agency is responsible for defining its needs and the best method for accommodating them. Id. A protester's mere disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

ITT's Target Acquisition Timing

ITT first asserts that the agency imposed an unstated evaluation criterion when it evaluated ITT's proposal under the Pcm subfactor. Protest at 15-16; Comments at 73-77. As relevant to this claim, the agency assigned a significant weakness to ITT's proposal under the Pcm subfactor based on the perceived risk that under dynamic flight conditions, ITT's CIRCM system would exceed the target acquisition timing that ITT specified for the system.⁶ AR, Tab 6, ITT Technical Factor Rollup Evaluation, at 1-2; AR, Tab 7, ITT Pcm Subfactor Rollup Evaluation, at 2. According to ITT, this weakness reflects an unstated evaluation criterion that

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successor-in-interest to a business unit that had submitted an offer had standing to pursue a claim based on that offer. L-3 Commc'ns Integrated Sys., L.P., supra, at 779.

⁶ The CIRCM system works in conjunction with the aircraft's missile warning system. CCOSLM ¶ 3. Target acquisition timing relates to the time that the CIRCM system takes to detect and settle on a target after the aircraft's missile warning system informs the CIRCM system of a threat. Id. ¶ 66.

offerors' target acquisition timing data must have been for tests performed under dynamic flight conditions.⁷ Comments at 77. ITT asserts that based on this alleged unstated evaluation criterion, the agency ignored target timing acquisition data in ITT's proposal for testing that was not performed under dynamic flight conditions. Id. at 73.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. The agency maintains that the solicitation reflected that its evaluation would include consideration of target acquisition timing under dynamic flight conditions. See CCOSLM ¶¶ 67-74. We agree.

With respect to the Pcm subfactor, the solicitation stated that the agency's evaluation would consider "the ability of [an offeror's] design approach to meet the Pcm requirement in paragraph 3.2.2 of the CIRCM System Performance Specification [(SPS)]." RFP at 71. Paragraph 3.2.2 of the CIRCM SPS included a subparagraph that stated as follows: "The CIRCM System shall successfully countermeasure threat missiles [within a classified parameter] after receipt of [the missile warning system] cue. This will be accomplished under all environmental and platform conditions delineated at paragraph 3.11." AR, Tab 32, SPS ¶ 3.2.2.3. Paragraph 3.11, in turn, included at least two subparagraphs that are relevant to ITT's protest claim. The first, titled Shock, stated as follows: "The CIRCM shall operate in the operational environment of helicopters and tilt-rotor aircraft during hard maneuvers, hard landings, ordnance release, rough handling and gunfire from onboard weapons without damage or degradation in performance." Id. ¶ 3.11.3. The second subparagraph, titled Acceleration, stated as follows: "The CIRCM System equipment shall operate without degradation or damage during acceleration environment encountered in extreme maneuvers and hard landings" Id. ¶ 3.11.19.

Collectively, these solicitation provisions expressly informed offerors that the agency's evaluation would consider the timing capability of the proposed CIRCM system under dynamic flight conditions. Accordingly, we see no merit in ITT's claim that the agency applied an unstated evaluation criterion.

ITT argues that notwithstanding the above-discussed solicitation provisions, the agency applied an unstated evaluation criterion because the solicitation instructed that timing data "shall be provided as a function of missile crossing line-of-site

⁷ ITT describes dynamic flight conditions as "the movement the aircraft is expected to make." Comments at 75. ITT states that in a laboratory, dynamic flight conditions are "simulated by placing the system on [a] platform that moves and turns as an aircraft might be expected to do." Id.

rate.”⁸ Comments at 76 (quoting RFP at 71). We see nothing in the record--and ITT has provided nothing--to suggest that the solicitation’s instruction that timing data be provided as a function of missile crossing line-of-site rate precluded the agency from considering whether the proposed CIRCM system would meet the timing requirement under dynamic flight conditions. Further, ITT’s arguments ignore the fundamental notion that the utility of the system being developed pursuant to this procurement depends on the system’s ability to function aboard an airborne helicopter that is subject to missile attacks. Thus, by its very nature, the CIRCM system must operate under dynamic flight conditions. In any event, as described above, the solicitation here reasonably communicated that target acquisition timing under dynamic flight conditions would be considered under the Pcm subfactor; ITT’s arguments to the contrary have no merit.⁹

ITT’s Pcm Subfactor Rating

Next, ITT contends that the agency assigned an incorrect adjectival rating to its proposal under the Pcm subfactor. In this regard, ITT argues that based on the evaluation rating definitions in the agency’s SSP, the evaluation results for ITT’s proposal under the Pcm subfactor correspond to a subfactor rating of good, rather than the rating of acceptable, which the proposal received. Comments at 77-79; see also Protest at 20.

The SSP defined a rating of good as applicable to a proposal that, among other things, “offers some significant strengths or numerous strengths that are not offset by weaknesses.” AR, Tab 3, SSP, at 34. The agency identified no strengths and five significant weaknesses for ITT’s proposal under the Pcm subfactor. AR, Tab 7, ITT Pcm Subfactor Rollup Evaluation, at 2. Thus, ITT’s proposal did not meet the criteria stated in the SSP for a rating of good. Moreover, an agency’s SSP is an internal guide that does not give rights to parties; it is the solicitation’s evaluation scheme, not internal agency documents, to which an agency is required to adhere in evaluating proposals. Sig Sauer, Inc., B-402339.3, July 23, 2010, 2010 CPD ¶ 184 at 6 n.9.

⁸ ITT states that line-of-site refers to “the missile and its movement” and that it is simulated in a laboratory by “having a target move around a specified area.” ITT Comments at 75.

⁹ ITT also argues that the agency considered the wrong target acquisition timing data when it evaluated ITT’s proposal. Protest at 16-19. ITT acknowledges, however, that the data that it believes the agency should have evaluated pertained to testing that was not performed under dynamic flight conditions. Comments at 73, 75-76. Accordingly, this argument is without merit.

ITT's [DELETED] Cable

ITT also challenges two aspects of the agency's evaluation of the firm's proposed use of a [DELETED] cable to transmit laser energy from the CIRCM system's laser to its pointer/tracker. ITT's first challenge relates to environmental exposure at the tip of the cable. As relevant to this issue, the agency documented the following weakness for ITT's proposal under the IA subfactor:

Exposure of [DELETED] materials to water vapor causes corrosion of the [DELETED] [;] thus the use of [DELETED] material in harsh environments, as defined in the CIRCM SPS, brings about severe design requirements for the [DELETED] material to protect it from exposure to water vapor. The test proposal noted that the design of the cable left the [DELETED] tip exposed to the environment . . .

AR, Tab 6, ITT Technical Factor Rollup Evaluation, at 2. This weakness also was referenced under the Pcm subfactor in a debriefing that the SSEB prepared for the SSA. AR, Tab 4, SSA Debriefing, at 52.

ITT states that the "test proposal" referenced in the weakness was a test report--titled Cable Hermetic Seal Demonstration--that was prepared by the manufacturer of the [DELETED] cable of ITT's [DELETED] cable assembly. Comments at 85. ITT acknowledges that the test report concludes with the statement that "[t]he cable construction leaves the [DELETED] tip potentially exposed." Id. (quoting Protest, exh. 8, ITT FPR, Vol. II, Technical, attach. J, Cable Hermetic Seal Demonstration, at 11). ITT maintains, however, that the agency ignored portions of its technical proposal showing that ITT took measures to "protect the [DELETED] cable and to make sure it was completely protected from the environment." Comments at 85. These measures included, ITT states, [DELETED]. Id. at 85-88.

The agency responds that it "understands that when the final cable assembly is installed in a complete CIRCM system, the [DELETED] tip is not left exposed to the environment." CCOSLM ¶ 133.a. The agency also states that it viewed ITT's final cable assembly as meeting the government's requirement. See id. ¶ 123 (referencing AR, Tab 18, ITT Debriefing Questions and Answers, at 1). According to the agency, the weakness arose because "no test data beyond Attachment J (Cable Hermetic Seal Demonstration) . . . was provided to substantiate ITT's assertions for the final assembly design," and the agency therefore determined that the design maturity and subsystem coupling/integration technique of ITT's cable represented a technical risk. Id.

The solicitation and contemporaneous record support the agency's position. Under the IA subfactor, the solicitation instructed offerors to "provide an estimate of the design maturity of their prototype system and provide test data/analysis to

substantiate the offerors['] maturity claims.” RFP at 64. Under the IA subfactor, the agency found that ITT’s “test data exposes a weakness and introduces a moderate to high risk for both design maturity and sub-systems coupling/integration technique,”¹⁰ and that “[t]he [DELETED] coupling technique . . . is a risky approach because the [DELETED] cabling has not been thoroughly substantiated through independent USG testing in a relevant environment.” AR, Tab 8, ITT IA Subfactor Rollup Evaluation, at 4-5. ITT has not shown that it submitted test data for the final assembly of its [DELETED] cable. Further, the agency’s observation that ITT’s test report noted that the design of the cable left the [DELETED] tip exposed to the environment is accurate. For these reasons, we do not find the agency’s criticism regarding the risk of environmental exposure to the [DELETED] tip to be unreasonable.

Moreover, even assuming for the sake of argument that the agency misunderstood the extent to which the final assembly of ITT’s [DELETED] cable would seal the tip, we fail to see how ITT was prejudiced. In this regard, the record reflects that the agency’s concern regarding the susceptibility of a [DELETED] cable to environmental risks reached beyond the issue of an exposed tip. As stated above, the agency noted that “[e]xposure of [DELETED] materials to water vapor causes corrosion of the [DELETED].” AR, Tab 6, ITT Technical Factor Rollup Evaluation, at 2. ITT’s test report supports this conclusion by referencing “the requirement for hermeticity”¹¹ for a [DELETED] cable and by detailing a complex design that is intended to achieve “hermeticity.” Protest, exh. 8, ITT FPR, Vol. II, Technical, attach. J, Cable Hermetic Seal Demonstration, at 2.

Another example of the agency’s concern in this area was the finding that “the use of [DELETED] material in harsh environments, as defined in the CIRCM SPS, brings about severe design requirements for the [DELETED] material to protect it from exposure to water vapor.” AR, Tab 6, ITT Technical Factor Rollup Evaluation, at 2. Both the [DELETED] cable and the final assembly of ITT’s cable feature numerous, technically complex design elements that are intended to seal the system from the environment. See ITT Comments, exh. 16, ITT FPR, Vol. II, Technical, at 71-73; Protest, exh. 8, ITT FPR, Vol. II, Technical, attach. J, Cable Hermetic Seal Demonstration, at 2-3. These elements support the agency’s criticism regarding “severe design requirements.” Finally, the agency documented a finding that “[t]he vulnerability of the [DELETED] material to water vapor results in

¹⁰ The referenced test data showed that notwithstanding various features that were to render the [DELETED] cable watertight, a leak occurred in one of the [DELETED] cables that were tested. See Protest, exh. 8, ITT FPR, Vol. II, Technical, attach. J, Cable Hermetic Seal Demonstration, at 11. The cause of the leak was said to have been subsequently corrected. Id. at 2-3.

¹¹ Hermeticity refers to the state of being completely sealed. CCOSLM ¶ 119 n.24.

additional reliability risk due to the harsh environments on board the aircraft.” AR, Tab 4, SSA Debriefing, at 55.

In sum, the record reflects that the agency’s concern regarding the environmental risk associated with ITT’s cable design was broader than the issue of an exposed tip. We find that the additional concerns were reasonable and documented. We therefore fail to see how ITT would have been prejudiced even if the agency did not recognize that ITT proposed to seal the tip of its [DELETED] cable. Prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. Armorworks Enters., LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3.

ITT also challenges the agency’s finding that the [DELETED] material was not tested at the power level and wavelengths that ITT proposed for its CIRCM system. Protest at 28-29; Comments at 93-97. Separate weaknesses were assigned to ITT’s proposal for this issue under the Pcm, IA, and reliability subfactors. AR, Tab 7, ITT Pcm Subfactor Rollup Evaluation, at 2; AR, Tab 8, ITT IA Subfactor Rollup Evaluation, at 4; AR, Tab 10, ITT Reliability Subfactor Rollup Evaluation, at 3. In essence, the agency’s concern was that testing at the power level and wavelengths specified in the proposal may have revealed failure modes that otherwise would not have manifested themselves. AR, Tab 6, ITT Technical Factor Rollup Evaluation, at 2; AR, Tab 7, ITT Pcm Subfactor Rollup Evaluation, at 2, 4; AR, Tab 10, ITT Reliability Subfactor Rollup Evaluation, at 3.

ITT asserts that a test summary report--titled Expanded Beam Cable Assembly (EBCA) Test--that the firm submitted in response to a discussions question shows that ITT conducted tests at power levels that “exceeded the design requirements.” Comments at 94 (referencing Comments, exh. 18, ITT FPR, annex D, attach. D, EBCA Test). ITT also asserts that a figure in the firm’s technical proposal--titled Figure 3-87--shows that testing was performed at wavelengths within the “relevant” range. Comments at 97-98 (referencing Comments, exh. 16, ITT FPR, Vol. II, Technical, at 76).

The agency responded to ITT’s concerns regarding the [DELETED] cable testing issues during ITT’s debriefing. With respect to the issue of power level testing, the agency advised ITT that the power level reflected in the EBCA Test report was less than the peak power level that ITT specified for its system in a classified addendum to ITT’s proposal. See AR, Tab 17, ITT Debriefing Charts, at 31. Similarly, with respect to the wavelength testing, the agency advised ITT that the wavelengths reflected in Figure 3-86 of ITT’s technical proposal--which appeared in conjunction with Figure 3-87--were not the wavelengths that were proposed in the classified addendum to ITT’s proposal. Id.

ITT has not shown--or even claimed--that the power level reflected in the EBCA Test was the same or exceeded the power level specified in the classified addendum to the proposal. Nor has ITT shown--or claimed--that the wavelengths reflected in Figure 3-87 were the same as the wavelengths that were proposed in the classified addendum to the proposal. An offeror bears the burden of submitting an adequately written proposal, and it runs the risk that its proposal will be evaluated unfavorably where it fails to do so. Tetra Tech Tesoro, Inc., B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 5. Here, the record indicates that ITT proposed specific power levels and wavelengths for its CIRCM system, but that its proposal did not reflect testing of the [DELETED] material at those power levels and wavelengths. The agency found this to be a weakness because of the potential for failure at the proposed power levels and wavelengths. We see no basis to question this finding.

Discussions

ITT contends that the agency failed to conduct meaningful discussions with the firm with respect to the testing of ITT's [DELETED] cable at full power. Protest at 46-47; Comments at 101-02. Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that reasonably could be addressed in a manner to materially enhance the offeror's potential for receiving award. Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11.

ITT does not argue that the agency failed to identify a proposal deficiency or significant weakness that ITT reasonably could have addressed. Rather, ITT argues that the agency ignored information that ITT provided in response to a discussions question regarding the testing of ITT's [DELETED] cable. Protest at 47; Comments at 102. Accordingly, ITT's argument is properly characterized as a claim that the agency unreasonably evaluated the firm's proposal with respect to the testing of the [DELETED] cable. Nothing in the record indicates that the agency ignored ITT's response to the discussions question at issue. Further, and as discussed above, we see no basis to conclude that the agency's determination to assign a weakness to ITT's proposal in this area was unreasonable. For these reasons, this basis of protest is denied.

ITT also argues that its discussions with the agency were not meaningful because the agency allegedly identified the concern regarding the sealing of the [DELETED] cable after the initial round of discussions, but did not raise the issue in the subsequent round of discussions. Comments at 102-05.

Although ITT's debriefing disclosed the agency's concerns regarding the sealing of the [DELETED] cable, AR, Tab 17, ITT Debriefing, at 17, 18, 24, ITT did not raise this argument until it filed its comments on the agency report, which was more than six weeks after ITT filed its initial protest. Accordingly, this argument is

untimely. 4 C.F.R. § 21.2(a)(2) (protests must be filed within 10 days of date when protester knew or should have known of basis for its protest).

Unequal Treatment

ITT alleges that the agency treated ITT, BAE, and Northrop unequally in evaluating the data rights that each firm offered to the government. Comments at 15-26; Supp. Comments at 38-46. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. LASEOD Group, LLC, B-405888, Jan. 10, 2012, 2012 CPD ¶ 45 at 4; Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4.

As relevant to ITT's allegation, the solicitation under the IA subfactor instructed as follows:

The offeror shall submit a description of how the offeror[']s design approach incorporates [modular open system architecture (MOSA)] business and technical principles. . . . The offeror[']s proposal shall identify proprietary or vendor-unique Commercial Off-The-Shelf (COTS), and license agreements. The goal is to receive Unlimited Rights or Government Purpose Rights.

RFP at 64. The agency did not assign any stand-alone strengths or weaknesses regarding data rights to the proposals of ITT, BAE, or Northrop. Tab 8, ITT IA Subfactor Rollup Evaluation, at 3-4; AR, Tab 36, Northrop IA Subfactor Rollup Evaluation, at 2-4; AR, Tab 42, BAE IA Subfactor Rollup Evaluation, at 2-3. The agency did, however, evaluate and consider each firm's data rights package. In this regard, neither BAE's nor Northrop's data rights packages adversely affected the ratings for those firms' MOSA approaches. See AR, Tab 36, Northrop IA Subfactor Rollup Evaluation, at 1; AR, Tab 42, BAE IA Subfactor Rollup Evaluation, at 1.

On the other hand, the agency found that ITT's MOSA approach was marginal in part because ITT's "data rights package contains limited and restricted rights assertions on [DELETED] items that limit the business aspects of their [MOSA] approach." AR, Tab 8, ITT IA Rollup Evaluation, at 1; see also AR, Tab 4, SSA Debriefing Charts, at 53. The agency characterized the issue with ITT's data rights package as follows:

ITT has 2 suppliers . . . that are making Limited Rights assertions on several [DELETED] items and 1 supplier requesting [DELETED] on [DELETED] items.

AR, Tab 4, SSA Debriefing Charts, at 37. ITT argues that "a side by side comparison of the offerors' data rights approaches shows that this criticism of ITT

was unwarranted” because ITT proposed “almost the exact same bundle of data rights” as BAE and Northrop. Supp. Comments at 45.

The record reflects that ITT, BAE, and Northrop each offered a mix of limited and unlimited data rights, and that each firm’s proposal set forth a strategy to minimize the effect of [DELETED] on the government. BAE’s and Northrop’s strategies essentially were to offer [DELETED] that would allow the government to procure software or hardware items that would be similar to any software or hardware items for which [DELETED]. See AR, Tab 40, BAE FPR, Vol. II, Technical, at II-105.2, II-107; AR, Tab 42, BAE IA Subfactor Rollup Evaluation, at 1; AR, Tab 46, Northrop FPR, Vol. II, Technical, at II-163-2, II-165, II-166; AR, Tab 36, Northrop IA Subfactor Rollup Evaluation, at 1. ITT’s strategy was similar in some respects, but it also involved a requirement that ITT’s [DELETED]. See AR, Tab 21, ITT FPR, Vol. VI, Contract Documentation, at 4; AR, Tab 8, ITT IA Subfactor Rollup Evaluation, at 2. ITT’s proposal noted that notwithstanding this requirement, [DELETED]. AR, Tab 21, ITT FPR, Vol. VI, Contract Documentation, at 4. For example, the [DELETED] rights offered by the supplier of [DELETED] were expressly conditioned on [DELETED], and were [DELETED]. *Id.* at 5, 9.

ITT has not shown--and our review of the record has not revealed--that BAE’s or Northrop’s proposals included conditional limitations on data rights similar to the one in ITT’s proposal. Accordingly, we do not see the agency’s evaluation as unequal; rather, we see it as reflecting a reasonable distinction between ITT’s proposal and the proposals of BAE and Northrop.

In any event, the record shows that for at least two reasons, the agency’s evaluation of ITT’s data rights package did not prejudice the firm. First, the agency’s ultimate assessment of the data rights packages offered by ITT, BAE, and Northrop was identical. Specifically, the bottom line conclusion in the SSEB’s debriefing to the SSA was that the data rights packages offered by ITT, BAE, and Northrop “may be sufficient” to competitively procure the proposed CIRCM system from other suppliers.¹² AR, Tab 4, SSA Debriefing Charts, at 36-38. Second, ITT’s proposal was assigned a significantly lower rating under the IA subfactor than BAE’s and Northrop’s proposals based on numerous weaknesses that are independent of data rights and which ITT has not challenged.¹³ In sum, the record here provides no basis on which to sustain ITT’s protest claim.

¹² Consistent with this conclusion, the SSA made no reference to the offerors’ data rights packages in his source selection determination. AR, Tab 5, SSDD.

¹³ ITT’s proposal was assigned a rating of acceptable under the IA subfactor, whereas the BAE’s and Northrop’s proposals were assigned ratings of outstanding. AR, Tab 4, SSA Debriefing Charts, at 28. Additionally, ITT’s proposal was assigned eight significant weaknesses and three weaknesses under the IA subfactor. AR,

(continued...)

ITT also alleges that the agency treated ITT and Northrop unequally in the evaluation of the firms' respective quantum cascade laser (QCL) modules. Comments at 99-101. In particular, ITT argues that its proposal received a weakness in connection with a QCL-related hardware failure that occurred under testing at 71 degrees Celsius, yet Northrop's proposal included QCL temperature performance testing data up to only 25 degrees Celsius. Id. at 100.

In response to ITT's allegation, the agency provided documents showing that Northrop's proposal included data reflecting the successful performance of Northrop's QCL at temperatures up to 71 degrees Celsius. AR, Tab 51, Northrop FPR, Vol. II, Technical, at 70-71, 73-1; see also Agency Supp. Brief ¶¶ 3, 5. ITT concedes that "both ITT and apparently [Northrop] tested their proposed lasers at temperatures up to 70°C," but argues that "there is no justification for ITT's proposed laser to have been evaluated as a significant weakness and a moderate to high risk." Comments on Agency Supp. Brief at 7. We have considered ITT's arguments regarding the evaluation of its QCL, and to the extent that they are timely, we conclude that they amount to mere disagreement with the agency, and provide no basis on which to sustain the protest.¹⁴

Best Value Determination

Finally, ITT asserts that the agency's best value determination was flawed because the determination was based on proposal evaluations that, according to the arguments described above, were flawed. Protest at 52-53; Comments 109-10. As the foregoing discussion explains, we see no merit in ITT's arguments. Moreover, the record reflects that the agency's best value determination involved a comparison of the specific strengths and weaknesses that the agency identified within the proposals of the competitive range offerors. AR, Tab 5, SSDD, at 14-16. The record further reflects that based on this comparison, the agency reasonably determined that BAE's higher-rated proposal represented a better value to the

(...continued)

Tab 8, ITT IA Subfactor Rollup Evaluation, at 3-4. None of these eleven weaknesses pertained to ITT's data rights package. Id.

¹⁴ ITT also raises challenges regarding various aspects of the agency's evaluation of BAE's proposal. Comments at 26-68. The agency responded to each challenge with an explanation of how specific sections of the solicitation and BAE's proposal supported the agency's evaluation findings. See Supp. CCOSLM ¶¶ 24-138. We have considered all of ITT's allegations, along with its comments on the agency's responses thereto, and conclude that none of the allegations has merit.

government than ITT's proposal, notwithstanding the cost premium associated with BAE's proposal. Id. at 15. Accordingly, there is no basis to sustain ITT's challenge to the agency's best value determination.

The protest is denied.

Lynn H. Gibson
General Counsel