U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Conti Federal Services, LLC

File: B-422162; B-422162.2; B-422162.3

Date: February 1, 2024

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Gary J. Campbell, Esq., and Jedidiah K. R. Blake, Esq., Perkins Coie, for Charter Contracting Company, LLC, the intervenor.
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Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's cost realism evaluation is sustained where record shows agency made unreasonable upward adjustments that raised protester's most probable cost above awardee's.

DECISION

Conti Federal Services, LLC, a small business of Orlando, Florida, protests the award of a contract to Charter Contracting Company, LLC, a small business of Boston, Massachusetts, under request for proposals (RFP) No. W912WJ-22-R-0014, issued by the Department of the Army, United States Army Corps of Engineers (USACE) for environmental remediation services. The protester primarily challenges the agency's cost realism evaluation.

We sustain the protest.

BACKGROUND

On September 21, 2022, using the procedures of Federal Acquisition Regulation (FAR) part 15, the agency issued the solicitation as a small business set-aside, seeking proposals for environmental remediation services at the Durham Manufacturing Company superfund site located in Durham, Connecticut.[1] Contracting Officer's

[1] A superfund site is land contaminated by hazardous waste in the United States which has been identified by the Environmental Protection Agency (EPA) as a candidate for
(continued...)

Statement and Memorandum of Law (COS/MOL) at 1; Agency Report (AR), Exh. 26, RFP at 1, Exh. 2, Specifications (Specs.) at 1, 5, 9.[2] The solicited project includes phased excavation and transport for disposal of "impacted soil." AR, Exh. 2, Specs. at 5. The solicitation explained that the project site is an area known to be contaminated with various volatile organic compounds (*e.g.,* benzene, toluene, methylene chloride). *Id.* at 9.

The solicitation contemplated award of a single cost-plus-fixed-fee contract with a 1-year period of performance; there were no option periods. RFP at 46, 104. The solicitation established that award would be made on a best-value tradeoff basis considering cost and the following non-cost factors, listed in descending order of importance: (1) team experience; (2) technical approach; and (3) past performance. *Id.* at 106. The non-cost factors, when combined, were approximately equal to cost. *Id.* The solicitation provided the agency would evaluate proposed costs for realism, reasonableness, and balance, and, if needed, adjust an offeror's proposed cost to calculate a most probable cost (MPC) to be used for evaluation purposes. *Id.* at 111-112.

After evaluating initial proposals, the agency established a competitive range consisting of the three most highly rated proposals, including those submitted by the protester and Charter, the awardee. AR, Exh. 23, Source Selection Decision (SSD) at 3. Using written evaluation notices (ENs), the agency conducted discussions with each offeror in the competitive range. At the conclusion of discussions, USACE requested and received final proposal revisions. *Id.* at 5. The agency's evaluators assessed the protester's and awardee's final proposals as follows:

	Conti	**Charter**
Factor 1: Team Experience	Outstanding	Outstanding
Factor 2: Technical Approach	Outstanding	Outstanding
Factor 3: Past Performance	Substantial Confidence	Substantial Confidence
Proposed Cost	$10,961,174	$11,614,339
Evaluated Cost (MPC)	$11,546,496	$11,540,018

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cleanup because it poses a risk to human health or the environment. *Sevenson Envt'l Servs., Inc.*, B-412676 *et al.*, Sept. 2, 2016, 2016 CPD ¶ 235 at 2 n.2. These sites are placed on a national priorities list for further investigation by the EPA, and possible cleanup through the Superfund program. *Id.* The Superfund program was established by the Comprehensive Environmental Response, Compensation and Liability Act in 1980, and "allows EPA to clean up contaminated sites." www.epa.gov/superfund/what-superfund (last visited Jan. 3, 2024).

[2] Our citations use the Adobe PDF pagination of documents in the record. Unless otherwise noted, citations to the solicitation are to the final conformed version of the RFP included in the record as agency report exhibit 26.

Id.

As part of the tradeoff analysis, the source selection authority (SSA) compared Charter's and Conti's same-rated proposals and found that while "Conti's proposal demonstrates strengths that provide value to the Government, the value provided by Charter in Factor 1 is considered more significant as they are more relevant to the proposed work than Conti's strengths." *Id.* at 7. The SSA found no discriminators between Conti's and Charter's proposals under the other two equally rated non-cost factors, technical approach and past performance. *Id.* at 7-8. Based on finding Charter's proposal superior to Conti's under the most important non-cost factor (team experience), the SSA concluded that "Conti's technical evaluation does not justify a higher cost proposal," and eliminated Conti's approximately $6,500 higher-cost offer from further consideration for award. *Id.* at 9. After performing a tradeoff analysis between Charter's proposal and that of the third offeror, the SSA determined that Charter's technically superior proposal merited payment of its associated price premium as compared to the third offeror, and selected Charter for award. *Id.* at 9-10.

The agency notified Conti of the award decision on October 17, 2023. COS/MOL at 3. After requesting and receiving a debriefing, Conti timely filed this protest with our Office.

DISCUSSION

Conti raises numerous challenges to the agency's evaluation of proposals and resulting source selection decision. Primarily, Conti takes issue with the agency's calculation of the firm's MPC, contending that the agency made multiple unreasonable upward adjustments. Conti also takes issue with the agency's best-value tradeoff. Although we do not address every argument or variation thereof raised by Conti, we have considered them all and find that only those discussed herein provide bases to sustain the protest.

Cost Realism Evaluation

Conti contends that, in calculating the firm's MPC, the agency unreasonably adjusted upward proposed costs for two labor positions and for diesel fuel needed to run a generator to provide temporary electrical service.[3] The agency maintains either that it reasonably adjusted Conti's costs or, to the extent its adjustments were erroneous, Conti was not prejudiced by the errors. For the reasons explained below, we disagree with the agency.

When an agency evaluates proposals for the award of a cost-type contract, an offeror's proposed estimated costs are not dispositive as, regardless of the costs proposed, the

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[3] Conti also argues in the alternative that even if the agency's upward adjustments for the two labor positions and fuel costs were reasonable, "the Agency has miscalculated the net impact on Conti's MPC." Protest at 15. In light of our finding below that the agency's upward adjustments to Conti's MPC were not reasonable, we need not address this argument.

government is bound to pay the contractor its actual allowable costs. FAR 15.305(a)(1), 15.404-1(d); *Trident Techs., LLC; Test Eng'g Strategic Techs., LLC*, B-412020.16 *et al.*, Jan. 31, 2018, 2018 CPD ¶ 65 at 6. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. *Id.* As our decisions have explained, an agency's cost analysis need not achieve scientific certainty, but the methodology employed must be reasonably adequate and provide some measure of confidence that the agency's conclusions about the MPCs for an offeror's proposal are reasonable and realistic in view of other cost information available to the agency at the time of its evaluation. *Tatitlek Techs., Inc.*, B-416711 *et al.*, Nov. 28, 2018, 2018 CPD ¶ 410 at 14. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. *Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

Cost Adjustments for Labor Positions

Relevant here, the solicitation required offerors to provide a quality control (QC) manager and a site safety and health officer (SSHO). AR, Exh. 2, Specs. at 78, 91-92, 141; *see also* RFP at 8, 37. The cost evaluation committee (CEC) found that Conti proposed a unit cost of $[DELETED] per month for each of these positions, which the evaluators considered "unreasonably low and not competitive when compared to the IGE [independent government estimate]."[4] AR, Exh. 20, Final Cost Evaluation Report (Eval. Rpt.) at 9. The CEC adjusted the "monthly unit costs for these personnel . . . utilizing the same unit cost as the Superintendent [position] proposed by Conti," which was $[DELETED] per month, resulting in an extended cost of approximately $[DELETED] per year for each position. *Id.* After subtracting Conti's proposed rates from the adjusted rate, the evaluators upwardly adjusted Conti's MPC by $104,889.55 for the two positions combined.[5] COS/MOL at 5; *see also* AR, Exh. 31, Conti Final MPC Calculations at *Direct Cost - HeavyBid Rev 1* worksheet rows 308, 315.

The protester argues it was unreasonable for the agency to use the labor rate for the superintendent position as the basis for upwardly adjusting the rates for the QC

[4] We note the CEC incorrectly found that Conti proposed the same unit cost for the QC manager and SSHO positions (*i.e.*, $[DELETED]). The record, however, shows that Conti proposed different rates of $[DELETED] and $[DELETED] for the QC manager and SSHO, respectively. AR, Exh. 18, Conti Final Proposal Cost Files at 20.

[5] This figure is pre-markup--*i.e.*, prior to application of Conti's labor overhead, general and administrative rate (G&A), and fee. Throughout our discussion we refer to pre-markup cost figures. While the application of Conti's markup costs would result in larger figures (*e.g.*, the approximately $[DELETED] pre-markup figure for the QC manager and SSHO positions increases to approximately $[DELETED] after markup), discussion of pre-markup figures is sufficient to demonstrate the errors in the agency's cost evaluation here. We also note that whether comparing the pre-markup figures or post-markup figures, the magnitude of the delta between Conti's proposed costs and the agency's adjusted MPCs remains approximately the same.

manager and SSHO positions, because the superintendent position requires higher qualifications and more duties than either of those positions.[6] Protest at 11-12. Moreover, the protester notes the superintendent rate used by the agency was higher than the IGE rates (for QC manager and SSHO) that formed the basis of the agency's comparison for purposes of determining realism. Comments & Supp. Protest at 4, 6. The IGE established rates for the QC manager and SSHO positions of $[DELETED] and $[DELETED], respectively. AR, Exh. 28, Detailed IGE at 15. While Conti acknowledges the IGE rate for the QC manager "is comparable to the rate used in the contemporaneous MPC analysis," the protester contends that use of the superintendent rate, rather than the IGE rate, for the SSHO position was unreasonable and prejudicial. Comment & Supp. Protest at 7. Conti highlights that the difference between the superintendent rate used by the CEC and the IGE rate for the SSHO is approximately $[DELETED]. *Id.* The protester argues that because its technical proposal "already received the highest-possible ratings and Charter's MPC was a mere $6,477.90 lower than Conti's MPC," this single change "would give Conti a substantial chance at receiving the award," especially where "the RFP made cost approximately equal to all non-cost factors." *Id.* at 7.

The record, here, does not explain why the CEC chose to use the rate for Conti's proposed superintendent, rather than the IGE rates for the QC manager and SSHO, as

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[6] In addition to challenging the amount of the upward adjustments, the protester contends it was unreasonable for the agency to question the realism of the firm's proposed rates at all because Conti provided sufficient justification for the rates in what the firm contends was a discussion response. Protest at 9-11. In support of its contention, Conti primarily cites to an August 30 letter it submitted to the agency. *Id.* at 10. The agency explains that discussions were closed after final revised proposals had been submitted by the July 12 deadline. COS/MOL at 2. The August 30 letter referenced by Conti was in response to the "requests for responsibility determination information" the contracting officer sent to all competitive range offerors on August 25. *Id.* at 3. The agency maintains the information submitted by offerors in response to the August 25 request "was for responsibility purposes only," and was not part of discussions or the evaluation of proposals. *Id.*

After discussions were closed and final proposals were received on July 12, the record confirms the agency's August 25 request specified it was seeking "additional information" as part of the "responsibility determination of your proposal." AR, Exh. 22, Conti Responsibility Information at 2. Nowhere did the request indicate that discussions were being reopened, nor did the request invite further proposal revisions. *Id.* at 2-4. It is well established that communications with offerors concerning responsibility matters are not considered discussions, and do not trigger the need to reopen discussions with all competitive range offerors. *DaeKee Global Co. Ltd.*, B-402687.8, Jan. 3, 2012, 2013 CPD ¶ 153 at 6. Accordingly, the protester's August 30 letter was not a discussion response and could not serve to justify Conti's proposed rates. Thus, Conti's contention that it was unreasonable for the agency to question the realism of the firm's proposed rates based on its reply to the responsibility inquiry has no merit.

the upward adjustment benchmark for these two positions. *See* AR, Exh. 20, Final Cost Eval. Rpt. at 9. Only in responding to the protest, does the agency provide a one-sentence explanation, asserting that "USACE used the salary of the Superintendent to estimate the realistic cost of these positions because the salaries have been similar on prior USACE contracts." COS/MOL at 7 n.4. Beyond this representation in a footnote in the agency's legal memorandum, USACE does not otherwise explain or defend its use of the superintendent rate.

Instead, USACE presents an alternative or "updated" MPC calculation that agency counsel crafted "based on the median salary for the [QC and SSHO] positions" from the website salary.com.[7] COS/MOL at 7 n.4. Based on these median salary figures and counsel's "updated" MPC calculation, USACE argues that the agency acted reasonably in finding Conti's proposed rates unrealistically low. *Id.* at 7. Noteworthy here is that counsel's "updated" MPC adjusted Conti's costs upward by a lesser amount than the evaluator's contemporaneous assessment. *Compare id.* at 5 *with id.* at 6. That is, while the CEC's evaluation upwardly adjusted Conti's costs for these two positions by $104,889.55, counsel's "updated" MPC calculation results in an upward adjustment of only $39,185.28, a difference of $65,704.27. *Id.*

In reviewing an agency's procurement actions, we do not limit our consideration to contemporaneously documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 4 n.3. Our Office will accord lesser weight to *post hoc* arguments or analyses because judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. While we accord greater weight to contemporaneous materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, the agency's lone explanation for the use of the superintendent position rate in calculating Conti's MPC is not found in the contemporaneous evaluation record, but in the post-protest arguments advanced by counsel for the agency. *See* COS/MOL at 7-9. Counsel's *post hoc* justification, however, does not "simply fill in previously unrecorded details," instead counsel's argument derives a new MPC calculation that is not reflective of the evaluation record or the source selection decision. As such, we find this

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[7] Salary.com is a commercial service that tracks salary data for various labor positions across U.S. and international markets. *Systems Implementers, Inc.; Transcend Technological Systems, LLC*, B-418963.5 *et al.*, June 1, 2022, 2022 CPD ¶ 138 at 23.

argument--crafted in the heat of litigation, with no support in the contemporaneous record--to be a *post-hoc* rationalization deserving of little weight. *RemedyBiz, Inc*, B-421196, Jan. 17, 2023, 2023 CPD ¶ 29 at 9.

Moreover, we view the agency's attempt to calculate an alternative or "updated" MPC in response to the protest as, essentially, conceding that the CEC's contemporaneous evaluation over-adjusted Conti's MPC--possibly, by as much as $65,704. As a result, we find the agency's use of the superintendent rate as the basis for its upward adjustments arbitrary, and the cost evaluation for the QC manager and SSHO positions unreasonable. *See e.g., Marine Hydraulics Intl., Inc.*, B-403386, B-403386.2, Nov. 3, 2010, 2010 CPD ¶ 255 at 6-8 (sustaining protest where agency essentially conceded that it used an inappropriately high hourly rate when calculating certain labor costs).

Competitive prejudice is an element of a viable protest, and our Office will not sustain a protest unless the record contains evidence reflecting a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. *CIGNA Govt. Servs., LLC*, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 7-8. Here, had the evaluators upwardly adjusted Conti's proposed rates to those of the IGE or to the median rates from salary.com, as agency counsel did in responding to the protest, the result would have been a reduction in Conti's MPC of somewhere between $21,000 and $66,000, plus markup. A reduction of either amount would have erased the approximately $6,500 delta between Conti's and Charter's MPC, making Conti's the lower-cost offer. Because the RFP made cost approximately equal in importance to the combined non-cost factors, and Conti's proposal received the highest possible ratings under each non-cost factor, we cannot say what impact reducing Conti's MPC below that of Charter would have had on the best-value tradeoff decision. In such circumstances, we resolve doubts regarding prejudice in favor of the protester, as a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. *Information Intl. Assocs., Inc.*, B-416826.2 *et al.*, May 28, 2019, 2019 CPD ¶ 200 at 9. We therefore conclude that there is a reasonable possibility that Conti was prejudiced by the agency's actions and sustain the protester's challenge to the agency's cost realism evaluation for the QC manager and SSHO positions.

Cost Adjustments for Fuel

The RFP calls for the provision of temporary electrical service to various buildings during different phases of the job, which is to be accomplished through use of a generator run on diesel fuel. AR, Exh. 2, Specs. at 241-242. The solicitation specified that the "contractor shall be responsible to provide temporary generator system (480V, 3ph) to power existing" buildings, and that "[t]he temporary generator shall operate 24 hours a day."[8] *Id.* In response to offeror questions, the agency clarified, through

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[8] In the context of electrical services, "V" refers to volts or voltage, and "ph" refers to phases of an electrical circuit. *Abbreviations Commonly used in Electrical Documents* at 7, 9, available at https://onlinelibrary.wiley.com/doi/pdf/10.1002/0470013893.app1 (last visited Jan. 9, 2024).

solicitation question and answer amendments that “[t]he Government anticipates a power load requiring a 2,000 amp generator.”[9] RFP at 16, *see also* at 37. The agency report explains that to produce “2,000 amps and 480 volts, requir[es] a 1,000 kW generator” (1,000 kW = 1 mW).[10] COS/MOL at 9.

The record shows that the evaluators found Conti’s proposed “fuel cost associated with Task 7: Temporary Electric Service is significantly less than the IGE,” and that “[n]o justification or calculation was presented showing fuel usage.” AR, Exh. 20, Final Cost Eval. Rpt. at 11. Based on this finding, the CEC upwardly adjusted Conti’s proposed fuel unit cost of $[DELETED] per month to $[DELETED] per month. *Id.* The record further shows that Conti’s proposed approach to the work included providing temporary electrical services for [DELETED] months ([DELETED] days), instead of the 222 days used in the agency’s IGE. *Compare* AR, Exh. 18, Conti Final Proposal Cost Files at 73 *with* AR, Exh. 28, Detailed IGE at 18.

Conti argues it was unreasonable for the agency to find its final proposed fuel costs unrealistic, as its EN responses explained that “the estimate was based on the projected average usage of [DELETED] gallons per day, *i.e.*, running 24x7, but with higher consumption on Monday through Friday during work hours.”[11] Protest at 12; *see also* AR, Exh. 17, Conti’s Final Cost Proposal at 7. Conti further contends the IGE used by the agency to assess realism was itself unreasonable because the IGE assumed a 2 mW generator based on a value engineering (VE) report for a different project, whereas, by the agency’s own admission, the solicited project requires only a 1 mW generator. Comments & Supp. Protest at 11-12, *citing* COS/MOL at 9 and AR, Exh. 29, VE Report at 2; *see also* AR, Exh. 28, Detailed IGE at 18 (“1.7.1 Generators” “Note: Assume rental of 2MW based on VE study.”). As a 2 mW generator is twice the size of a 1 mW generator, the protester contends a 2 mW generator uses twice the fuel--meaning the IGE’s estimated fuel costs are approximately double what is needed for the solicited project.[12] Comments & Supp. Protest at 12-13.

The agency does not explain or defend its contemporaneous evaluation of Conti’s fuel costs. In lieu of defending the contemporaneous MPC calculations, the agency represents:

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[9] “A” or “amp” refers to amperes. *Abbreviations Commonly used in Electrical Documents* at 1.

[10] “kW” means kilowatt, and “mW” means megawatt. *Abbreviations Commonly used in Electrical Documents* at 4, 6.

[11] “24x7” is a colloquialism for 24 hours a day, 7 days a week.

[12] Both the protester and agency cite to https://www.generatorsource.com/Diesel_Fuel_Consumption.aspx for their generator fuel usage estimates. *See* Comments & Supp. Protest at 12; COS/MOL at 9 n.9.

> USACE discovered errors in this element of the MPC during protest review. However, correcting this error increased the MPC rather than reducing it. Thus, USACE does not believe these errors had a material impact on the SSA's tradeoff decision. While determining the MPC for fuel, the cost team accidentally used Conti's unit cost ($[DELETED]), rather than Conti's total fuel cost ($[DELETED]).

COS/MOL at 9. Counsel for the agency then proceeds to proffer a *post hoc* "updated" MPC calculation, which the agency maintains increase Conti's MPC for fuel "to an estimated $1,310,219." *Id.*

The protester characterizes the agency's claimed error as "a red herring," and posits that "the Agency just wants a chance to bolster its protest position by revising its estimate upward for Conti (and Conti alone)" based on fuel cost information prepared after the protest was filed. Comments & Supp. Protest at 15.

Other than asserting it made an error, the agency does not explain how using Conti's unit cost (rather than Conti's total fuel cost) in the contemporaneous MPC calculations was a mistake or in what way it impacted the calculations. *See* COS/MOL at 9. Based on a review of the record, it is not apparent to us where this alleged error resides. Rather, as explained above, the record shows the CEC compared Conti's unit cost to the IGE unit cost and then extended out the unit cost by Conti's proposed [DELETED]-month timeframe to arrive at a pre-markup upward adjustment of $704,988.[13] Changing the comparison from unit costs to total costs does not alter the results, as the agency suggests. Instead, if Conti's pre-markup total fuel cost of $[DELETED] is subtracted from the IGE's total fuel cost of $[DELETED] for [DELETED] months,[14] the result is a difference of $704,988--the exact same pre-markup amount by which the CEC upwardly adjusted Conti's MPC based on the contemporaneous comparison of unit costs.

As with the labor cost adjustment discussed above, rather than providing additional details consistent with the contemporaneous record, the agency's *post hoc* claim of a mistake in the fuel cost adjustments is at odds with the record. Accordingly, we give little weight--and find even less merit--to the agency's *post hoc* arguments that the

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[13] As noted above, while the IGE assumed the provision of temporary electrical services for 222 days, Conti's proposed approach required provision of temporary electrical services for only [DELETED] days (*i.e.*, [DELETED] months). *Compare* AR, Exh. 18, Conti Final Proposal Cost Files at 73 *with* AR, Exh. 28, Detailed IGE at 18. Accordingly, the CEC properly extended unit costs out to [DELETED] months when comparing Conti's proposed fuel costs to the IGE.

[14] Because the IGE assumed the provision of temporary electrical services for 222 days, as compared to Conti's [DELETED] days, to compare the IGE fuel costs to Conti's the IGE's monthly unit cost must be multiplied by [DELETED] months, rather than using the IGE's total fuel cost for 222 days ($[DELETED] * [DELETED] = $[DELETED]).

evaluators' upward cost adjustment to Conti's fuel costs should have been over a half million dollars higher than what the CEC contemporaneously calculated. *See e.g., CIGNA Govt. Servs., LLC, supra* at 6 (giving light weight to agency's *post hoc* assertions regarding upward cost adjustment where there was no basis in record).

Moreover, even if we were to give consideration to counsel's *post hoc* "updated" fuel cost calculations, the agency's revised upward adjustment amount of $1,310,219 is mathematically incorrect, using the agency's own post-protest estimating figures. Specifically, the agency states that for its "updated" fuel cost calculations, it assumed a 1 mW generator running at an estimated 75 percent load resulting in fuel consumption of 52.1 gallons per hour, or 1,250 gallons per day, as opposed to the [DELETED] gallons a day proposed by Conti. COS/MOL at 9. The agency further assumed a fuel cost of $4.72 per gallon. *Id.* If 1,250 gallons per day is multiplied by the [DELETED] days proposed by Conti and then by $4.72 per gallon, the result is $[DELETED]. The record provides no explanation for how agency counsel arrived at the amount of $1,310,219, as there is no citation to the record for this assertion in the memorandum of law. COS/MOL at 9.

We also note the agency's post-protest contention that 1,250 gallons of fuel would be required every day is inconsistent with the evaluators' contemporaneous assumption that fuel usage would vary between workdays and non-work days. The record shows that, in one of the cost ENs sent to Charter, the evaluators indicated the manufacturing operation at the work site "is closed Friday through Sunday so the electrical load could be reduced on those days. Fuel consumption would be significantly less during these days based on this reduced load for these three days." AR, Exh. 15, Charter ENs at 6. Conti's proposal reflects a similar understanding, discussing an assumption of "higher [fuel] consumption Monday - Friday during work hours than during the evenings or weekend." AR, Exh. 17, Conti's Final Cost Proposal at 7.

Here, the agency's *post hoc* recalculation of Conti's fuel MPC is not only misleading but lacks a mathematical foundation and is belied by the record. More importantly, neither the contemporaneous record nor the agency's response to the protest explain why the CEC based their fuel cost calculations for a project requiring a 1 mW generator on an IGE that assumed use of a 2 mW generator. Accordingly, we find the cost adjustments for fuel to be unreasonable.[15] Further, as the CEC's $704,988 upward adjustment to

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[15] The protester also takes issue with the agency's upward adjustments of the protester's costs arguing the agency double counted markup for fuel costs when making its initial and final MPC adjustments. In this regard, the protester asserts that when making its initial MPC calculations, the agency compared markup from an IGE that contained an embedded yet unspecified amount of markup to the protester's pre-markup proposal and upwardly adjusted the protester's proposed costs to account for this unspecified amount of markup. Comments & Supp. Protest at 13. The record confirms that the VE report figures used by the agency as the basis for the IGE's estimated fuel costs included an unspecified amount for markup. AR, Exh. 29, VE

(continued...)

Conti's MPC for fuel is too large--by approximately $350,000--there is a reasonable possibility the protester was prejudiced by the agency's error, because reducing Conti's MPC by approximately $350,000 would make Conti's proposal not just lower cost than the awardee's proposal, but the lowest cost proposal in the competitive range.[16]

Best-Value Determination

Finally, Conti takes issue with the agency's best-value determination. *See generally* Protest at 17-20. In reviewing an agency's source selection decision, we examine the supporting record to determine if it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *International*

Report at 1. The record also confirms that when calculating Conti's final MPC, the agency included in that final MPC, Conti's proposed markup for fuel costs. AR, Exh. 31, Conti Final MPC Calculations at *Conti Pricing Worksheet-Rev 1* worksheet columns T-Y (showing the agency calculated a "subtotal" direct cost for each item then added G&A and fee to each item to reach a "Total Price"). Thus, the agency's final MPC calculations for fuel include both Conti's proposed markup and the agency's upward cost adjustment based on the unspecified markup from the IGE. Without knowing the specific amount of markup from the IGE, we cannot ascertain the exact impact of this double counting on the agency's MPC calculations for Conti's fuel costs. We can and do conclude, however, that there was some impact from this double counting error, and that correcting this error would result in Conti having a lower MPC. Accordingly, we find the agency's evaluation of Conti's fuel costs unreasonable for this reason also.

[16] In discussing the recalculation of Conti's fuel MPC, the agency notes, for the first time, that Conti's electrical subcontractor's quotation "contains multiple exclusions that are not accounted for in its cost . . . including prevailing wage requirements, high voltage wiring, utility company fees, removal of existing conduits, coordination drawings, and more." COS/MOL at 9. The agency represents that "[t]hese costs do not appear to be accounted for elsewhere in Conti's proposal but are required for the work by the plain language of the solicitation and contract." *Id.* at 9-10. Charter, as the intervenor, posits that these exclusions mean Conti's proposal failed to meet all the requirements of the solicitation, and, thus, should have been deemed ineligible for award. Intervenor Comments at 5-6. On this basis, Charter argues Conti cannot demonstrate competitive prejudice from any errors the agency may have made during the procurement. *Id.* at 6.

The protester responded to the intervenor's argument, maintaining the claims were incorrect for a variety of reasons. Supp. Comments & 2nd Supp. Protest at 5 n.3. Our review of the record finds that none of the purported exclusions were noted in the contemporaneous evaluation. *See generally* AR, Exh. 19, Final Technical Evaluation Report at 14-18 (including no discussion of exclusions in Conti's proposal and assigning the proposal the highest possible ratings under all three non-cost factors). Below we recommend that the agency conduct new cost evaluations and make a new source selection decision. Additionally, we note that if, as represented in the memorandum of law, the agency considers there to be solicitation requirements excluded from Conti's proposal, the agency should reopen discussions to raise this issue with the firm.

Resources Group, B-409346.2 *et al.*, Dec. 11, 2014, 2014 CPD ¶ 369 at 15. The above-discussed errors in the agency's cost evaluation resulted in the protester's MPC being overstated by much more than the approximately $6,500 delta between Conti's and Charter's MPC. As the RFP made the combined non-cost factors approximately equal to cost, and as the source selection decision was based in part on Conti's same-rated proposal having a higher MPC than Charter, we conclude that the source selection decision was unreasonable, and sustain the protest on this basis. *See e.g., Marine Hydraulics Intl., Inc., supra* at 7-8 (finding source selection unreasonable where tradeoff was premised on multiple cost evaluation errors).

RECOMMENDATION

In light of the agency's cost evaluation errors, we recommend that the agency: (1) review the IGE and make any necessary adjustments; (2) perform new cost evaluations; (3) if necessary, reopen discussions and request revised proposals; and (4) make a new source selection decision. If a proposal other than Charter's is selected for award, the agency should terminate for convenience the contract awarded to Charter and award a contract to the appropriate offeror. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for such costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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