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Comptroller General
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Decision

Matter of: NV Services

File: B-284119.2

Date: February 25, 2000

Ronald K. Henry, Esq., and Larry J. Gusman, Esq., Kaye, Scholer, Fierman, Hays & Handler, for the protester.

Benjamin N. Thompson, Esq., Jennifer E. McDougal, Esq., and Grady L. Shields, Esq., Wyrick Robbins Yates & Ponton, and Frank M. Rapoport, Esq., Pepper Hamilton, for LB&B Associates, Inc., the intervenor.

Bernard J. Roan, Esq., National Aeronautics & Space Administration, for the agency. Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's cost realism analysis erred in calculating the probable cost of the awardee's proposal because the proposal did not account for the provision of safety equipment, employee training, and phase-out costs, all of which were required by the solicitation for a cost-plus-award-fee services contract; however, the protester was not prejudiced by this misevaluation because the awardee's evaluated probable costs were still substantially less than, and its proposal was technically superior to, the protester's proposal.
2. Protest that the agency should have downgraded the awardee's technical proposal for failing to identify specific personnel available for contract performance is denied, where the solicitation, as amended, did not require such a staffing plan.
3. Challenge to the agency's evaluation of the protester's and awardee's past performance is denied, where the agency based its judgment upon information in the offerors' proposals and received from references identified by the offerors, and the protester does not demonstrate that the agency's judgment was unreasonable.
4. Agency is not required to conduct discussions with the offerors where the solicitation advised that the agency intended to make award on the basis of initial proposals without conducting discussions and the record was adequate to allow the agency to make its best value determination.

5. Where an agency's requirements change after the issuance of a solicitation, the agency must issue an amendment to notify offerors of the changed requirements; although the agency may not properly award a contract with the pre-award intent to materially modify the scope of work, we will not sustain a protest on this basis absent prejudice to the protester.

DECISION

NV Services (NVS)¹ protests the award of a contract to LB&B Associates, Inc. under request for proposals (RFP) No. RFP5-51132-106, issued by the National Aeronautics and Space Administration (NASA) for facilities operation and maintenance services at the Goddard Space Flight Center, Greenbelt, Maryland. NVS argues that NASA unreasonably evaluated NVS's and LB&B's technical proposals, performed an unreasonable cost realism evaluation of LB&B's cost proposal, and improperly failed to conduct discussions concerning the cost proposals. NVS also complains that the agency awarded the contract to LB&B with the intent to materially modify the scope of work.

We deny the protest.

The RFP, issued as a competitive small disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), provided for the award of a cost-plus-award-fee contract for a 2-year base period with one 3-year option period. The contract will provide for planning and implementation of a comprehensive operations and maintenance program, covering electrical, mechanical, plumbing, and utility services, and for plant engineering and planning, site utility restoration, and construction coordination and quality assurance services. In performing the maintenance services, the contractor will employ "reliability centered maintenance" (RCM)² strategies and operate a computerized maintenance management system. In general, the contractor is responsible for providing all resources (such as, labor, supervision, tools, equipment, and material) necessary to perform the contract. RFP attach C. Among other requirements, the contractor will be required to:

¹ NVS is a joint venture of North America Telecommunications Inc. (NATI) and Viteri Construction Management, Inc., which proposed Capitol Technology Services, Inc. (CTSI) as the principal subcontractor. NVS Proposal, Oral Presentation Charts, at 2, 8. NATI was the incumbent contractor for most of the work covered by the RFP.

² The RCM strategy was described by the RFP as "a mixture of Preventive Maintenance, Predictive Testing and Inspection (PT&I), and Proactive Maintenance measures." RFP attach. C, at C1-8.

provide or make available training courses in environmental compliance, hazardous materials, hazardous waste management, safety, and emergency response, as well as, other areas relevant to the areas of work in accordance with applicable laws.

Id. at C1-6. See id. at C3-2.

The RFP provided for award, without discussions, on a cost/technical tradeoff basis, and stated the following evaluation factors and subfactors for award:

1. Mission suitability	
	a. Management plan
	b. Understanding and approach to meeting the requirements
	c. Quality control
2. Past performance	
	a. Relevant experience
	b. Technical performance
3. Cost	

RFP at 96. The RFP stated that the mission suitability, past performance, and cost factors were of relatively equal importance, and that mission suitability and past performance, when combined, were significantly more important than cost. RFP at 97.

Offerors were informed that the mission suitability factor would be adjectivally and numerically rated on a 1,000-point scale. The mission suitability subfactors were weighted as follows: management plan (300 points), understanding and approach to meeting the requirements (400 points), and quality control (300 points). RFP at 100. A detailed description as to how proposals would be evaluated under each of the mission suitability subfactors was provided. For example, under the management plan subfactor, offerors were advised that, among other things, NASA would be evaluating the offerors' organizational structure; access to corporate resources; and plans for recruiting, staffing, and compensation. RFP at 101-03.

The past performance factor, which was to be adjectivally rated, provided for the evaluation of an offeror's experience and record of performing services similar in size, content, and complexity to the requirements of the solicitation.³ RFP at 103-04.

³ In assessing offerors' past performance, the integrated evaluation panel (IEP) assigned points to offerors' contract performance, as a guide in determining which adjectival rating would be assigned. See, e.g., Agency Report, Tab 10, IEP Evaluation Notes of NVS's Past Performance, at 66-70.

Offerors were informed that the agency would consider information provided by the offerors as well as information available within NASA or from other government agencies or non-government organizations.

The RFP stated that offerors' cost proposals would be assessed for cost realism and reasonableness. RFP at 104. The RFP also stated that:

the proposed cost of the work (and rates proposed) may be a significant indicator of an Offeror's understanding and ability to perform the [statement of work]. Therefore, Mission Suitability scores may be adjusted for lack of cost realism.

RFP at 100. Accordingly, the solicitation provided a formula for an adjustment to an offeror's mission suitability factor point score based upon the percentage difference between the offeror's proposed and probable costs; that is, an offeror's mission suitability score would be decreased by a specified number of points commencing at a proposed/probable cost difference of 6 percent or more. Id.

Detailed instructions were provided for the preparation of proposals. RFP at 78-93. Among other things, offerors were required to provide a total compensation plan, addressing all proposed labor categories. Id. at 78. In addition, offerors were instructed to provide, as part of their cost proposals, indirect cost ceiling rates and the costs of leasing or buying motor vehicles if necessary for contract performance. Id. at 91-92.

On August 27, 1999, proposals were received from seven offerors, including NVS and LB&B, which were evaluated by the IEP. The technical ratings of NVS and LB&B, the two highest-rated offerors, were as follows:

	NVS	LB&B
Mission Suitability	935/Excellent	915/Excellent
a. Management Plan	281/Excellent	274/Excellent
b. Understanding and approach to meeting the requirements	369/Excellent	357/Very Good
c. Quality Control	285/Excellent	284/Excellent
Past Performance	Very Good	Excellent

Agency Report, Tab 11, IEP Report, at 6, 8, 11, 13. NVS's proposal was found to offer nine significant strengths, two strengths, and no weaknesses under the mission suitability factor, while LB&B's proposal was found to offer eight significant strengths and no weaknesses. Id. at 6, 11. Both firms proposed staffing of 115 staff-years (although not identical skill mixes). Hearing Transcript (Tr.) at 84. The evaluators praised both NVS's and LB&B's proposed organizational structure, offers of a project manager with authority over project resources, recruiting and

staffing plans, and corporate resources. The evaluators found that NVS had an excellent understanding of the contract requirements and provided an exceptional approach for providing all operations and maintenance of building structures. Agency Report, Tab 11, IEP Report, at 7. LB&B’s proposal was determined to have a very good understanding and approach to meeting the requirements subfactor; in particular, the evaluators praised LB&B’s thorough understanding of the RCM program, complemented by systematic PT&I methodologies. *Id.* at 12. Both NVS and LB&B were found to offer comprehensive and excellent quality control plans. *Id.* at 8, 13.

Under the past performance factor, the evaluators found that NVS possessed (through its joint venturers and principal subcontractor) significant relevant experience in all areas of the statement of work. Contracting Officer’s Statement at 17; Agency Report, Tab 11, IEP Report, at 9. NVS’s technical performance subfactor and overall past performance factor ratings were assessed as very good. Agency Report, Tab 11, IEP Report, at 8-9, and Tab 12, Source Selection Briefing Charts, at 25.

The IEP found that LB&B had “strong, significant relevant experience/capability in meeting all areas of the [statement of work].” The IEP also found LB&B’s technical performance to be excellent and assessed LB&B’s overall rating for the past performance factor as excellent. Agency Report, Tab 11, IEP Report, at 13.

The IEP also evaluated the offerors’ cost proposals for accuracy, realism, and reasonableness. Agency Report, Tab 11, IEP Report, at 4, 10, 14. In performing this evaluation, the IEP assessed the offerors’ proposed overall staffing (direct labor hours), labor rates, indirect cost rates (general and administrative (G&A) and overhead/fringe rates), other direct costs (ODC), and proposed award fee. *Id.*, attach. A. In addition, NASA requested advisory audit reports from the Defense Contract Audit Agency (DCAA) concerning offerors’ direct labor rates and indirect cost rates. Agency Report, Tab 16, DCAA Report of NVS’s Proposal, and Tab 17, DCAA Report of LB&B’s Proposal. DCAA also reviewed LB&B’s proposed ODCs with respect to LB&B’s proposed vehicle expenses. Agency Report, Tab 17, DCAA Report of LB&B’s Proposal, at 6. NVS’s and LB&B’s proposed and probable costs were as follows:

	Proposed	Probable	Percentage Difference
NVS	\$(DELETED)	\$(DELETED)	0
LB&B	\$(DELETED)	\$40,830,862	[DELETED]

Agency Report, Tab 11, IEP Report, at 9, 13.

The IEP found that NVS had proposed adequate staff (total direct labor hours) to perform the contract work and that NVS’s proposed direct labor rates, overhead and

G&A rates, and award fee ([DELETED] percent of the total costs) were acceptable. Id. at 10. The evaluators stated that NVS's proposed \$[DELETED] for general liability insurance appeared overstated (the government's estimate for these costs is \$156,890), but found that it could not determine from NVS's proposal if in fact these costs were overstated;⁴ no adjustment was made to NVS's probable cost to reflect this concern. Id.; Agency Report, Tab 1, Government Estimate, at 8.

With respect to LB&B's cost proposal, the IEP found that LB&B's proposed staffing (total direct labor hours) was adequate and accepted as realistic LB&B's proposed direct labor rates. LB&B's proposed award fee ([DELETED] percent of total costs) was found reasonable. The IEP made realism adjustments for LB&B's overhead and G&A rates and for the firm's proposed vehicle expenses (an ODC). These adjustments resulted in an \$[DELETED] increase in LB&B's probable costs. Agency Report, Tab 11, IEP Report, at 14.

The source selection authority (SSA) was briefed by the IEP on the panel's technical and cost evaluation results. Agency Report, Tab 13, Source Selection Statement, at 1. Based upon the evaluation results, the SSA concluded that discussions were not necessary. Id. at 3. From her review of the evaluated proposal strengths and weaknesses and probable costs of performance of the offerors, the SSA determined that only NVS and LB&B had a reasonable chance of receiving award. Id. at 8-9; Agency Legal Memorandum at 3. Weighing the relative merits of NVS's and LB&B's proposals, the SSA concluded that LB&B's proposal reflected the best value to the government, given its probable cost advantage of \$[DELETED] and higher past performance rating. Specifically, the SSA stated that:

the difference in mission suitability scores between NVS and LB&B was so slight as to be negligible. LB&B had a moderately lower probable cost and a higher rating for Relevant Experience and Past Performance than NVS. Therefore, I concluded that LB&B was the superior proposal.

Agency Report, Tab 13, Source Selection Statement, at 9. On November 9, award was made to LB&B. This protest followed.

COST REALISM EVALUATION

NVS first challenges NASA's assessment of the cost realism of LB&B's proposal, primarily because the agency allegedly did not account for a number of ODC items

⁴ NVS proposed \$[DELETED] in its ODCs as its costs for liability insurance, NVS Cost Proposal, exh. 2, Elements of Cost Summary, and its principal subcontractor, CTSI, proposed \$[DELETED] for its liability insurance costs. Agency Report, Tab 11, IEP Report, encl. A.

required for contract performance.⁵ Supplemental Protest at 3. Specifically, NVS complains that LB&B proposed unrealistic costs for general liability insurance and phase-in, and no costs for an RCM function/coordinator, training, safety equipment, phase-out, elevator testing, overhead doors, asbestos removal, and overtime.⁶ Protester's Comments at 6-12.

When agencies evaluate proposals for the award of cost reimbursement contracts, an offeror's proposed estimated costs are generally not dispositive because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 11. 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. FAR §§ 15.305(a)(1), 15.404-1(d); CACI, Inc.-Fed., B-216516, Nov. 19, 1984, 84-2 CPD ¶ 542 at 5. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., B-241569, Feb. 19, 1991, 91-1 CPD ¶ 183 at 5, recon. denied, American Management Sys., Inc.; Department of the Army--Recon., B-241569.2, B-241569.3, May 21, 1991, 91-1 CPD ¶ 492.

NASA's cost realism evaluation of LB&B's proposal is questionable in several areas. Specifically, NVS proposed \$[DELETED] for its costs of training employees (NVS Cost Proposal, exh. 2, Elements of Cost Summary; Agency Report, Tab 11, encl. A), which is a specific contract requirement (see RFP attach. C, at C1-6), but LB&B did not specifically identify any costs for training employees. NASA argues that LB&B's costs for providing employment training are included in LB&B's total compensation plan, where LB&B provided for tuition reimbursement for job-related courses as an employee fringe benefit. See Supplemental Contracting Officer's Statement at 8; LB&B Proposal, Total Compensation Plan, at TC-9. Based on our review of LB&B's proposal, we find that LB&B's voluntary tuition reimbursement benefit cannot reasonably be read as accounting for training that is required by the contract. Thus, we think LB&B's probable costs should have been adjusted to account for training costs.

⁵ LB&B proposed \$[DELETED] million for its ODCs, while NVS proposed \$[DELETED] million. Agency Report, Tab 11, IEP Report, attach. A, at 3. The government's cost estimate included \$4.97 million for ODCs. Agency Report, Tab 1, Government Estimate, at 8.

⁶ NVS also complained that LB&B had not proposed costs for nonrecurring subcontracts. NVS abandoned this allegation when it did not respond to the agency's explanation in its report on the protest.

We also find unreasonable or unsupported NASA's evaluation of LB&B's cost proposal with respect to the awardee's probable costs for safety equipment, for which LB&B proposed no costs but NVS proposed \$[DELETED]. LB&B Cost Proposal; NVS Cost Proposal, exh. 2, Elements of Cost Summary. The RFP required contractors to provide supplies to the extent not supplied by the agency. See RFP attach. C, at C1-13. NASA speculates that LB&B would account for these costs as depreciation to be recovered as part of overhead costs. Supplemental Contracting Officer's Statement at 2. The safety equipment to which NVS refers, however, consists of safety shoes, glasses, gloves, overalls, and back-belts, see NVS Cost Proposal, Cost and Pricing Rationale at 8, which are supplies that are not generally depreciable. See FAR § 31.205.11 (depreciation is applicable to tangible capital assets). Thus, it appears that an adjustment should be made to account for these costs as well.

Another questionable item, for which LB&B's costs should be upwardly adjusted, is contract phase-out costs, for which LB&B also proposed no costs but NVS proposed \$[DELETED]. LB&B Cost Proposal, exh. 3, Phase-in and Phase-out Costs, at 4-3; NVS Cost Proposal, exh. 3, Phase-in and Phase-out Costs. NASA suggests that LB&B's failure to propose costs for contract phase-out meant that these costs would not later be allowed. See Supplemental Contracting Officer's Statement at 8. We disagree. Unlike the phase-in costs, which the RFP provided would be a fixed-price item, the phase-out costs were cost reimbursable. RFP at 91; Tr. at 8. Although LB&B proposed no costs for phase-out, our review of its proposal indicates that it did not contractually commit to forbear these costs, and we find from the record that NASA would have to reimburse LB&B for its incurred phase-out costs, absent a contractual cap.⁷

We have no basis, however, to question the agency's cost realism evaluation of LB&B's proposal with respect to the other costs protested by NVS. With respect to general liability insurance, LB&B proposed, as part of ODCs, only \$[DELETED] for its liability insurance costs for the term of the contract, in contrast to NVS's proposed liability insurance costs of approximately \$[DELETED] and the government estimate of \$156,890. LB&B Cost Proposal, exh. 2, Elements of Cost Summary, at 4-2; NVS Cost Proposal, exh. 2, Elements of Cost Summary; Agency Report, Tab 1, Government estimate, at 8. Despite this substantial difference, NASA found LB&B's proposed liability insurance costs realistic. We have recognized that a contractor's probable insurance costs will be based upon a variety of factors, such as historical loss experience, liability limits, and loss control measures. See Department of State--Recon., B-243974.4, May 18, 1992, 92-1 CPD ¶ 447 at 7. Here,

⁷ We have been informed that during the course of this protest NASA and LB&B agreed to a \$[DELETED] cap on phase-out costs. Agency's Reply to the Protester's Post-Hearing Comments at 6. However, this does not establish the reasonableness of its pre-award evaluation of these costs.

NASA based its judgment on LB&B's indication in its proposal that its insurance costs, [DELETED]. Supplemental Contracting Officer's Statement at 7; LB&B Cost Proposal at 3-7. Apart from its arguments that it proposed far more costs for liability insurance than did LB&B, NVS has not shown that NASA's judgment in this regard was unreasonable. Given that contractors could reasonably be expected to bear dissimilar costs for liability insurance, we think that NASA reasonably did not normalize LB&B's liability insurance costs to the level of NVS's costs, as NVS suggests.⁸

NVS complains that it proposed as ODCs its costs to provide the RCM function/coordinator (\$[DELETED]), elevator testing (\$[DELETED]), overhead door maintenance (\$[DELETED]), and asbestos removal (\$[DELETED]), and that LB&B did not specifically provide any costs for these items. Protester's Comments at 10-12. The record evidences that NVS proposed to subcontract this work and, accordingly, identified these costs as ODCs. See NVS Cost Proposal at 13. LB&B, on the other hand, did not propose subcontracting these items but proposed to perform them itself. See, e.g., LB&B Proposal, Oral Presentation Slides at 5, 12 (proposal to do all but elevator maintenance and inspection and boiler certification work in-house); LB&B Cost Proposal at 3B-3 (proposal of a full-time RCM coordinator). Thus, LB&B's cost to perform these items is included in LB&B's total direct labor costs. NVS has not argued that LB&B's direct labor costs are understated in this respect.

NVS next complains that NASA failed to account for LB&B's alleged failure to propose sufficient supervisory personnel in two functional areas: (1) facilities operations console and (2) mission support operations and maintenance. Protester's Comments at 11; Declaration of NATI Project Manager, Jan. 11, 2000. The statement of work required that these two functional areas be staffed and managed 24 hours per day, 7 days per week. RFP attach. C, at C4-2, C11-1. NVS states that NATI performed the required supervision of these functions with 9 supervisors and was required to pay overtime to ensure complete coverage; specifically, NVS asserts that each function requires a commitment of 4.8 supervisors, based upon NVS's proposed [DELETED] productive hours per employee. Declaration of NATI Project Manager, Jan. 11, 2000, at 1. NVS argues that LB&B will either have to require its supervisors for these functions to work uncompensated overtime or pay overtime to these supervisors, which was not provided for in LB&B's proposal. Protester's Comments at 11, 15-17. The protester does not state, however, what cost impact, if any, would result from LB&B's alleged failure to propose sufficient supervisory personnel.

⁸ We recognize that the IEP was concerned that NVS's proposed liability insurance costs may be overstated; we nevertheless think the agency reasonably did not downwardly adjust NVS's proposed insurance costs, given NVS's arguments that its estimate is not overstated but was based on actual quotes. Protester's Comments at 7.

While LB&B proposed neither uncompensated nor compensated overtime for these supervisors, we think that NASA could reasonably find that LB&B could perform these two functional areas as proposed. NVS's contention that 4.8 supervisors are necessary for each function does not establish that LB&B's proposal was inadequate. The record shows that LB&B proposed [DELETED] supervisors for each function.⁹ See LB&B Proposal, Oral Presentation Slides at 42, 55; Cost Proposal at 3B-1, 3B-4. In this regard, LB&B stressed in its proposal that in performing the contract it would cross-utilize personnel within branches and across branches, see LB&B Proposal, Oral Presentation Slides, at 10, and at least for one of the functional areas stressed the "hands-on" nature of the branch supervisor. *Id.* at 42. We find no basis to question NASA's evaluation of LB&B's cost proposal in this regard.¹⁰

NVS also complains that the agency did not reasonably evaluate LB&B's proposed phase-in costs. As explained above, however, phase-in costs are a fixed-price item under the RFP, such that no cost realism adjustment would be appropriate. See FAR § 15.404-1(d)(3) (fixed prices should not be adjusted in a cost realism evaluation).

In sum, we find several errors in NASA's probable cost evaluation, as described above. We calculate that a reasonable probable cost evaluation of LB&B's proposal would result in an upward adjustment of \$337,115 in LB&B's probable costs.¹¹ Because LB&B's probable costs were evaluated to be nearly \$1 million lower than NVS's probable costs, we find that the agency's cost evaluation errors did not affect the firms' relative cost standing.

⁹ We also note that LB&B proposed [DELETED] productive work hours for these employees, as compared to NVS's proposed [DELETED] productive work hours. See LB&B Cost Proposal, sched. A, Direct Labor Cost, at 5-1, 5-4.

¹⁰ NVS also complained that LB&B's technical proposal should have been downgraded under the management plan subfactor to the mission suitability factor to account for LB&B's alleged failure to propose sufficient supervisory personnel to staff these two functions, contending that LB&B must intend to require its supervisory personnel in these two functions to work uncompensated overtime to meet the RFP requirements, which LB&B failed to identify, as required by the RFP. Given the reasonableness of the agency's assessment that LB&B had proposed sufficient supervisory personnel to perform these functions as required by the RFP, there is no basis to find that the agency should have downgraded LB&B's technical proposal for its proposed supervisory staffing of these functions or to conclude that LB&B would use uncompensated overtime.

¹¹ Our calculation is based upon the assumption that NVS's proposed costs for safety equipment, training, and phase-out are reasonable estimates for these items. We then applied LB&B's G&A ceiling rate and [DELETED] percent award fee to determine the total probable cost adjustment.

MISSION SUITABILITY EVALUATION

NVS next challenges NASA's evaluation of LB&B's technical proposal. Specifically, NVS complains that NASA unreasonably assessed LB&B's proposal as excellent under the management plan subfactor where LB&B did not identify the specific personnel it was proposing. NVS argues that LB&B's proposal was "nothing but an empty shell whose one idea for performance consisted of recruiting the incumbent workforce if it was selected for award."¹² NVS contends that its proposal therefore should have been evaluated as technically superior to LB&B's under the mission suitability factor. Protester's Comments at 12.

In reviewing protests of allegedly improper evaluations and source selection decisions, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 3-4. A protester's mere disagreement with an agency's judgment does not render it unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

We find that NVS's complaints provide no basis to object to the agency's technical evaluation of LB&B's proposal under the management plan subfactor. Contrary to NVS's assertion, the RFP did not require offerors to identify specific personnel available for performance. As amended, offerors were required by the RFP to provide, among other things, a management plan describing the offeror's organization, authority levels, resources (in terms of staffing, facilities, equipment, and finances), and recruiting plans. RFP at 83-85, and amend. No. 1, at 2.

Here, the agency found that LB&B had provided an excellent discussion of its organizational structure, which the agency found demonstrated an excellent ability to provide the services proposed, and a very good discussion of its company resources in terms of LB&B's staffing, company support, facilities, equipment and finances. Agency Report, Tab 11, IEP Report, at 11. The agency also found that

¹² We dismiss as untimely NVS's complaint, raised for the first time in its comments, regarding LB&B's proposal to hire from the incumbent contractor a construction coordination supervisor, five construction coordinators, and an RCM coordinator, even though the construction coordination and RCM functions are new functions that were not part of the incumbent contract. Protester's Comments at 17-18. NVS should have been aware of the basis for this protest allegation from its review of LB&B's proposal and the agency's evaluation documents, which NVS was provided on December 3, 1999. NVS did not raise this new allegation until January 11, 2000, more than 10 days from the date it knew or should have known the basis of the allegation. 4 C.F.R. § 21.2(a)(2) (1999).

LB&B had provided a very good staffing and recruiting plan.¹³ *Id.* at 12. We find nothing from our review of LB&B's proposal to question the reasonableness of the agency's evaluation. Specifically, with respect to staffing the contract, LB&B identified the skill mix it intended to provide and the sources (e.g., current employee, incumbent workforce hire, or outside hire) on which LB&B intended to rely to obtain the necessary personnel. *See* LB&B Proposal, Oral Presentation Slides at 18-24. Although NVS disagrees with NASA's judgment, this disagreement does not demonstrate that the agency's evaluation determination was unreasonable.

NVS also argues that LB&B's technical proposal should have been downgraded under the understanding/approach to meeting the requirements subfactor to the mission suitability factor because LB&B's failure to propose estimated costs or proposal of inadequate costs for various aspects of the work (i.e., safety equipment, training, asbestos removal, and liability insurance) indicated a lack of understanding. Although, as shown above, we found that LB&B did not appear to realistically price all aspects of the contract work (i.e., training, safety equipment, and contract phase-out), the protester fails to recognize that the RFP provided a formula for adjusting an offeror's technical rating under the mission suitability factor. Offerors were informed that their point scores would be adjusted only in the event the difference between costs as proposed and as evaluated was 6 percent or more. RFP at 100. Here, the difference between LB&B's overall proposed costs and probable costs, even as adjusted in our decision, is slightly more than 3.2 percent.

We therefore conclude that NASA's evaluation of LB&B's proposal under the mission suitability factor was reasonable. Under the circumstances, we find no basis to object to NASA's conclusion that NVS's and LB&B's proposals were essentially equal under this factor.

PAST PERFORMANCE EVALUATION

NVS also protests that NASA unreasonably evaluated LB&B's and NVS's experience and technical performance under the past performance factor. Specifically, NVS argues that the agency unreasonably averaged the past performance scores received by each of its joint venturers and its principal subcontractor, and that this had the effect of negating NVS's "advantages." NVS also complains that the agency did not consider the types of services, and size and kind of contracts, performed by each of

¹³ NVS also complained that LB&B received credit for offering to provide a project manager with significant experience, where LB&B did not specifically identify the project manager. As with other staff, offerors were not required to identify a project manager.

the joint venturers and subcontractor, to obtain meaningful conclusions.¹⁴ Protester's Comments at 20-23.

NASA responds that it analyzed the information provided by the offerors as well as evaluating the past performance questionnaires obtained from the references identified in the proposals. Contracting Officer's Statement at 17; Agency Report, Tab 10, Past Performance Questionnaires. From this information, the agency determined that NVS had significant relevant experience in all areas of the contract work. With respect to each joint venturer and the principal subcontractor, the evaluators assessed the questionnaire responses. Specifically, the evaluators found as follows:

Viteri received ratings from good to excellent in all areas. Viteri has excellent customer relations and adherence to schedules. NATI received ratings from good to excellent in all areas. NATI was rated mostly excellent in quality, timeliness and business relations. CTSI received very good to excellent ratings. Several of NATI's and CTSI's customers noted that both have excellent QC [quality control] programs, and their ability to identify technical problems and adherence to schedule is exceptional. In addition, all three companies have very low personnel turnover.

Agency Report, Tab 11, IEP Report, at 9. The IEP concluded that, overall, NATI's past performance was excellent, Viteri's was good, and the CTSI's was very good. Id.; Agency Report, Tab 12, Source Selection Briefing Charts, at 25. NASA concludes that NVS's very good rating under the past performance factor was justified.

The evaluation of past performance is a matter within the discretion of the contracting agency. HLC Indus., Inc., B-274374, Dec. 6, 1996, 96-2 CPD ¶ 214 at 3. In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation. CDA Inv. Techs., Inc., B-272093, B-272093.2, Sept. 12, 1996, 97-1 CPD ¶ 102 at 7.

Here, we find the agency's evaluation of NVS's experience and technical performance to be reasonable. The record reflects that the IEP specifically credited the joint venture with significant relevant experience in the contract work, and the

¹⁴ In its initial protest, NVS complained that the agency did not consider the extent of CTSI's anticipated contribution before averaging the joint venturers' and subcontractors' past performance ratings together. Protest at 7. Because NASA addressed this complaint in its report and NVS did not further support this argument in its comments, we consider this complaint abandoned.

SSA was so informed. See Agency Report, Tab 12, Source Selection Briefing Charts, at 25.

With respect to the technical performance subfactor, NASA found from its assessment of the information received in the past performance questionnaires that NATI's past performance was excellent, Viteri's was good, and CTSI's was very good. Agency Report, Tab 11, IEP Report, at 9. NVS does not assert that any of the underlying past performance information received by NASA was erroneous or that NASA's individual adjectival ratings for NATI, Viteri, or CTSI, based upon this information, was erroneous. Instead, NVS challenges the overall past performance rating, arguing that this rating does not accurately reflect its strengths nor recognize the differences in the types of work performed by the joint venturers and subcontractor, that is, for example, that Viteri primarily performed fixed-price construction contracts as opposed to NATI, which performed cost-reimbursable service contracts. Protester's Comments at 21.

We find no basis in this record to conclude that NVS would be entitled to a higher past performance rating.¹⁵ The RFP informed offerors that, in assessing offers under the technical performance subfactor, the agency would evaluate an offeror's compliance with technical requirement and standards, quality of performance provided, and responsiveness to government personnel. RFP at 104. This does not require the kind of analysis that NVS asserts should have been done. Here, the agency reasonably assessed the offerors' technical performance from information obtained from sources identified by the offerors, as provided for by the RFP. We find that NVS's challenge to its past performance rating is nothing more than mere disagreement with the agency's evaluation judgment, given NVS's failure to show that NASA's evaluation was inconsistent with the RFP criteria or unreasonable in any regard.

NVS also challenges the agency's past performance evaluation of LB&B on the basis that none of LB&B's identified contract references are relevant in the areas of construction coordination and quality assurance.¹⁶ NVS thus argues that LB&B does not have relevant experience in all areas of the RFP statement of work, as reported by the IEP, and that LB&B therefore does not deserve an excellent past performance rating. Supplemental Protest at 7; Protester's Comments at 23.

The agency responds that it was able to conclude from LB&B's proposal, as well as its identified contracts, that LB&B had relevant experience with respect to

¹⁵ The protester concedes by its arguments that NASA evaluated all offerors' past performance on the same basis. See Protester's Comments at 22.

¹⁶ In its comments, NVS also untimely asserts that LB&B does not have experience with respect to construction inspection.

construction coordination and quality assurance. The intervenor notes that construction coordination and quality assurance was expected to comprise only 10 percent of the contract work. See Agency Report, Tab 3, Acquisition Strategy Briefing Charts, at 8; Intervenor's Comments at 17.

We find the agency had a reasonable basis to conclude that LB&B had relevant experience in all areas of the contract scope of work and merited its excellent rating. Specifically, with regard to construction coordination and quality assurance, LB&B identified in its proposal a number of contracts under which it was responsible for these functions. For example, LB&B identified a current \$31 million, cost-plus-award-fee contract with the Department of Agriculture for operations and maintenance support services, which “includes construction coordination and [quality assurance], utilization of PT&I, and our engineering support staff provides facilities engineering support.”¹⁷ LB&B Past Performance Proposal at 4. Other examples include an indefinite-quantity contract with the General Services Administration (GSA) building alterations and repair, and a \$1.7 million fixed-price contract with GSA for mechanical maintenance services (LB&B was the managing partner in a joint venture, which provided construction coordination and quality assurance).

In sum, the record reasonably supports NVS's very good rating and LB&B's excellent rating under the past performance factor.

AWARD ON INITIAL PROPOSALS

NVS also protests that NASA should not have made award on initial proposals to LB&B, but rather should have conducted discussions with LB&B concerning its proposed ODCs and with both offerors concerning their proposed award fee. Supplemental Protest at 10.

There is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. While the contracting officer's discretion in deciding not to hold discussions is not unfettered, it is quite broad. We review the exercise of such discretion to ensure that it was reasonably based on the particular

¹⁷ NVS states that LB&B was the prime contractor for this contract, and claims that the construction coordination and quality assurance were actually provided by a subcontractor. From our review of the record, including the past performance questionnaire provided by Agriculture, we find no support for NVS's claim that this work was provided by a subcontractor. In any event, the agency could reasonably credit LB&B for experience involving these functions, even if the work were actually performed by a subcontractor under its supervision. See Battelle Mem'l Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 22.

circumstances of the procurement. Robotic Sys. Tech., B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 at 11.

Here, we find that NASA reasonably exercised its discretion to make award on the basis of initial proposals, as provided for by the RFP. It is true that the agency found that LB&B understated its proposed costs and our review found a number of errors in the agency's cost realism evaluation of LB&B's proposal; we also found, however, that the firms' relative cost standing was unaffected by NASA's and our probable cost adjustments. Under the circumstances, the agency had no reasonable doubt as to which offer represented the best value to the government and could make award on initial proposals. See Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 19-20.

PRE-AWARD INTENT TO MODIFY CONTRACT

NVS also protests that NASA awarded the contract to LB&B with the intent to materially expand the scope of the contract work. Specifically, NVS states that only 3 weeks after contract award NASA modified LB&B's contract to add work for the machine shop, sheet metal shop, and variable frequency drive operations. Protester's Comments at 4; Agency Report, Tab 15, LB&B Contract Mod. No. 1, Dec. 1, 1999. This is work that NASA, during the procurement that is protested here, had added to the predecessor contract performed by NATI. NVS argues that this additional work reflects a significant increase in workload, and if it had been included in the RFP, NVS would have substantially reduced its proposed G&A rate and award fee.¹⁸ Protester's Comments at 5; Protester's Post-Hearing Comments at 8-9.

¹⁸ NASA argues that we should have dismissed NVS's initial protest of this issue as too "obscure" and unsupported to allow the agency to respond to the protester's allegation. Agency's Post-Hearing Comments at 2. We disagree. In its November 12 protest, NVS alleged upon information and belief that NASA was modifying the specifications and statement of work. On December 1, NASA did exactly what NVS was alleging. We think the agency had sufficient information to know exactly the nature of NVS's complaint and to have adequate information to respond to the allegation.

NASA also contends that NVS's allegation (raised in its initial protest) that the agency had a pre-award intent to modify the scope of the contract is untimely because NVS allegedly knew prior to contract award to LB&B that this work would be added to the follow-on contract. NASA did not support these timeliness arguments in its post-hearing comments, as our Office had requested. In any event, we find this protest allegation timely because the record establishes that NVS could not be certain that this work would be included in the follow-on contract until LB&B's contract was modified to include it. Specifically, during the hearing, the

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Generally, where an agency's requirements change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR § 15.206(a); Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. The purpose of the rule is to avoid award decisions not based on the agency's most current view of its needs. See N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD ¶ 467 at 12. Agencies must amend solicitations to reflect a significant change in the government's requirements even after the submission of BAFOs, up until the time of award. See United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-9, aff'd, Department of Energy et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis reflecting the agency's actual requirements. Dairy Maid Dairy, Inc., B-251758.3 et al., May 24, 1993, 93-1 CPD ¶ 404 at 7-9.

The record shows that before this work was added to NATI's predecessor contract it was performed by agency personnel. Tr. at 27-28, 38. As part of an assessment to determine which work should be contracted out, NASA determined that the work for these three functions (machine shop, sheet metal shop, and variable frequency drive operations) should be performed by a contractor. NASA sought the agreement of its employee union to contract-out this work, and a final decision could not be made on contracting for these services until an agreement was reached. Tr. at 34, 54, 108-09. The agreement with the union to contract out these services was executed on September 14, 1999, after the August 27 closing date for receipt of proposals. Hearing exh. 2, Memorandum of Understanding between NASA and the Union. NATI's proposal to perform the additional work was obtained on September 29, and the additional work added to NATI's contract on October 26. Hearing exh. 4, NATI Contract Mod. No. 71. NATI performed these services until the agency modified LB&B's contract to add this work on December 1.

NASA now admits that it knew, during the procurement and prior to award, that this additional work would be added to this contract.¹⁹ Agency Post-Hearing Comments

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agency's witnesses admitted that they had no discussions with NATI's project manager concerning the addition of this work to the contract ultimately awarded to LB&B. Tr. at 53-54, 69-70. These witnesses also acknowledged that it was possible that the work for these three functions could be performed separately from the other contract work, although this would be less efficient. Tr. at 56.

¹⁹ In its December 14, 1999 agency report, NASA denied that it had modified the contract scope of work, as alleged by NVS, and failed to provide any documents regarding its contract modifications. This denial was inconsistent with the facts. As indicated above, on December 1, NASA modified LB&B's contract to modify the scope of work. NASA did not provide the relevant contract modification to our
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at 8; Contracting Officer Memorandum for Record (Dec. 1, 1999). Nevertheless, NASA argues that the additional work was not material (between a 5 to 10 percent increase in work, according to the agency's estimates), such that it would not significantly impact NVS's and LB&B's relative cost standing. Tr. at 75, 80-81, 102-03.

In determining materiality, NASA and LB&B cite decisions of our Office in which we determined whether a contract modification exceeded the scope of the original contract. Agency's Post-Hearing Comments at 14; Intervenor's Post-Hearing Comments at 5-7. This is not the appropriate standard. As argued by NASA and the intervenor, the modification of a contract after award generally concerns a matter of contract administration that is within the discretion of the contracting agency and is not for review by our Office, except where it is alleged that the modification is outside the scope of the original contract such that it should have been separately procured. 4 C.F.R. § 21.5(a); Theatre Aviation Maintenance Servs., B-233539, Mar. 22, 1989, 89-1 CPD ¶ 294 at 4. However, the allegation that an agency awarded a contract with the intent to modify the scope of work concerns pre-contract award actions in violation of FAR § 15.206(a), which requires that the solicitation be amended, even after receipt of proposals, to reflect the agency's actual requirements. The appropriate standard in reviewing these pre-contract actions is not whether the subsequent modification is within the scope of the original contract but whether the changed work could significantly affect the competitive positions of offerors such that the RFP should have been amended. United Tel. Co. of Northwest, *supra*, at 10. Here, it should have been apparent to NASA that increasing the scope of the contract work by approximately 6 percent could affect the offerors' respective proposals.

Nevertheless, we do not find that NASA's failure to modify the RFP prejudiced NVS. As the protester was instructed at the hearing, *see* Tr. at 16-17, our Office will not sustain a protest unless there is a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; *see Statistica, Inc. v. Christopher*, 102 F. 3d 1577, 1581 (Fed. Cir. 1996). To establish prejudice, NVS argues that if NASA had revised the RFP to

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Office and the parties until January 4, 2000. Additional relevant documents establishing the agency's pre-award intent to modify the contract were not provided to our Office and the parties until February 8, the day before the hearing scheduled to elicit testimony concerning the agency's pre-award intent to modify the contract. The agency's failure to timely and forthrightly respond to the protester's allegations and to provide relevant documents, as required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(b)(2) (Supp. II 1996), and our Bid Protest Regulations, 4 C.F.R. § 21.3(c), caused our Office and the parties to needlessly expend resources to explore and establish this intent and hampered the expeditious resolution of this protest.

reflect this additional work, this would have resulted in revised proposals that would have affected both the technical and cost evaluations. Protester's Post-Hearing Comments at 5.

With respect to the technical evaluation, NVS asserts that its proposal would have been judged superior to LB&B's under the mission suitability factor had NASA considered the two firms' respective approaches to performing the additional work. The record shows that NATI provided seven employees during performance of this work, Tr. at 93, (although NATI proposed seven and a half employees in its proposal to add this work to the predecessor contract, see Hearing exh. 3), and that LB&B proposed seven employees and the same skill mix to perform the Modification No. 1 work. Tr. at 98; Hearing exh. 7, LB&B's proposal to perform the additional work. While NVS argues that it would have proposed eight employees to perform this additional work, Protester's Post-Hearing Comments at 9, the agency states that it found LB&B's proposal of seven employees to be acceptable, Tr. at 98, and NVS has not shown that this judgment was unreasonable. Given the similarity in the technical approaches to performing this work, we see no reasonable possibility that NVS's technical merit under the mission suitability factor would be found to be superior to LB&B's, even if this additional work had been considered in the evaluation.

With respect to the cost evaluation, NVS asserts that its G&A costs and award fee would have significantly decreased if the additional work had been considered. Specifically, NVS argues that increasing its proposed staffing by eight employees represented a 6.5 percent increase in its proposed staffing (an increase from 115 to 123 employees); this, NVS asserts, would decrease its G&A rate by 6.5 percent (which NVS calculated by taking the difference between 115 and 123 employees) because NVS, as a new entity, has no other contracts in its allocation base.²⁰ Protester's Post-Hearing Comments at 8. NVS also argues that had it known that the scope of the RFP work would be so increased it would have considered a reduction of its award fee from [DELETED] to [DELETED] percent; NVS contends that, though this reduction would require "approval," it is "natural" because NATI only received a 7 percent award fee on the prior contract and because if NVS and NATI did not have to perform two separate contracts there would be a reduced administrative burden. Protester's Post-Hearing Comments at 8; Declaration of NATI Project Manager, Feb. 14, 2000, at 2.

We do not find NVS's prejudice arguments persuasive. Despite its access to all the cost information necessary to do so and our request, see Tr. at 16-17, NVS made no effort to establish the cost impact of these asserted changes in its G&A rate and award fee. Instead, NVS chose to make generalized arguments that its G&A rate and award fee would decrease.

²⁰ In contrast, according to NVS, the G&A rate of LB&B, an established entity with multiple contracts, would not change by virtue of this additional work.

Moreover, NVS's arguments are otherwise unpersuasive. With respect to the G&A rate, NVS's cost proposal indicated that the allocation base for its G&A cost pool was all costs less subcontract costs, and that its ceiling rate was less than its estimated G&A rate.²¹ NVS Cost Proposal, Cost and Pricing Rationale, at 14, and sched. C, Summary of Rates and Factors. While it is clear that some decrease in NVS's G&A rate is possible, given the increase in costs that would occur from increasing the staffing, we think that it is too simplistic to calculate that difference by simply looking at the difference between the amount of staffing; rather, it would be necessary to consider the impact the staffing would have upon NVS's total contract costs, which comprise the G&A allocation base. NVS did not make this calculation, however. Furthermore, there is no indication that NVS would have proposed a G&A rate below its already proposed ceiling rate, given that this rate was less than its estimated rate.

We are also not persuaded that NVS would have lowered its award fee by the amount now claimed. This reduction represents a more than [DELETED]-percent decrease in its anticipated profit, and NVS's arguments do not support the amount of the decrease. That is, NVS argues that 7 percent is the amount of the award fee in NATI's contract, but this was also true when NVS submitted its proposal under the RFP, which had a larger scope of work than NATI's contract. While NVS also argues that a reduction of fee is appropriate because it would not need to administer two separate contracts, the fact is that NVS would not be holding the two contracts. Apart from the fact that NATI and NVS are two separate entities, NATI's contract to perform this additional work was set to expire no later than the end of March 2000 (if all of the contract's monthly options were exercised). Finally, NATI's project manager admits that reduction of the fee amount would have to be the subject of consideration and approval (presumably by the joint venture), and the project manager does not state that he had any role in structuring the NVS cost proposal or that he would be involved in, or would make, the decision to reduce the award fee. Under these circumstances, we discount as speculative and unsupported NVS's assertion that it would have lowered its award fee. See Ricards Int'l, Inc. T-A INFOTEQ, B-277808, B-277808.2, Nov. 21, 1997, 98-1 CPD ¶ 2 at 7-8.

In any case, even accepting the protester's claimed reductions in its G&A rate and award fee, we calculate that NVS would not have changed its cost standing relative to LB&B.²²

²¹ NVS, as a new entity, does not have an established G&A rate. The estimated rate stated in NVS's cost proposal is based upon NVS's projected cost pool and allocation base for G&A costs.

²² Our calculation is based upon NVS's providing eight employees to perform the additional work (as NVS asserts in its post-hearing comments) and LB&B providing seven employees and based upon NVS's asserted reductions in its G&A rate (the 6.5
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NVS also asserts that there are a number of ODCs associated with the additional staff provided to perform the increased work (that is, training, safety equipment, vehicle expenses, and liability insurance costs) that have not been addressed in considering LB&B's cost to perform this work. NVS, however, does not identify the amount associated with these costs. Significantly, NVS also does not state what ODC costs would be associated with its increased staffing to perform this work, although it would appear likely that it, too, would have additional costs for these items.

CONCLUSION

We find that NASA erred in a number of regards in its conduct of the procurement. Notably, the agency failed to properly assess several aspects of LB&B's cost proposal and did not revise the RFP to reflect the change in the agency's requirements. Nevertheless, these errors did not prejudice NVS because the relative competitive standing of NVS and LB&B would not change as a result of correcting these errors. That is, the two firms' proposals would continue to be viewed as essentially equal under the mission suitability factor, and LB&B's proposal would be rated higher than NVS's proposal under the past performance factor while LB&B's probable cost of performance is lower than that of NVS. Under these circumstances, there is no reasonable possibility that NASA's best value determination would be different.

The protest is denied.

Comptroller General
of the United States

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percent reduction) and award fee ([DELETED] to [DELETED] percent). In calculating LB&B's total probable cost, we used LB&B's probable G&A rate and award fee, and added the additional probable cost adjustments we found should have been made under a proper cost realism analysis. We also note that NVS asserts that during contract performance it would have increased its staffing to 11 or 12 employees; this would have further exacerbated the difference between NVS's and LB&B's probable costs.