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Decision

Matter of: PEMCO World Air Services

File: B-284240.3; B-284240.4; B-284240.5

Date: March 27, 2000

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DIGEST

1. In evaluating past performance, agency reasonably downgraded incumbent contractor because of specific documented problems attributed to incumbent contractor's performance of predecessor contract.
2. Where solicitation advised offerors that agency intended to award contract on the basis of initial proposals, agency reasonably concluded that award could not be made to protester on the basis of a proposal that contained conflicting information regarding compliance with a material contract requirement.
3. Agency's intent to obtain required Defense Security Cooperation Agency's (DSCA) determination prior to issuing task orders for foreign military sales customers, rather than prior to award of requirements contract, does not provide a basis to sustain protest, where agency's approach is consistent with the advice and direction of DSCA.

DECISION

PEMCO World Air Services protests the Department of the Navy's award of a contract to Canadian Commercial Corporation (CCC) on behalf of IMP Group Limited¹ under request for proposals (RFP) No. N00019-98-R-0011 to provide

¹ Pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) § 225.870-3, contracts with Canadian firms generally are to be made with the CCC,

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depot-level maintenance services for various Navy and foreign military sales (FMS) customers' helicopters. PEMCO, the incumbent contractor, protests various aspects of the agency's evaluation of proposals, focusing primarily on the agency's negative assessments of PEMCO's past performance and its ability to perform certain contract requirements.

We deny the protest.

BACKGROUND

The solicitation, issued on April 22, 1999, sought depot-level inspection and maintenance services for U.S. Navy H-3 helicopters and FMS customers' AS-61, MK-1, MK-2 and H-3 helicopters for a 1-year base period with four 1-year option periods. The contract is a follow-on contract to one awarded to PEMCO in 1994.

As in the predecessor procurement, this RFP contemplated award of a fixed-price, requirements-type contract with certain cost-reimbursement provisions. Offerors were required to propose fixed prices for performing "standard depot-level maintenance" (SDLM), which consisted of the basic work generally required for all helicopters,² and fixed hourly labor rates to perform work that was considered to be "over and above" the SDLM requirements. RFP § B. The RFP stated that proposals would be evaluated on the basis of technical capability, past performance and price, with technical capability and past performance "significantly more important than Price," RFP § M-2, and advised offerors that the Navy intended to award a contract on the basis of initial proposals without conducting discussions. RFP § L-12(f)(4), at 88.

With respect to the evaluation of technical capability, the RFP listed eight equally weighted evaluation factors,³ and advised offerors that the agency would assign a

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which then subcontracts performance of the contract to a specific firm. In this case, CCC's proposed subcontractor is IMP Group Limited.

² SDLM includes all "unconditional" requirements to be performed on each aircraft. The RFP provided detailed guidance regarding the costs and activities covered by SDLM, stating: "The offeror shall include all labor, burdens, profit, COM and indirect material in the fixed-unit price for the inspection and unconditional depot maintenance (see Attachment (1) SOW for definition of 'unconditional') requirements to be performed under this CLIN." RFP § B, at 16.

³ The factors were: understanding of the work to be performed; proposed facilities and equipment; qualifications of the personnel; ability to meet the 40-day requirement for a complete teardown, inspection, evaluation, and estimation of the required "over-and-aboves"; reporting requirements; facility certification

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qualitative rating and a proposal risk rating for each technical evaluation factor.⁴ Regarding past performance, the RFP stated that the agency would evaluate offerors' experience in reworking "the same or similar rotary wing aircraft" and would assign a performance risk rating based on the agency's assessment of that experience. RFP § M-2.

Proposals were submitted by five offerors, including PEMCO and CCC/IMP, by the July 9 closing date. Oral presentations and facility visits were conducted between July 29 and August 11. Thereafter the offerors' proposals were evaluated by a technical evaluation team (TET), a past performance evaluation team (PPET) and a price evaluation team (PET).

PEMCO's proposed price of \$53,303,191 was the second highest; its past performance risk was rated "very high";⁵ and its technical capability was rated "unsatisfactory"⁶ with "high"⁷ risk. Overall, the evaluation by the individual teams resulted in the following ratings of the offerors' proposals:

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requirements; contractual delivery requirements; and response to sample task. RFP § M-2.

⁴ The RFP also advised that assessment of offerors' technical capabilities would be based on the offerors' oral presentations and facility visits. RFP §§ L-13(c)(ii), M-2.

⁵ The agency's system for rating past performance employed adjectival ratings ranging from "very low" to "very high." The definition of a "very high" performance risk rating was: "Based on the offeror's performance and systemic improvement record, extreme doubt exists that the offeror will successfully perform the required effort." Agency Report at 5.

⁶ The agency's system for qualitatively rating technical capability employed adjectival ratings ranging from "outstanding" to "unsatisfactory." The definition for an "unsatisfactory" rating was: "Proposal does not comply substantially with requirements." Agency Report at 4.

⁷ The agency's system for rating proposal risk employed adjectival ratings ranging from "low" to "high." The definition of "high" proposal risk was: "Likely to cause significant serious disruption of schedule, increase in cost, or degradation of performance, even with special contractor emphasis." Agency Report at 4.

Offeror	Technical Capability		Past Performance Risk	Total Evaluated Price
	Qualitative Rating	Proposal Risk		
CCC/IMP	Highly Satisfactory	Low	Very Low	\$52,323,253
Offeror A	Highly Satisfactory	Low	Very Low	\$52,563,458
Offeror B	Highly Satisfactory	Medium	Low	\$53,725,147
Offeror C	Satisfactory	Medium	Unknown	\$40,254,330
PEMCO	Unsatisfactory	High	Very High	\$53,303,191

Agency Report at 6.

The PPET’s assessment of PEMCO’s “very high” past performance risk was based primarily on PEMCO’s performance under the predecessor contract and, more specifically, on PEMCO’s work on Navy helicopters under that contract.⁸ The agency states that the rating was based on consideration of reported quality defects, schedule slippages, negative contractor performance assessment report (CPAR) ratings, and the comments of Navy personnel who dealt directly with PEMCO under the prior contract. Agency Report at 6.

Regarding PEMCO’s rating of “unsatisfactory” under technical capability, the TET identified a deficiency in PEMCO’s technical proposal regarding the evaluation factor “ability to meet the 40 day requirement for a complete teardown, inspection, evaluation and estimation of the required over and above.” RFP § M-2. Specifically, RFP § L-13 required offerors to address how they would comply with the requirement to identify, within 40 days after aircraft induction, 80 to 90 percent of the material and labor that would be necessary for each aircraft.⁹ With its oral presentation, PEMCO presented charts which led the TET to conclude that PEMCO’s initial inspections to identify the labor and material necessary for each aircraft

⁸ Similar to what is contemplated under this solicitation, PEMCO’s prior contract required performance of depot-level maintenance on both Navy and FMS customers’ helicopters.

⁹ The RFP’s statement of work provided as follows: “The SDLM Evaluation Report (CDRL A00C) is due not later than 40 calendar days following induction. To complete this report, the contractor shall: conduct a comprehensive initial inspection and identify 80% to 90% (80% for the first two inducted aircraft and 90% for every aircraft thereafter) of the over and above work and material required to complete the DLM.” RFP Statement of Work, § 3.1.1.

would not be completed within the first 40 days following aircraft induction. Accordingly, the TET evaluated PEMCO's proposal as failing to satisfactorily demonstrate that it would comply with the RFP's 40-day report requirement.

On November 9, the agency's competitive award panel (CAP) convened, reviewed the reports submitted by the individual evaluation teams, and discussed each offeror's proposal with representatives of the evaluation teams. Based on the reports and discussions, the CAP made the following statements regarding PEMCO's past performance:

Under the current H-3 contract, [the Navy program office] has experienced numerous schedule delays, quality problems and cost issues primarily on the USN H-3 aircraft. No systemic improvements were proposed or have been implemented to date. The CPARS data and other Quality Deficiency Reports document PEMCO's performance during the life of the contract. . . . Extreme doubt exists that PEMCO will successfully perform.

Agency Report, Tab 18b, Memorandum from CAP Chair to SSA 5 (Nov. 10, 1999).

Regarding PEMCO's technical proposal, the CAP stated, "PEMCO did not demonstrate its ability to comply with the 40-day report." *Id.* at 4. Overall, the CAP concluded that "[a]ward could not be made to PEMCO without discussions." *Id.* at 8.

In contrast, the CAP made the following determinations regarding CCC/IMP's proposal:

IMP's technical proposal was rated Highly Satisfactory [HS] overall with a Low proposal risk. The HS rating was assigned as a result of several noted strengths: IMP has extensive experience on the H-3 [deleted]; IMP has superior crew spaces; [deleted]; IMP has extensive experience in developing repair estimates, historical database for the H-3 [deleted]; IMP can draw upon a very large artisan/engineering base, if needed; IMP has extensive rotary wing engineering and artisan experience [deleted]. IMP's response to the sample task was considered to be a strength as it showed how it is able to apply its existing experience in performing upgrades [deleted].

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IMP was assigned a Very Low performance risk rating. This was due to their extensive and successful depot level experience with Canadian H-3's and with reworking components. IMP has delivered numerous aircraft and thousands of components on time, within cost, and with excellent quality. The few problems encountered on the various programs were quickly resolved and systemic improvements put into place to prevent future occurrences. Essentially no doubt exists that IMP will successfully perform.

Id. at 3, 5.

Based on the above information, the CAP determined that award could be made to CCC/IMP without discussions, and that "IMP's price is the lowest realistic offer." Id. at 7. After considering all of the information presented by the evaluation teams, the CAP concluded that "IMP's proposal represents the best value to the Government and recommends that award of the H-3 SDLM contract be made to IMP upon the basis of its initial offer." Id. at 8.

Based on the CAP's recommendation, no discussions were conducted with the offerors, and the source selection authority selected CCC/IMP for contract award on November 15. This protest followed.

DISCUSSION

Past Performance

PEMCO first protests the agency's assessment of "very high" past performance risk.¹⁰ PEMCO expresses disagreement with various aspects of the agency's evaluation, concluding that "a proper past performance evaluation of the PEMCO proposal would have found that PEMCO presents very low risk."¹¹ Protest at 21.

¹⁰ PEMCO also asserts that the agency "erred" in its past performance evaluation by failing to consider PEMCO's experience with regard to fixed wing aircraft. Protest at 21. As noted above, the RFP specifically advised offerors that past performance would be evaluated on the basis of experience in reworking "the same or similar rotary wing aircraft." RFP § M-2 (emphasis added). PEMCO's post-award protest challenging this unambiguous solicitation provision is untimely and not for consideration on the merits. 4 C.F.R. § 21.2(a)(1) (1999).

¹¹ Under the agency's past performance evaluation scheme, "very low risk" was defined as follows: "Based on the offeror's performance and systemic improvement
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Although our Office will review an agency's evaluation of past performance to ensure that it was conducted reasonably and in accordance with the terms of the solicitation, H.F. Henderson Indus., B-275017, Jan. 17, 1997, 97-1 CPD ¶ 27 at 3, the evaluation of an offeror's past performance is a matter primarily within the discretion of the contracting agency, since it is the agency that must bear the burden of any difficulties resulting from a defective evaluation, and we will not substitute our judgment for a reasonably based past performance rating. Chem-Services of Indiana, Inc., B-253905, Oct. 28, 1993, 93-2-CPD ¶ 262 at 2-3. Further, an agency's assessment of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the underlying facts. Quality Fabricators, Inc., B-271431, B-271431.3, June 25, 1996, 96-2 CPD ¶ 22 at 7. Finally, in establishing its requirements and assessing offerors' relative abilities to perform those requirements, an agency's judgment in matters related to human safety and national defense carries considerable weight. BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67 at 3; Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 5.

Here, the record shows that the PPET obtained information regarding PEMCO's past performance from a variety of sources including discussions with the Navy's program managers for both domestic and FMS aircraft, and a review of various documents, including quality deficiency reports and the CPAR resulting from PEMCO's prior contract. At a hearing conducted by GAO in connection with this protest, the PPET chair testified that he relied most heavily on input from the Navy program managers responsible for the aircraft serviced under PEMCO's predecessor contract. Hearing Transcript (Tr.) at 56-57.

The Navy program manager responsible for domestic aircraft provided an overview of his office's assessment of PEMCO's performance under the prior contract, testifying at the GAO hearing as follows:

- Q. How would you describe PEMCO's performance under the prior H-3 contract?
- A. Below average.
- Q. And could you elaborate more on that; in what areas are they lacking?
- A. Mainly looking through the CPAR, the number of quality deficiency reports written against the aircraft that were delivered to the fleet. I

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record, essentially no doubt exists that the offeror will successfully perform the required effort." Agency Report at 5.

think we had a lot of issues with the 40-day report that never got resolved that could have been resolved.

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Q. How would you describe PEMCO's willingness to work with the PMA in resolving problems?

A. Absolutely, I would say, the worst I have witnessed in any dealings with a contractor. . . . I just have never witnessed this type of adversarial relationship between a contractor and the government.

Tr. at 187-89.

The Navy's deputy program manager provided more extensive testimony regarding specific aspects of PEMCO's past performance that were considered deficient. First, he discussed the Navy's discovery of a crack in the frame of an aircraft that had been delivered to the Navy following PEMCO's completion of its work, testifying as follows:

The one critical [discrepancy] that stands out in my mind . . . I think it was the third aircraft that we had down there, NA-3 sequence number. There's a structure back there, some hinge fittings that hold the tail on. Once the aircraft flew back to the squadron . . . when the maintenance personnel [went] out and they look[ed] the aircraft over, they discovered a major crack in one of the frames. They immediately called engineering. I dispatched some people up there to take a look at it. We found that it was cracked very severely. So we replaced that. We did a metallurgical analysis on that particular crack. It was cracked approximately 75 percent through. If that hinge would have broken, we would have lost the aircraft and the crew aboard.

Tr. at 91.

The deputy program manager went on to discuss the test and evaluation activities the Navy performed in determining that the crack had been present when PEMCO performed its maintenance of the aircraft, testifying as follows:

Now, the question that we had to answer was, how long had that crack been there, because from [PEMCO's facility in] Dothan, Alabama to [the Navy squadron in] Norfolk, Virginia where this aircraft ultimately went [and the crack was discovered], was probably five, six hours flight So[,] taking a look at the crack, there's several ways that you can ascertain how long the crack has been there. One of the first things that jumped out at us was that there was corrosion in the crack. That led us to believe that the crack had been there for quite some time. And there was paint in the crack. As part of the rework

procedure, the contractor . . . actually strip[s] the paint off this particular component. . . . The area in which the crack was formed was within the zone area that the contractor was supposed to inspect. . . . [T]he paint that was sprayed back over the area that was stripped was found inside the crack. So that led us to conclude that corrosion in the crack, that the paint, the same chemical makeup as the paint on the exterior surface of the hinge fitting, was there. Certainly, if it's in the crack, the crack had to precede the application of the paint.

Tr. 92-93.

A quality deficiency report (QDR) was prepared for this incident, and PEMCO received that QDR on January 21, 1997. PEMCO responded, stating that it was “unable [to] provide answers to your questions . . . until the Government’s, and the contractor’s, investigation of the subject discrepancy is complete.” Letter from PEMCO to the Administrative Project Management Office (January 30, 1997). On March 24, 1998, PEMCO provided its final response to the QDR, generally denying fault in the matter, arguing that the crack was “just outside or, at best, on the fringe surfaces of the area normally stripped,” and concluding: “PEMCO can not positively confirm nor deny that a crack pre-existed on the port side of the lower pylon fitting at the time of the SDLM performance.” PEMCO Quality Assurance Investigation Results Relative to QDR Number V09212-96-0016, Mar. 24, 1998, at 2. PEMCO’s response did not meaningfully address the presence of corrosion or paint inside the crack.

The Navy’s deputy program manager testified that, in connection with the incident involving the crack, he went to PEMCO’s facility and found additional evidence that PEMCO’s quality assurance (QA) procedures were flawed, testifying:

I went down – I was the system engineer at the time when that happened, so I went down and talk[ed] with the QAR, quality assurance rep, for DCMC. They had pulled all the documentation, the records that were used to verify the work done on that particular component. In the course of that NDI [nondestructive inspection] inspection, there’s some rework that they do on that component also, and it takes anywhere from 40 to 56 hours to effect repair. And there are certain subsequent steps that the artisan goes through, and then the QA checks to make sure that he does those correct, before he proceeds. Well, when I looked at–there was oh, probably 20, 30 pages of rework instructions there, what struck me immediately when I read that was there are about six or seven days stamped off by the artisan doing the work. When I looked at the section for the QA for PEMCO on the other side, it had the same date on it. So the artisan has worked five or six days on this component, with the individual dates stamped

on that, but the QA guy that's supposed to come and ensure that these steps are done properly has all got the same date.

Tr. 96-97.

Finally, the deputy program manager testified about various other deficiencies in PEMCO's prior performance,¹² specifically discussing at length problems with PEMCO's delivery of the SDLM evaluation report, generally referred to as the 40-day report. He explained that the 40-day report's timely identification of necessary parts and material was, and is, critical to keeping contract performance on schedule. Tr. at 75-77. He then criticized PEMCO's delivery of 40-day reports under the prior contract, testifying as follows:

Q. What is your opinion concerning PEMCO's performance of the inspection and documentation of the inspection in the 40-day report?

A. This, I think, has been—we've been on record for quite some time, if you look back throughout the program management review meetings and things like that. That has been the largest bone of contention on this entire contract. It's so crucial in order for us to maintain cost and schedule and performance, knowing which components we need to provide as government-furnished equipment to the contractor, it's there in the time that he needs it so we don't have any work slippages. We have received numerous 40-day reports [from PEMCO] . . . that are generally one page. Now, if you were to go and look at the material list, which was ordered on that aircraft, at the end, you will see pages and pages. So now . . . that was our bone of contention. . . . The list [in the 40-day report] should have been extensive. So we constantly stress[ed] to the contractor, this—you're delivering a report but it doesn't have the information in it that we need in order to get the material to you in a timely fashion. We need a list of what type of material you're going to need and the estimate of man-hours that you're going to need so we can go grab that funding if necessary, if we're short, to make this program work on schedule and within cost. We have yet to get that, except for two FMS aircraft, where we feel they actually provided an adequate 40-day report.

Tr. at 105-06.

¹² He testified that there were instances when the Navy found loose bolts in the electronic flight control system of a completed aircraft, Tr. at 98, documentation errors in the logbooks, Tr. at 100, and foreign object debris in the electronics bay of another completed aircraft. Tr. at 101.

The record shows that the content of PEMCO's 40-day reports was, in fact, an ongoing issue between PEMCO and the Navy during performance of the prior contract. For example, the agency's minutes of a program review meeting, conducted at PEMCO's facility in October 1997, contain the following statements:

A general discussion of the time frame to identify requirements to repair the aircraft occurred. The Govt feels that the 40 Day Report is not properly identifying the parts required, that some of the logistics problems we are all encountering are due to improper use of the 40 day reports, and that 40 day reports should cover 80% of the items needed for over & above work. Govt also concedes that problems with funding prevent obtaining parts on time in some cases.

Agency Report, Tab 37, H-3 Program Review, Oct. 22-23, 1997, at 2.

Again, in the portion of the minutes relating to PEMCO's performance of work on FMS aircraft under the predecessor contract, the minutes stated:

Forty Day Reports were discussed. The criticism leveled at PEMCO was that all the 40 Day Reports were nearly identical. Additionally, parts requirements are not being provided to the Govt quickly enough.

Id. at 14.

During PEMCO's performance of the prior contract, the agency formally documented its dissatisfaction with various aspects of PEMCO's performance, including the content of PEMCO's 40-day reports, through the CPAR process. See Federal Acquisition Regulation (FAR) Subpart 42.15. A CPAR was issued in July 1999,¹³ which stated, among other things: "[deleted]."¹⁴ Agency Report, Tab 39, Contractor Performance Assessment Report, June 30, 1999, at 4. In conjunction with preparing the CPAR, the agency gave PEMCO an opportunity to provide its input and comments on the agency's assessment of its performance.¹⁵ These input comments

¹³ This CPAR was applicable to PEMCO's performance from November 1997 through November 1998.

¹⁴ The CPAR also contained negative assessments--that is "[deleted]" or "[deleted]" ratings-- with regard to PEMCO's: [deleted]. Agency Report, Tab 39, Contractor Performance Assessment Report, at 4.

¹⁵ PEMCO asserted that it should not have received any negative ("[deleted]" or "[deleted]") ratings except with regard to [deleted]. With regard to that element of the CPAR, PEMCO acknowledged that it [deleted]. Agency Report, Tab 39, at 5. ([deleted].)

were considered by the authorized reviewing official who concluded: “It is my assessment that the Government evaluation . . . is an accurate assessment of PEMCO’s performance.” *Id.* at 3.

Finally, following the GAO hearing, the Navy submitted a printout of a computer file maintained by the Navy Inventory Control Point, regarding PEMCO’s requisition of parts and material under the predecessor contract, along with a declaration from the Navy’s assistant deputy program manager summarizing the data in the file. The printout and declaration indicate that, for the sixth, seventh and eighth Navy aircraft inducted under PEMCO’s prior contract, there were a total of 210 requisitions during the first 45 days following aircraft induction, and a total of 1,880 requisitions after the first 45 days following aircraft induction.¹⁶ Declaration of Assistant Deputy Program Manager, Feb. 29, 2000.

In pursuing this protest, PEMCO submitted documents and provided testimony addressing the issue of whether the agency’s past performance evaluation, including the prior CPAR determinations, was reasonable and accurate. In reviewing PEMCO’s protest, we considered all of the documents and testimony submitted by the parties.¹⁷ We also considered the fact that the Navy contemporaneously documented its concerns and its ongoing dissatisfaction with PEMCO’s prior performance, including use of the CPAR process, that it provided PEMCO an opportunity to address those concerns in an ongoing manner, and subjected the final CPAR to review by an authorized official at a level above the program manager. On the basis of the record as a whole, we see no basis to conclude that the agency’s past performance evaluation is inadequately documented, contains significant error, or is otherwise unreasonable. Accordingly, there is no basis to sustain PEMCO’s protest challenging its past performance evaluation.

¹⁶ The declaration states that, for the first five Navy aircraft, requisition numbers were not identified with a particular aircraft; accordingly, it was not possible to determine the time period within which particular requisitions were made.

¹⁷ At the GAO hearing, testimony was provided by the Navy program manager; the Navy’s deputy program manager; the Navy’s PPET chair; the administrative contracting officer, who is a Defense Logistics Agency (DLA) employee; a former DLA industrial specialist; PEMCO’s contracts manager; and PEMCO’s military planning manager.

Technical Capability

PEMCO next protests the agency's technical evaluation of "unsatisfactory" and "high" proposal risk regarding PEMCO's ability to comply with the RFP's 40-day report requirements. As discussed above, the RFP provided that "[t]he Government will evaluate . . . the offeror's ability to meet the 40 day requirement for a complete teardown, inspection, evaluation and estimation of the required over-and-aboves." RFP § M-2. PEMCO complains that the agency's evaluation was flawed because its proposal "repeatedly demonstrated its commitment to completing the inspection by the 38th day and submitting a report in the 38th-and 40th-day time period." Protest at 11.

The agency states that, based on conflicting information which PEMCO provided with its oral presentation,¹⁸ the agency could not determine that PEMCO's 40-day reports would provide the required level of specificity regarding identification of the labor and material necessary for each individual aircraft.¹⁹ The agency refers to specific slides PEMCO presented with its oral presentation which indicated that PEMCO's initial inspections to identify necessary labor and material would extend well beyond the 40th day following induction of each aircraft. In particular, [deleted]. Agency Report, Tab 10b, at 48. [deleted].²⁰ Id.

¹⁸ As noted above, the RFP provided that assessment of offerors' technical capabilities would be based on the offerors' oral presentations and facility visits. RFP §§ L-13(c)(2), M-2.

¹⁹ As noted above, the RFP's statement of work provided that, within the first 40 days, the contractor was required to identify 80 percent of all work and material that would be necessary to complete the required maintenance on the first two aircraft and 90 percent for every aircraft thereafter.

²⁰ At the time of PEMCO's oral presentation, the agency also expressed concern about [deleted]," (identified on the chart as "Engines, Gearboxes, Rotor Heads, Drive Shaft Inspe[ction]") [deleted]. Agency Report, Tab 10b, at 46. At the hearing, the Navy's deputy program manager agreed that other portions of PEMCO's initial proposal indicated that the individual subtasks to be performed at [deleted] included activities other than initial inspections and, therefore, that this chart did not necessarily establish that PEMCO would fail to complete the required inspections by the 40th day. Tr. at 162-72.

The agency was concerned that PEMCO's proposal indicated that inspections necessary for submission of the 40-day reports would not be completed by the time the reports were submitted. However, consistent with the agency's intent to award a contract on the basis of initial proposals,²¹ the agency was careful not to engage in communications that would constitute discussions--which would have required that it similarly conduct discussions with, and permit proposal revisions from, all other offerors. Accordingly, during oral presentations, the agency sought clarification from PEMCO regarding this aspect of its proposal, referencing slide 4-5 and asking PEMCO to clarify how that chart "matches up" with another specific PEMCO chart, which indicated that all initial inspections would be completed prior to submission of the 40-day reports. Agency Report, Tab 18g, Clarification Questions and Answers from Oral Presentation - PEMCO. PEMCO's response did not address the inconsistency between the two charts. *Id.* Accordingly, the agency concluded that, without conducting discussions, it could not satisfactorily determine that PEMCO would comply with the 40-day report requirements.²²

The evaluation of technical proposals is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. *Loral Sys. Co.*, B-270755, Apr. 17, 1996, 96-1 CPD ¶ 241 at 5. In reviewing an agency's technical evaluation, GAO will not reevaluate the proposal, but will examine the record to ensure that the evaluation was reasonable, in accordance with stated evaluation criteria, and not in violation of procurement laws and regulations. *Ogden Support Serv., Inc.*, B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135

²¹ As noted above, the RFP advised offerors that the agency intended to award a contract on the basis of initial proposals. RFP § L-12(f)(4). Additionally, the agency reminded PEMCO of this intention at the beginning of PEMCO's oral presentation. Videotape of PEMCO's Oral Presentation.

²² Regarding the agency's clarification request, PEMCO complains that, "[t]o the extent that the [agency] remained confused about so fundamental a point as the incumbent contractor's willingness to comply with a requirement that it had met for the preceding five years, the [agency] had an obligation to seek clarification or open discussions." Protest at 12. First, PEMCO's assertion regarding its "willingness to comply with a requirement that it had met for the preceding five years" ignores the substantial, documented disagreement between the parties on this precise issue. Further, to the extent PEMCO is asserting that the agency "had an obligation . . . to open discussions," PEMCO is mistaken as a matter of law. Where, as here, an agency states its intention to award on the basis of initial proposals, there is no requirement to conduct discussions in order to remedy defects in an otherwise unacceptable proposal. FAR § 15.306(a); *Kahn Instruments, Inc.*, B-277973, Dec. 15, 1997, 98-1 CPD ¶ 11 at 8. Finally, as discussed above, the agency did seek clarification regarding the inconsistency in PEMCO's submission, but PEMCO's response failed to eliminate the inconsistency.

at 3. The offeror has the burden of submitting an adequately written proposal, and an offeror's mere disagreement with the agency's judgment concerning the adequacy of the proposal is not sufficient to establish that the agency acted unreasonably. Caldwell Consulting Assocs., B-242767, B-242767.2, June 5, 1991, 91-1 CPD ¶ 530 at 6.

Here, we do not find unreasonable the agency's determination regarding PEMCO's compliance with the 40-day report requirement. In light of the past and ongoing disagreements between PEMCO and the agency on this precise issue,²³ we find it remarkable that PEMCO would submit conflicting information regarding this aspect of its proposal, and we find reasonable the agency's particular concern in this regard when, upon being directed to that particular slide during its oral presentation, PEMCO failed to clarify the apparent inconsistency. We have reviewed all of PEMCO's proposal, including the particular portions triggering the agency's concerns and, particularly in the context of PEMCO's prior performance of this contract, do not find unreasonable the agency's uncertainty regarding how PEMCO was proposing to comply with the 40-day report requirements. In light of the agency's clearly stated intent to award a contract on the basis of initial proposals, we conclude that the agency acted reasonably, both with regard to its evaluation and in the clarifications that it sought. PEMCO's protest regarding the agency's evaluation of its technical capability is denied.²⁴

²³ PEMCO had previously argued that "the [prior] contract does not state that the SDLM effort or a portion of the requirements thereof, must be accomplished within 40 days of aircraft induction." Letter from PEMCO to Commanding Officer, Naval Air Systems Command (June 11, 1998). During PEMCO's oral presentation, PEMCO's Director of Military Programs referred to "intense" meetings between PEMCO and the agency in connection with the CPAR process. Videotape of PEMCO's Oral Presentation.

²⁴ PEMCO also protests various other aspects of the agency's evaluation of its technical capability, arguing that it should have received credit for various other technical "strengths." We have reviewed all of PEMCO's additional assertions and find that they constitute mere disagreement with the agency's judgment and fail to establish that the agency's evaluation was unreasonable. See Caldwell Consulting Assocs., supra. In any event, in light of our determination that the agency reasonably evaluated PEMCO's past performance and its ability to comply with the 40-day report requirement, there is no potential prejudice flowing from PEMCO's arguments, since higher ratings in other portions of its proposal could not have made it eligible for award. Prejudice is an essential element of every viable protest and our Office will not sustain a protest if there is no reasonable possibility that the protester was prejudiced by the agency's actions. 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).

Arms Export Control Act

Finally PEMCO protests that the agency has failed to comply with certain provisions of the Arms Export Control Act (AECA).²⁵ Specifically, PEMCO references a portion of the AECA which provides that “[f]unds made available under this Chapter may be used for procurement outside the United States only if the President determines that such procurement will not result in adverse effects on the economy of the United States or the industrial mobilization base.”²⁶ 22 U.S.C. § 2791(c). PEMCO complains that the determination is required prior to the agency’s award to a Canadian company, but has not yet been made.

The agency responds that PEMCO’s protest on this issue is misplaced, because the determination required by the AECA need only be made prior to issuance of task orders for FMS work.²⁷ The agency states that, consistent with the directions of DSCA, the Navy “fully intends to comply with [the AECA] in connection with any task orders issued against the contract using AECA funds,” and will obtain the required determinations prior to issuing any FMS task orders. Agency Memorandum in Support of Request for Partial Summary Dismissal, Jan. 5, 2000, at 2.

The Navy’s position on the required timing of the determination is supported by DSCA. In a letter provided by the Navy as part of the protest record, DSCA directly addresses the issue, stating:

In the case of the requirements contract to Canadian Commercial Corporation of Ottawa, Ontario, Canada for H-3 helicopter depot level inspection and maintenance services for the U.S. Navy and other FMS customers, including the Government of Egypt, the waiver must be in place before FMF [foreign military financing] funds may be obligated for task orders under the contract. In the case of a requirements contract, however, the waiver does not have to be obtained prior to the award of the contract.

Letter from DSCA General Counsel to Department of the Navy (Dec. 29, 1999).

²⁵ The AECA authorizes the President to sell defense articles and defense services to eligible foreign countries. 22 U.S.C. § 2761 (1994).

²⁶ The parties agree that the authority to make the required determination has been delegated to the Director of the Defense Security Cooperation Agency (DSCA).

²⁷ The agency further explains that determination of the type of funding that will be used for FMS task orders--which triggers the statutory requirement--was not established at the time the contract was awarded. Agency Memorandum in Support of Request for Partial Summary Dismissal, Jan. 5, 2000, at 2 n.8.

Based on the statutory language regarding the DSCA determination, along with DSCA's own unambiguous statement regarding the point in time at which DSCA's determination must be obtained, PEMCO's assertion that the Navy was required to obtain the DSCA determination prior to awarding CCC/IMP the requirements contract provides no basis for sustaining the protest. Cf. Matter of Accounting for Reports of Discrepancy under Foreign Military Sales Program, B-222666, Jan. 11, 1988.

The protest is denied.

Comptroller General
of the United States