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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Resource Consultants, Inc.

File: B-290163; B-290163.2

Date: June 7, 2002

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Duane L. Zezula, Esq., Department of Transportation, Transportation Security Administration, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office has jurisdiction over protest challenging the Transportation Security Administration's (TSA) award of a contract for services where the applicable statutory language effectively exempts TSA's acquisitions of equipment, supplies, and materials--but not acquisitions of services--from GAO's bid protest jurisdiction.

2. Protests that contracting agency's evaluation of proposals and source selection decisions were unreasonable are denied where the record shows that the evaluation and source selection decisions were reasonable and consistent with the solicitation's stated evaluation criteria.

DECISION

Resource Consultants, Inc. (RCI) protests the award of a contract to NCS Pearson, Inc. under request for proposals (RFP) No. DTTS59-02-R-00440, issued by the Department of Transportation's (DOT) Transportation Administrative Service Center (TASC), on behalf of the newly created Transportation Security Administration (TSA), to obtain a wide range of human resources services to establish and support the TSA. RCI challenges as unreasonable the agency's evaluation of proposals and source selection decisions.

We deny the protests.

In the aftermath of the terrorist hijackings and crashes of passenger aircraft on September 11, 2001, the Congress passed, and the President signed, the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 et seq. (2001), on November 19, 2001. The ATSA established the TSA as a new agency within the DOT and tasked it with security responsibilities for all modes of transportation overseen by the DOT and other related activities. As part of its mission to ensure aviation security, the TSA was made responsible for passenger security, including the qualification, recruitment and examination of a federal workforce responsible for all phases of security screening at various security checkpoints throughout commercial airports. To fulfill this mission, the TSA is required to hire and deploy more than 30,000 federal security screeners and thousands of federal security managers, federal law enforcement officers, and intelligence and support personnel to screen all passengers and property at 429 domestic airports by November 19, 2002. Id. § 110(c).

The TASC, which was delegated authority to conduct procurements on behalf of the TSA, issued this solicitation on January 18, 2002 to acquire contractor support to develop, implement and execute an overarching qualification, assessment, staffing, and placement system and to provide on-going human resources services for airport security screeners, law enforcement officers and other TSA personnel in compliance with federal law, regulation and policy to allow the TSA to meet or exceed the dated mandates and other legislative requirements of the ATSA. RFP § C.1.0.B. The RFP's scope of work was broadly written to encompass a wide range of human resources services divided into four separate modules, three of which are at issue here: Module 1, "Posting and Applicant Intake for Security Screener and Law Enforcement Job Applications and Additional Postings as Required"; Module 3, "Candidate Selection"; and Module 4, "Day-to-Day Servicing." RFP § C.2.0.G.

The agency planned to award a single contract for each module, and to evaluate each module independently of the other modules, but contractors were not limited to one award. Award was to be made, without conducting discussions, to the offeror whose proposal provided the best value. The agency planned to award time-and-material and labor hour contracts with a cost line item for other direct costs. Performance was to commence upon award and continue through December 31, 2002.

Proposals would first be evaluated against minimum requirements for each module on a go/no-go basis. Proposals meeting the minimum requirements would then be evaluated to ascertain which represented the best value to the government against technical approach and price evaluation factors; technical factors were to outweigh price. RFP § M.A.2. The technical approach evaluation factor was comprised of two subfactors, past performance and management/technical approach. Past performance was more important than management/technical approach. Id. For each module proposed, offerors were required to provide a total labor price based on total proposed hours, a proposed mix of labor categories, hour per category

comprising the total hours, loaded hourly rates per category, and other direct costs. The agency planned to conduct a price reasonableness evaluation. RFP § M.C.

Twenty-five offerors submitted proposals by the February 1 closing date. Proposals not deemed grossly deficient were referred to a technical evaluation team, which first evaluated them against the RFP's minimum requirements, and then evaluated those proposals meeting the minimum requirements under the solicitation's past performance and management/technical approach subfactors.

With at least eight offerors submitting proposals for each module, the agency concluded that there was adequate price competition and that the requirement for price reasonableness was satisfied. Source Selection Official (SSO) Decision at 7; Federal Acquisition Regulation (FAR) § 15.404-1(b)(2)(i). The RFP's requirements were broad in scope due to the inherently uncertain nature of the requirements and the government's desire to seek out a variety of proposed solutions, and the agency anticipated and received wide price variances based on a wide range of proposed approaches and labor hours. Since many proposals were based on differing sets of assumptions for required workloads, some proposals were not considered realistic because the hours proposed were too low to accomplish the requirements, and other proposals were considered realistic for their proposed solutions but their solutions were not as comprehensive as other offerors' solutions, the SSO concluded that the total proposed prices did not represent "real" price differences. As a result, on a module-by-module basis, the agency compared offerors' proposed labor hours, loaded labor rates, and other direct costs to see if a similarity in these breakdowns would support price reasonableness. The SSO ultimately concluded that, given their widely disparate approaches and levels of comprehensiveness, none of the offerors demonstrated an approach that would offer a comparable technical solution at a much lower price as compared to any other offeror.[1] SSO Decision at 8.

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[1] RCI's allegation that the agency failed to conduct an adequate price reasonableness evaluation is unpersuasive. The government may use various price analysis techniques and procedures to ensure a fair and reasonable price, including the comparison of proposed prices received in response to the solicitation; normally, adequate price competition establishes price reasonableness. FAR § 15.404-1(b)(2)(i). The agency recognized that offerors' differing assumptions and approaches might diminish the reliability of their proposed prices for purposes of comparison, and went on to compare their proposed rates and other direct costs. The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, see HSG Philipp Holzmann Technischer Servs. GmbH, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67 at 6, and RCI has given us no basis to question the adequacy of the agency's price reasonableness determination. As for RCI's contention that the agency failed to conduct a cost realism analysis, where, as here, a solicitation provides for the award of a time-and-materials contract with fixed-price burdened labor rates, there is no requirement that the agency conduct a cost realism

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Under Module 1, NCS's proposal was rated outstanding under both technical approach subfactors and overall, with a proposed price of $10,183,748 using 68,121 hours. RCI's proposal was rated outstanding under the past performance subfactor, acceptable under the management/technical approach subfactor, and outstanding overall, with a proposed price of $[DELETED] using [DELETED] hours. Under Module 3, both proposals were rated outstanding under both technical approach subfactors and overall. The agency evaluated NCS's proposed price at $36,919,512 using 456,005 hours, and RCI's proposed price at $[DELETED] using [DELETED] hours.[2] Under Module 4, both proposals were rated outstanding under both technical approach subfactors and overall. NCS's proposed price was $29,065,166 using 326,480 hours and RCI's proposed price was $[DELETED] using [DELETED] hours.

The SSO's source selection decision set forth the basis for his conclusions regarding price reasonableness, as discussed above, and compiled a table of the "pros" and "cons" of each offeror's technical proposal, on a module-by-module basis. In his trade-off analyses for each module, the SSO found that NCS had the best technical proposal and clearly demonstrated the capability to perform the requirements in the necessary time frame; other offerors also had strong technical proposals, but had identified weaknesses. The SSO found that NCS's higher price was indicative of its comprehensive technical approach and realistic workload assumptions, whereas other offerors' lower proposed prices were the result of either unrealistic assumptions or a less comprehensive approach. The SSO concluded that, if consistent approaches and workload assumptions were used, no offeror proposed an approach that indicated the government would ultimately pay less than it would to any other offeror, and found that NCS's approach provided the clearest assurance it could accomplish the requirements in the congressionally-mandated timeframes. SSO Decision at 8-10. NCS was awarded a contract for all four modules.

After RCI filed these protests challenging the agency's evaluation of proposals and source selection decisions, the agency determined that contract performance was in the best interests of the United States and that urgent and compelling circumstances existed which significantly affected the interests of the United States, and which would not permit waiting for our decision, and executed an override of the statutory stay of performance of the contract. See 31 U.S.C. § 3553(d)(3)(C)(i) (2000).

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analysis in the absence of a solicitation provision requiring such an analysis. See General Atomics, B-287348, B-287348.2, June 11, 2001, 2001 CPD ¶ 169 at 7; ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD ¶ 102 at 10.

[2] As discussed below, RCI's evaluated price for Module 3 was neither the price it actually proposed nor the price it intended to propose.

We first address the contention made by the agency and NCS that our Office lacks jurisdiction to hear this protest. In this regard, under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1)(A) (1994). CICA provides that the term "Federal agency" has the meaning given the term by section 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 472 (1994). That Act defines the term "Federal agency" as including any executive agency, and defines the term "executive agency" as including any executive department or independent establishment in the executive branch of the government. 40 U.S.C. § 472(a),(b). Neither the agency nor NCS disputes that the TSA is a federal agency for purposes of CICA.

Instead, both the agency and NCS argue that the ATSA provides that TSA procurements are subject to the Federal Aviation Administration's (FAA) Acquisition Management System (AMS) under 49 U.S.C. § 40110(d) (1998 Supp. IV), and that 49 U.S.C. § 40110(d)(2)(F) specifically exempts procurements subject to the AMS from our bid protest jurisdiction. In support of their position, the agency and NCS rely on section 101(o) of the ATSA:

> (o) ACQUISITION MANAGEMENT SYSTEM.–The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.

While 49 U.S.C. § 40110(d)(2)(F) does exempt procurements subject to the AMS from our bid protest jurisdiction,[3] this provision of the ATSA unambiguously limits the application of the AMS to the TSA's acquisitions of "equipment, supplies, and materials." The procurement at issue here is not an acquisition of "equipment, supplies, and materials" but, rather, an acquisition of services. In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of the Congress. If it does, the matter ends there, for the unambiguous intent of the Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

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[3] Section 40110(d)(2) lists provisions of federal acquisition law that shall not apply to the acquisition management system; one of these is "Subchapter V of chapter 35 of title 31, relating to the procurement protest system." 49 U.S.C. § 40110(d)(2)(F).

We find that the statutory language at issue here unambiguously limits the application of the AMS to the TSA's acquisitions of "equipment, supplies, and materials," and end our inquiry by concluding that neither this nor any other provision of the ATSA exempts the TSA's acquisitions of services from our bid protest jurisdiction.

We do not agree with NCS that, in drafting the ATSA, the Congress simply tracked the language of the statute it previously used to permit the FAA Administrator to develop and implement the AMS, and intended to make the same language applicable to the TSA. The statutory authority for the AMS is couched in inclusive terms, directing the FAA Administrator to develop and implement an acquisition management system that "addresses the unique needs of the agency and, at a minimum, provides for more timely and cost-effective acquisitions of equipment and materials." Pub. L. No. 104-50, § 348(a), 109 Stat. 436, 460 (1995), codified at 49 U.S.C. § 40110(d). In contrast, the language in the ATSA is a clear limitation on the applicability of the AMS to the TSA's acquisitions of "equipment, supplies, and materials." In any event, neither the ATSA nor its legislative history evidence congressional intent to simply grant to the TSA the same procurement authority as was previously granted to the FAA. On the contrary, while the conference report on the ATSA indicates that the House amendment had provided that the TSA would have the "same procurement and personnel authority as the FAA," H.R. Conf. Report No. 107-296, at 54 (2001), the conference substitute contains no such language. Id. We recognize that the practical effect of our interpretation of this provision is that protests of TSA acquisitions may take two different tracks depending upon the nature of the acquisition, but conclude that this interpretation is mandated by the specific language of the statute. Unless the Congress changes the statutory language, our Office will consider protests of TSA acquisitions of services.

Turning to the merits of the protests, RCI argues that various aspects of the evaluation of its own proposal and of the NCS proposal, as well as the source selection decisions flowing from those evaluations, are unreasonable.

The evaluation of technical proposals is primarily the responsibility of the contracting agency, and our Office does not make an independent evaluation of their merits. Rather, we examine the agency's evaluation to ensure that it is reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. The protester bears the burden of showing that the evaluation is unreasonable, and the fact that it disagrees with the agency does not render the evaluation unreasonable. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Our review of the record shows that RCI has not met that burden.

Under Module 1, "Posting and Applicant Intake for Security Screener and Law Enforcement Job Applications and Additional Postings as Required," offerors were required to implement an automated process to distinguish qualified candidates from unqualified candidates, determine the highest band qualification for qualified

candidates, and place candidates on appropriate referral lists. NCS's proposal was rated outstanding under both technical approach subfactors and overall. RCI's proposal was rated outstanding under the past performance subfactor, acceptable under the management/technical approach subfactor, and outstanding overall.

The SSO considered the NCS proposal to have 11 "pros" and no "cons," and considered the RCI proposal to have 7 "pros" and 2 "cons"--its failure to address in greater detail the technology that would drive its database system, and the fact that its technical approach was more of a process than an execution plan.[4] Since several other offerors had higher technical ratings and lower pricing than RCI, the SSO did not consider RCI's proposal in his tradeoff decision. RCI argues that its acceptable rating under the technical/management approach subfactor was unwarranted.

RCI contends that there was no RFP requirement to describe the technical configuration and specifications for the computer system that would house the candidate management system, and no RFP requirement that this database be designed to run on TSA computers. As the agency explains, however, its concern that RCI failed to address in detail the technology that would drive its database system was not with systems architecture, but with RCI's failure to include details about the functional capabilities of its database and how it would work with existing government systems.[5] RCI's objection that the agency is not procuring the database system and does not need this detail does not address the agency's reasonable concern that it could not ascertain RCI's ability to meet the requirements using its database without having details about the functional capabilities of that database.

As for the second "con" identified by the SSO, the agency explains that RCI's proposal showed the steps it would take to meet the requirements but lacked details about how its plan would be specifically implemented, a failure that was exacerbated by the lack of a specific timeline. As a result, RCI's proposal did not demonstrate how it would apply sufficient resources to process the required number of applicants in a timeframe that would permit subsequent actions, such as assessing candidates, and hiring, training, and deploying huge numbers of personnel, to take place while still ensuring that the TSA's overall requirements would be met. In this regard, section L.C.(2) of the RFP required offerors to provide a detailed plan for

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[4] The technical evaluation team identified separate weaknesses for both offerors regarding a lack of a detailed timeline, but the SSO did not consider this to be a separate "con" for either proposal.

[5] The RFP stated that "[i]nteroperable database capability is required to capture, assess, link, and report information used to prioritize local hiring, capture data for trend analysis, and integrate this data with the global management of an applicant/candidate/new hire database and feed TSA [human resources] systems," and offerors were required to "ensure that all data capture can be linked, integrated and/or imported into the [DOT] [human resource] systems." RFP §§ C.2.0.B, D.

managing and accomplishing each module to include ensuring the timely delivery of services. RCI's referral to various parts of its proposal has not persuaded us that this information encompasses the detail of concern to the agency and gives us no basis to find its conclusions unreasonable.

RCI next argues that the SSO unreasonably selected the higher-priced NCS proposal over its lower-priced proposal under Module 3, "Candidate Selection."

The SSO's tradeoff analysis shows that he found seven "pros" and no "cons" in NCS's technical proposal, and eight "pros" and one "con" in RCI's technical proposal--its proposal of only [DELETED] candidate assessment sites. The agency evaluated NCS's proposed price as $36,919,512, using 456,005 hours, and RCI's proposed price as $[DELETED] using [DELETED] hours.

In response to the protests, the SSO provided a declaration in which he elaborated on his source selection decision.[6] The SSO explained that while NCS's proposal was evaluated as having no technical weaknesses, RCI's proposal was evaluated as having one weakness he considered very significant: it was not clear to him that RCI's proposal of only [DELETED] candidate assessment sites would be adequate to get the job done in the required timeframe. The SSO also stated he had a significant concern regarding RCI's price proposal using only [DELETED] hours to do the work, as compared with the 456,005 hours proposed by NCS. The SSO explained that Module 3 included the interviewing process, which called for the development of interviewing protocols, training interviewers, conducting and scoring the interviews, making and gaining approval of salary recommendations, extending offers of employment, negotiating offers of employment, processing the entry onto duty, and entering all relevant information relative to the above processes into the appropriate databases. The SSO's conservative estimate was that, to hire 30,000 to 50,000 people, it would be necessary to conduct approximately 60,000 to 100,000 interviews. The SSO believed that [DELETED] hours was a severe underestimate of the hours that would ultimately be required to simply perform the interviews, let alone to perform the rest of the required work. Considering both of his concerns with RCI's proposal, the SSO determined that NCS's significant strengths and lack of weaknesses merited its additional cost.

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[6] Notwithstanding RCI's apparent request that we accord the SSO's post-protest explanation little weight, such explanations that provide a detailed rationale for contemporaneous conclusions, as is the case here, simply fill in previously recorded details, and will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. Jason Assocs. Corp., B-278689 et al., Mar. 2, 1998, 98-1 CPD ¶ 67 at 6-7.

RCI's argument that the SSO failed to consider whether NCS's proposal to perform the requirements using 456,005 hours was excessive compared with its own proposal to perform the requirements using [DELETED] hours is undermined by its concession that it actually intended to propose a price of $[DELETED] for Module 3 using [DELETED] hours.[7] In our view, this confirms the SSO's concern that RCI's proposed hours and resulting price were unrealistic to perform the required tasks. Moreover, in light of the large number of expected candidates and their geographic dispersion, RCI has given us no basis to discount the SSO's concern regarding the sufficiency of RCI's proposal of only [DELETED] candidate assessment sites.

Module 4, "Day-to-Day Servicing," included all facets of human resources services to include maintenance of official personnel folders, reporting to the office of personnel management central personnel data file, staffing, recruitment, compensation/classification, employee relations, labor relations, benefits and retirement counseling, record keeping and maintenance, office of workers' compensation tasks, and other requirements.

Both proposals were rated outstanding under both technical approach subfactors and overall. NCS proposed a price of $29,065,166 with 326,480 hours and RCI $[DELETED] with [DELETED] hours. The SSO's tradeoff analysis shows that he found NCS had six "pros" and one "con"--it was unclear whether the firm had provided labor relations or benefit services to other clients. The SSO found that RCI's proposal had seven "pros" and two "cons"--the proposal assumed centralized processing and none of its past/current projects were of the size and scope of this project.

In his post-protest declaration, the SSO explained why he found the NCS proposal to be superior. The SSO did not believe that the one weakness in the NCS proposal, its failure to demonstrate that it had provided labor relations or benefits support to other customers, threatened the firm's ability to successfully complete the project in the time mandated by the Congress, and did not consider this weakness significant. On the other hand, RCI's proposal had two weaknesses. While the SSO questioned whether RCI's assumption that there would be centralized processing was a good assumption, he considered RCI's second weakness, its failure to demonstrate that any of its past/current projects met the TSA requirements in size and scope, to be much more significant. He considered the fact that RCI had never undertaken a project of this size and scope before to be a very significant weakness that could threaten its ability to complete the project within the mandated timeframes, and contrasted this significant weakness with the significant strengths in the NCS proposal. He noted that the NCS proposal was credited with a well-prepared,

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[7] In its proposal for Module 3, RCI apparently inadvertently inserted its intended pricing for Module 2 ($21,040,322 using 96,682 hours), and vice versa. It is not clear why the agency believed that RCI's proposed price for Module 3 was $18,472,266.

thoughtful, and creative plan and considerable practical experience, and stated that the NCS proposal indicated it was currently maintaining 30,000 personnel folders on other projects. He concluded that this reflected favorably on the firm's ability to complete the project within the mandated timeframes.

RCI first contends that the SSO failed to adequately consider NCS's weakness regarding its lack of labor relations and benefits to other customers. We do not agree. As the agency explains, the purpose of this procurement is to assist the TSA in finding, evaluating, and hiring an enormous number of passenger screeners and law enforcement officers to be deployed at 429 airports nationwide in less than one year. To accomplish this task, certain skills are required and, as the agency explains, some are more important than others. At the outset of the TSA's existence, the 10-month period covered by this contract, the agency believes there will be little need for labor relations experience and the only significant role played by human resources regarding benefits concerns retirement benefits, which should not be an issue during this short-lived contract. While RCI objects that these are just hypotheses on the part of the agency, we find them reasonable justifications in support of the agency's conclusion.

RCI next argues that the agency irrationally considered its assumption of centralized processing to be both a strength and weakness. However, as the agency cogently explains, the fact that RCI assumed that there would be centralized processing was a strength in concept, but was a weakness in practice because RCI did not fully and adequately explain how such an approach would be implemented to meet the scope of the TSA's requirements--the ability to provide day-to-day personnel servicing support to more than 30,000 recently hired employees nationwide. The agency was concerned, for example, that a centralized processing facility in one time zone might not be available to provide support during the work hours of TSA personnel dispersed across various other time zones. RCI's objection that this feature of its proposal could just as easily have been a strength does not address the agency's concerns, which we find reasonable.

RCI finally argues that it did have a project of the size and scope of the TSA project, referring to a contract listed in its proposal under which it stated that it maintained official personnel folders for 28,000 students who passed through a training center on an annual basis. As the agency explains, while 28,000 students pass through the training center each year, RCI's proposal stated that there were only approximately 7,000 students there at any one time, and the agency could only conclude that the firm probably maintained 7,000 files at one time, less than one-fourth of the minimum TSA requirement of more than 30,000 files. RCI's response--that the successful contractor would begin performance by maintaining just one file and build up over time--does not address the agency's concern that, at some point, the contractor will be maintaining approximately 30,000 files, and its conclusion that it could not ascertain that RCI had experience on that scale.

Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6. Where, as here, the RFP allows for a price-technical tradeoff, the selection official retains discretion to select a higher-priced but also technically superior submission, if doing so is in the government's best interest and is consistent with the solicitation's stated evaluation and source selection scheme. 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 10. Here, technical factors were to outweigh price, and past performance was the most important technical/management subfactor. The SSO found that NCS submitted the superior proposal for each module, and that its higher price was indicative of its comprehensive technical approach and realistic workload assumptions. He also considered that the danger of selecting an inferior but less expensive offer involved accepting a greater risk that the project might not be accomplished as well or as timely as required, and the fact that, in either case, the result would be to increase the risk to the United States of a successful terrorist attack. SSO Declaration at 2. In other words, the SSO was aware of the technical advantages of NCS's proposal, and specifically determined that those advantages were worth NCS's higher price. This is all that is required for a proper tradeoff, and the fact that RCI believes the price premium is too great is not sufficient to establish that the SSO's determination was unreasonable. Id. at 11; General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44 at 11.

The protests are denied.

Anthony H. Gamboa
General Counsel