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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## **Decision**

**Matter of:** Earth Resources Technology, Inc.

**File:** B-403043.2; B-403043.3

**Date:** October 18, 2010

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James H. Roberts III, Esq., Van Scoyoc Kelly PLLC, for the protester.  
Mark D. Colley, Esq., Dominique L. Castro, Esq., and Avi M. Baldinger, Esq., Arnold & Porter LLP, for Columbus Technologies and Services, Inc., the intervenor.  
Victoria H. Kauffman, Esq., Daniel C. Hymer, Esq., and James A. Vatne, Esq., National Aeronautics and Space Administration, for the agency.  
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest that agency misevaluated offerors' technical proposals and performed an unreasonable cost evaluation is denied where record demonstrates that the technical evaluation was reasonable and consistent with solicitation, and any errors in the cost evaluation did not result in competitive prejudice.

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### **DECISION**

Earth Resources Technology, Inc. (ERT), of Annapolis Junction, Maryland, protests the award of a contract to Columbus Technologies and Services, Inc., of Pasadena, California, under request for proposals (RFP) No. NNG09276134R, issued by the National Aeronautics and Space Administration (NASA), Goddard Space Flight Center, for software engineering support services. ERT challenges various aspects of the agency's award decision.

We deny the protest in part and dismiss it in part.

### **BACKGROUND**

NASA issued the RFP on August 7, 2009 as a competitive section 8(a) small business set-aside in order to obtain software engineering support services for the design, development, test and deployment of software, data and information systems that support NASA's aerospace missions. The selected contractor will be required to provide support for the development and test laboratories, test facilities, and technical operations of Goddard's Software Engineering Division. RFP at BATES

123. As amended, the RFP contemplated award of an indefinite-delivery/ indefinite-quantity (ID/IQ) cost-plus-award-fee contract with a 5-year ordering period and a maximum ordering value of \$250 million.

The RFP advised that proposals would be evaluated on the basis of three factors: (1) mission suitability; (2) cost; and (3) past performance. As individual factors, the cost factor was less important than the mission suitability factor but more important than the past performance factor. The mission suitability and past performance factors, when combined, were considered to be significantly more important than the cost factor. RFP at BATES 425.

The mission suitability factor was comprised of the following subfactors: (A) understanding the requirements of the statement of work (SOW); (B) technical approach to sample problem i.e., representative task order (RTO); (C) management plan; and (D) safety & health. As described in the RFP, these subfactors were to be evaluated using adjectival ratings, with a corresponding percentage score, and numerical scores on a 1000 point scale.<sup>1</sup>

Pursuant to the 1000 point scale, the subfactors were weighted as follows:

<b>Mission Suitability Subfactors</b>		<b>Points</b>
A	Understanding the Requirement of the SOW	275
B	Technical Approach to Sample Problem <u>i.e.</u> , RTO	275
C	Management Plan	400
D	Safety & Health	50
Total Points		1000

RFP at BATES 429.

For the purposes of the evaluation, the RFP indicated that the maximum points available for each subfactor would be multiplied by the assessed percent for each subfactor to derive the score for the particular subfactor. For example, if a subfactor had 200 possible points and an offeror received an adjectival rating of “very good” with 80 percentage points, the score for that subfactor would be 160 points. RFP at BATES 119.

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<sup>1</sup> The available adjectival ratings for evaluating proposals under mission suitability were excellent, very good, good, fair, or poor. RFP at BATES 119.

With regard to cost, the RFP provided that offerors' cost proposals would be evaluated for both realism and reasonableness and the agency would determine a most probable cost to the government for each offeror.<sup>2</sup> RFP at BATES 119, 448.

As it is relevant to ERT's protest, the RFP indicated that the agency intended to make award based on initial proposals, thus it advised offerors that their initial proposals should contain their best terms from a technical and cost standpoint. The agency, however, reserved the right to conduct discussions if it deemed necessary. Id. at BATES 402.

Five offerors submitted proposals in response to the solicitation, including ERT and Columbus. Upon receipt of the proposals, the agency performed an initial review of the information provided by the offerors to determine acceptability. During this review, the agency found that three of the five offerors, including ERT and Columbus, neglected to submit a required total compensation plan for one of their significant subcontractors. The agency concluded, however, that "these omissions or abstractions did not represent a significant issue" and all five initial proposals were considered "acceptable for evaluation purposes." Agency Report (AR) exh. 30, Source Evaluation Board (SEB) Report, at BATES 4697.

Using the adjectival and numerical rating system described in the solicitation, the SEB evaluated proposals under the mission suitability factor and related subfactors.<sup>3</sup> The SEB documented significant strengths, strengths, weaknesses, significant weaknesses, and deficiencies that it found in support of the adjectival and numerical ratings assigned to each proposal. Based on its evaluation of offerors' cost proposals, the agency adjusted some of the offerors' proposed costs upward (to include the proposed costs of ERT and Columbus) to arrive at a most probable cost for each offeror. Contracting Officer (CO) Statement at 10-16.

The consensus evaluation findings for the proposals submitted by ERT and Columbus, the two most highly rated proposals, are summarized as follows:

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<sup>2</sup> The agency would assign a level of confidence rating of high, medium, or low for the probable cost determination to indicate the likelihood that the adjusted price would be a close approximation of the actual cost of contract performance. RFP at BATES 119, 448.

<sup>3</sup> The proposals of the offerors other than the protester and the awardee are not relevant to resolution of this protest, and are not further discussed.

	<b>ERT</b>	<b>Columbus</b>
<b>Mission Suitability</b>		
Subfactor A	156.75/Good	222.75/Very Good
Subfactor B	184.25/Good	178.75/Good
Subfactor C	360/Very Good	360/Very Good
Subfactor D	30/Good	30/Good
<b>Total Score</b>	731	791.5
<b>Past Performance</b>	High Confidence	High Confidence
<b>Proposed Cost</b>	\$202 million	\$187 million
<b>Probable Cost</b>	\$229 million	\$226 million

AR exh. 30, SEB Report, at BATES 4720-4745.

The SEB forwarded a detailed report of its consensus evaluation findings to the Source Selection Authority (SSA), who was responsible for making the ultimate award decision. After considering the SEB's findings the SSA concluded that Columbus' proposal presented "the best technical approach at the lowest probable cost." AR exh. 38, Source Selection Statement, at BATES 5800. On May 27, 2010, NASA informed offerors that Columbus had been selected for award. That same day, ERT wrote NASA expressing its concern with the agency's decision to make award without first holding discussions. By letter dated June 4, the contracting officer informed ERT and Columbus that, based on a desire to obtain "a better value for NASA," the agency had decided to reopen the competition in order to hold discussions with ERT and Columbus. CO Statement at 21. This decision, as explained by the contracting officer in the letters to ERT and Columbus, was at the direction of the Head of the Contracting Activity. Columbus then filed a protest with our Office on June 9, challenging the agency's decision to reopen the competition on various grounds.

In a letter dated June 24, the agency advised our Office that it was taking corrective action in response to Columbus' protest by: (1) rescinding the agency's decision to establish a competitive range and conduct discussions with ERT and Columbus; (2) rescinding the June 4 competitive range determination letters sent to ERT and Columbus; and (3) awarding the contract to Columbus as the successful offeror. AR exh. 40, at BATES 5902B. The record reflects that NASA provided ERT's counsel with a copy of the agency's corrective action letter on June 25. *Id.* at BATES 5902A. On July 28, we dismissed Columbus's protest as academic based on the agency's notice of corrective action. *Columbus Technologies and Servs., Inc.*, B-403043, June 28, 2010. On June 28, NASA awarded the contract to Columbus. Following a debriefing, ERT filed this protest.

## DISCUSSION

ERT's protest raises two general categories of challenges. First, ERT argues that NASA's decision not to establish a competitive range and not to hold discussions was improper. Second, ERT challenges various aspects of NASA's evaluation of proposals.

### NASA's Decision Not to Conduct Discussions

While ERT attempts to characterize the first aspect of its protest as a challenge of NASA's "unexplained, unreasonable, and irrational elimination of ERT from a competitive range of ERT and [Columbus]," NASA did not in fact eliminate ERT from the competitive range. Rather, in response to the protest filed by Columbus, NASA decided that it would not reopen the competition for the purpose of holding discussions, as it had previously indicated, and would instead reinstate its original selection decision. Because NASA was not conducting discussions, the establishment of a competitive range was not necessary, and it therefore rescinded the letters to ERT and Columbus advising them that they were included in the competitive range for the purpose of holding discussions.<sup>4</sup> Given this context, ERT's challenge of the agency's actions are properly understood as a challenge of the agency's corrective action, specifically its decision not to reopen the competition for the purpose of holding discussions with offerors.

To the extent such a challenge even establishes a valid basis of protest, it was not timely filed.<sup>5</sup> NASA advised ERT's counsel on June 25 of the agency's intended corrective action in response to the protest filed by Columbus and expressly advised that NASA was not going to open discussions with offerors. AR exh. 40, E-mail to Protester's Counsel, at BATES 5902A. Because ERT's protest of the agency's decision in this regard amounts to a challenge of the agency's corrective action and the ground rules established for the competition, see Northrop Grumman Info. Tech, Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10; Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7, it was unreasonable for ERT to wait until July 11, after having received its debriefing regarding the award

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<sup>4</sup> Establishment of a competitive range is merely a precursor to an agency's decision to hold discussions with a limited number of firms. See Federal Acquisition Regulation § 15.306(c)(1) (stating "Agencies shall evaluate all proposals in accordance with 15.305(a), and if discussions are to be conducted, establish the competitive range.").

<sup>5</sup> To the extent ERT argues that the agency should have held discussions as a consequence of the various procurement errors identified in its protest, this is a derivative argument, which presupposes unproven agency errors, and thus does not establish an independent basis of protest.

decision, to protest NASA's decision in this regard. Rather, because ERT knew or should have known of this basis of protest as a consequence of ERT's counsel receiving the June 25 letter, ERT should have, at the latest, protested the agency's decision not to hold to discussions within 10 days of receiving the June 25 letter, or by July 6. Having failed to timely protest this matter, the allegation is dismissed. 4 C.F.R. § 21.2.

## Evaluation Issues

ERT has also alleged numerous errors concerning the agency's technical and cost evaluations. The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Cherry Rd. Tech.; Elec. Data Sys. Corp., B-296915 et al., Oct. 24, 2005, 2005 CPD ¶ 197 at 6. An offeror's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 18.

As an initial matter, we conclude that ERT abandoned many of the evaluation issues raised in the initial protest it filed with our Office. Where an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. Here, the record reflects that while the agency thoroughly addressed each protest allegation raised by ERT with a detailed factual discussion and legal analysis, ERT, in most instances, either failed entirely to provide a response, or merely reiterated verbatim its original protest allegations, and, at times, mischaracterized the agency report as having failed to respond to its protest allegations, or as having admitted error.

By way of example, ERT initially alleged that NASA erred in failing to assign performance risk or a significant weakness or a deficiency due to Columbus' undue reliance on its large subcontractors. Protest at 11. In responding to this issue, the record reflects that NASA addressed why the SEB did not consider Columbus unduly reliant and why the SEB in fact considered Columbus' teaming arrangements to be significant strengths. Moreover, NASA pointed to the fact that ERT in fact relied on its proposed subcontractors to a greater extent than Columbus.<sup>6</sup> Agency Legal

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<sup>6</sup> The record reflects that ERT proposed to perform 60 percent of the work as the prime contractor and allocated the remaining percentage between its proposed

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Memorandum at 20-21. ERT, however, responded by merely restating, verbatim, its initial protest allegations and reiterating its position that discussions and new evaluations are necessary to address “procurement errors.” Protester’s Comments at 12. Because ERT did not substantively address any of the points raised by the agency, we deem ERT to have abandoned this issue as well as four other issues concerning the agency’s technical evaluation.<sup>7</sup>

Similarly, we find that ERT abandoned two of its three cost evaluation challenges. Specifically, ERT had alleged that NASA: (1) improperly adjusted ERT’s proposed costs for its significant subcontractors in excess of their proposed cost ceilings; (2) improperly made an upward adjustment to ERT’s cost proposal to account for facilities costs where those costs were properly accounted for in ERT’s cost proposal; and (3) unreasonably escalated ERT’s direct labor rates. NASA responded to each of these issues and admitted fault with respect to the second issue, noting that it made an improper upward cost adjustment to ERT’s proposal in the amount of \$466,000, but asserted that ERT was not prejudiced as a result of the error since Columbus remains the highest rated and lowest cost offeror.

Regarding the first issue, NASA explained that it properly upwardly adjusted ERT’s significant subcontractor costs in excess of their proposed cost ceilings because NASA could not reasonably rely on these ceilings because the agency has no privity of contract with the subcontractors, and could not legally enforce the ceiling rates. NASA further explained that even if it had evaluated ERT’s significant subcontractor costs using the ceiling rates, ERT’s total adjusted cost, including the \$466,000 noted

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significant subcontractors (a significant subcontractor was defined as one whose subcontract is likely to be the lower of 5% or more of the government pricing model or 10% of the representative task order’s proposed value, RFP at BATES 400) and other subcontractors at levels below the significant subcontractor threshold. AR exh. 30, SEB Report, at BATES 4796. Columbus proposed to perform [DELETED] percent of the work as the prime contractor and allocated the remaining portion of the work among its proposed significant subcontractors and other subcontractors at levels below the significant subcontractor threshold. *Id.* at BATES 4786. The record also reflects that the Small Business Administration (SBA) denied a size status protest filed by ERT against Columbus in which ERT alleged, among other things, that Columbus was unduly reliant on its large business subcontractors. *See* Columbus’ Supp. Comments, exh. 1, SBA Size Determination Ltr., Aug. 23, 2010.

<sup>7</sup> Specifically, we consider ERT to have abandoned the following issues: Issue 4 (inconsistencies in NASA’s evaluation of ERT’s proposal); Issue 5 (errors in NASA’s evaluation and rating of Columbus’ proposal); Issue 6 (NASA erred in downgrading ERT’s Proposal); and Issue 7 (NASA evaluators missed sections of ERT’s proposal that addressed “lack of information” concerns).

above, would be reduced by \$625,000, which is still not enough to overcome Columbus' cost advantage. Regarding the third issue, NASA explained that it escalated both ERT's and Columbus' labor rates to match the actual incumbent labor rates where both firms proposed to capture large percentages of the incumbent workforce. ERT did not address any of the agency's arguments regarding these issues, and instead mischaracterized the agency as having admitted a \$625,000 error in its evaluation of ERT's costs. We deem these matters to have been abandoned by ERT. See Citrus College; KEI Pearson, Inc., *supra*.

We also agree with the agency's position that ERT was not prejudiced by its error in calculating ERT's facility costs since, accounting for this mistake, ERT's total evaluated cost would still be more than \$2 million higher than Columbus' total cost, and Columbus was considered technically superior to ERT. Prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Armorworks Enter's, LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3.

We now turn to the issues raised by ERT that it did not abandon. In challenging the agency's evaluation, ERT contends that NASA's review of potential conflicts of interest involving NASA evaluators was inadequate. Specifically, ERT argues that rather than obtain conflict information in advance from agency evaluators, NASA should have waited until receiving proposals, which identified teaming members, before obtaining conflict information.

As explained by NASA, prior to receipt of proposals, all SEB participants received a briefing regarding conflicts and were required to submit, specifically for this procurement, Office Government Ethics (OGE) Form 450--Confidential Financial Disclosure Report, and also were required to disclose: (1) any assets falling below the dollar thresholds required on their annual OGE Form 450; (2) any anticipated interests or involvement by a person or entity with whom the employee has a covered relationship; and (3) any changes to information reported on their latest annual OGE Form submission. AR exh. A, Decl. of CO. Immediately after all proposals were received, NASA reviewed the OGE Form 450s against a list of all prime offerors and their proposed subcontractors for potential conflicts. Based on this review, all SEB participants were cleared to fully participate in the evaluation process. Id.

ERT takes issue with the level of detail provided by the agency during its briefing of the SEB members and complains that it was improper for the SEB members to submit the required OGE Form 450 "without knowing which companies would be involved in the procurement action," such as Raytheon and Orbital, subcontractors for Columbus. Protester's Comments at 9. The protester's arguments do not provide a basis to question the propriety of NASA's actions. ERT has not cited any legal authority--and we are not aware of any--to suggest that NASA's briefing was inadequate or that the evaluators should have disclosed financial ties after, rather

than before, the agency disclosed the identity of the prime offerors and their subcontractors. To the contrary, NASA's process of having individuals make their disclosures before actually knowing the field of competitors would make it more difficult for someone seeking to intentionally evade the screening process since they would not be in a position to know which assets they should not disclose. Given this record, we have no basis to conclude that the agency's process for identifying potential conflicts with its evaluators was unreasonable or otherwise improper.

ERT also challenges various aspects of the agency's evaluation of Columbus' proposal under the mission suitability factor. For each issue raised, ERT cites the findings of two evaluators, as reflected in their draft individual evaluator worksheets, and contends that the agency's evaluation was necessarily unreasonable because these draft comments were not adopted in the SEB consensus evaluation report.

ERT's reliance on the draft findings of these two evaluators is misplaced, however. As we have held, there is nothing unusual or improper about evaluators reaching different conclusions and assigning different ratings when evaluating a proposal, since both subjective and objective judgments are involved. The mere presence of such apparent inconsistencies does not demonstrate that the agency's evaluation was improper. See Phoebe Putney Memorial Hospital, B-311385, June 19, 2008, 2008 CPD ¶ 128 at 3 n.2. Rather, it is the substantive and detailed findings of the SEB's consensus evaluation report, which establishes the relevant basis of inquiry, and other than its reference to the evaluator notes, ERT has failed to independently establish that these consensus findings were unreasonable or otherwise improper.<sup>8</sup>

As a final matter, ERT argues that the SEB unreasonably treated Columbus' failure to submit a total compensation plan for one of its significant subcontractors as a weakness. According to ERT, this was a "material omission" that prevented Columbus' proposal from forming the basis of award. Supplemental Protest at 9. The record reflects that significant subcontractors for both ERT and Columbus neglected to submit total compensation plans as requested in the RFP, however, the agency concluded that these omissions did not render the proposals of either firm unacceptable. AR exh. 30, SEB Report, at BATES 46976. Specifically, the SEB determined that the omission of both Columbus and ERT qualified as a weakness because the agency was deprived of certain cost information, which increased the risk associated with the firms' proposals. Id. at 4732, 4745. While ERT may disagree with the agency's evaluation judgment in this regard, a judgment which NASA

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<sup>8</sup> In a supplemental report, NASA provided detailed responses to the specific issues raised by ERT, which included explanations of why the draft findings of the evaluators were not incorporated in the final consensus evaluation and why the draft findings did not support ERT's arguments. ERT did not rebut any of the agency's substantive analyses regarding these issues.

applied equally to ERT and Columbus, ERT's mere disagreement does not demonstrate that the agency's evaluation was unreasonable or otherwise contrary to the terms of the RFP.

The protest is denied in part, and dismissed in part.

Lynn H. Gibson  
Acting General Counsel