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## Decision

**Matter of:** Nan Inc.

**File:** B-407718; B-407718.2

**Date:** January 29, 2013

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Brian A. Darst, Esq., Brian A. Darst Law Office, for the protester.  
Richard Huber, Esq., Department of the Navy, for the agency.  
Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that the agency improperly evaluated proposals with regard to applicable building codes is denied where the record shows the agency's evaluation was reasonable because the building codes cited by the protester do not apply under the solicitation.

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### DECISION

Nan, Inc., of Honolulu, Hawaii, protests the award of three multiple-award contracts to P&S Construction, Inc., of North Chemsford, Massachusetts, Innovative Technical Solutions, Inc., of Walnut Creek, California, and Desbuild Corp., of Hyattsville, Maryland, under request for proposals (RFP) No. N40084-12-R-0003, which was issued by the Department of the Navy, Naval Facilities Engineering Command for design-build construction projects in Singapore. Nan contends that the agency failed to evaluate proposals in accordance with the solicitation's evaluation criteria, as they relate to applicable building codes.

We deny the protest.

On April 27, 2012, the Naval Facilities Engineering Command-Far East issued the RFP for the award of multiple design-build construction contracts to provide a variety of general construction services including: new construction, building renovation, alteration, repair of facilities and infrastructure, roofing, and demolition.

RFP at 8. The RFP anticipated the award of three<sup>1</sup> indefinite-delivery, indefinite-quantity (ID/IQ) contracts for a 1-year base period and four 1-year options. Id. at 8-9. The total estimated cost for all awards under the RFP was not to exceed \$20,000,000. Id. at 8. The RFP stated that the initial task order issued under the ID/IQ contract would be a “seed project” to repair and upgrade four units of a Naval Guest Inns and Suites facility in Singapore. Id.

The RFP announced that the three ID/IQ awards would be made to the offerors whose proposals provided the best value to the government, based on the evaluation of non-price and price factors. The RFP also stated that the overall best value offeror, in addition to receiving an ID/IQ contract, would be awarded the first task order for the seed project. Id. at 8-9. The RFP identified five non-price evaluation factors: (1) corporate experience and key personnel qualifications, (2) management approach and quality control, (3) safety, (4) past performance, and (5) technical solution for the seed project. Id. at 10. Of the non-price factors, past performance was the most important, with all other factors combined being equal to past performance. With regard to price, the solicitation explained that the agency’s evaluation would be based upon the total price for the seed project. Id. at 12. The RFP stated that for purposes of award, the non-price factors were “approximately equal” to price. Id. at 10.

As relevant here, the solicitation required offerors to submit their technical solution for the seed project. The solicitation described the project as a “full renovation of the existing building,” which consisted of living and dining rooms, bathrooms, kitchens, laundry, master bedrooms, second and third bedrooms, and corridors and verandas. RFP, Part 3, Seed Project, at 3. The work was intended to result in a “completely renovated building with four (4) living units, in compliance with international and local code of practices and standards (whichever is stringent and applicable).” Id. In this regard, the solicitation referenced the applicable codes, including: the International Building Code (IBC)<sup>2</sup> “with exceptions and additions noted in UFC [Unified Facilities Criteria]<sup>3</sup> 1-200-01,” and the Whole Building Design

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<sup>1</sup> The solicitation provided, however, that the agency could elect to award more or fewer than three contracts.

<sup>2</sup> The IBC is a model code that establishes minimum requirements to safeguard the public health, safety, and general welfare of the occupants of new and existing buildings and structures. See IBC, Chapter 1, Scope and Administration, Section 101, General (2009).

<sup>3</sup> UFC documents provide planning, design, construction, sustainment, restoration, and modernization criteria, and apply to the Military Departments, the Defense Agencies, and the Department of Defense Field Activities. United Facilities Criteria, UFC 1-200-01, General Building Requirements (Nov. 28, 2011). For the

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Guide, which incorporates UFC standards. RFP, Part 4, Section Z10-General Performance Technical Specification, at 1-3.

Offerors were required to provide, as part of their technical solution for the seed project, a narrative description of their general concept, conceptual drawings of floor layout plans as specified in the RFP, and project schedules. RFP at 20. The RFP outlined specific requirements--separate from the general construction requirements of the overall ID/IQ contract--for the completion of the seed project's four living units. See RFP, Part 3, Seed Project, at 1-37. For example, the solicitation required offerors to remove items such as curtain rods and mirrors, paint walls, re-varnish floors, remove and replace floor tiles, supply and install socket outlets, replace lighting fixtures, and supply and install new wash basins and faucets. Id. at 5-10. The RFP also included conceptual floor plan drawings to show the agency's concept for the finished design of the seed project.

The RFP stated that the agency's evaluation of an offeror's technical solution for the seed project would consider its narrative and conceptual drawings to determine whether the proposal demonstrates a clear understanding of the architectural and engineering requirements of the project. The agency would also evaluate whether the effectiveness of the design-build team's technical solution provided the agency a high level of confidence that the work will be performed in accordance with the technical requirements. RFP at 21.

The agency received nine proposals by the June 8 date for receipt of proposals, including proposals from the three awardees and Nan. Following initial evaluations, the agency concluded that it would hold discussions with Nan and five other offerors.

The agency's evaluation of the protester's initial proposal identified a concern with Nan's proposed alterations to the conceptual drawing floor plans to provide for emergency egress and natural ventilation. Agency Report (AR), Tab V2, at 76-77, 85. In this regard, Nan's technical solution and conceptual drawings proposed alterations to the floor plan for additional doorways, windows, and pathways, to account for adjustments it believed were required under the IBC. On August 13, the agency sent discussion questions to Nan to address its concerns regarding Nan's proposed "betterments." AR, Tab W, Nan's Discussion Questions, at 1-4. The

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Department of Defense, the IBC is modified through reference to "core" UFCs. Core UFCs provide the unique military building criteria that parallel the building code. In the case of conflicts between the IBC and the military criteria, the military requirements under the UFC control. AR at 11.

discussion questions requested the protester, in relevant part, to address the following:

[Technical Proposal] Question 5.1: Your proposal indicated that you need to deviate from the Government provided floor plan to satisfy statutory requirements for egress. Please clarify if you have already verified with the Planning Authorities in Singapore the requirement for such building and for such work – note the “seed” project is a “minor” project involving simple additions and alterations only.

\* \* \* \*

[Technical Proposal] Question 5.3: You proposed betterments exceeding RFP requirements, such as improvements to the egress and natural ventilation and furred walls, but these may not be required and may affect your competitive price for the seed project. Please clarify and submit a revised price proposal as needed.

\* \* \* \*

[Price Proposal] Question 2: Your price proposal for the “seed” project is higher than the estimated price range (between US\$250,000 and US\$500,000) specified in the solicitation, which appears to indicate a lack of understanding of the Project Program requirements. Please verify and submit a revised price proposal as necessary.

Id. at 2.

Nan’s response explained that it believed, “given the current RFP requirements,” its alterations to the floor plan, which included building improvements for emergency egress and natural ventilation, were “required to comply with the IBC.” AR, Tab LL3, Nan Response to Discussions (Aug. 20, 2012), at 8, 12. Rather than seeing these alterations as optional “betterments,” Nan expressed its belief that these were minimum requirements to complete the contract in accordance with the RFP, which required compliance with IBC. Id. at 8. Further, Nan provided:

Overall, after reviewing NAVFAC’s discussion questions, it appears to Nan, Inc. that the present RFP requirements may not illustrate the owner’s project scope as intended. Nan, Inc.’s price is a reflection of the current RFP requirements, namely execution of a “full renovation” and project compliance with the International Building Code. If the RFP requirements were to be revised to more closely align with the

Owner's perceived intent, our Design-Build team feels that we could work closely with NAVFAC to reduce the project costs.

AR, Tab LL3, Nan's Response to Discussions, (Aug. 20, 2012), at 1.

On August 22, the agency notified offerors that it had concluded discussions and requested final proposal revisions.<sup>4</sup> On August 24, Nan submitted its final proposal revision and once again expressed its belief that the seed project required the contractor's proposal to comply with the IBC's emergency egress and natural ventilation standards. Nan did not amend its price for the seed project in its final submission. AR, Tab LL4, Nan Final Proposal Revision, at 1.

The agency evaluated the final revised proposals as follows:

<b>Offeror</b>	<b>Overall Technical<sup>5</sup></b>	<b>Past Performance</b>	<b>Price</b>
P&S Construction, Inc.	Good	Satisfactory Confidence	\$470,700.00
Innovative Technical Solutions, Inc.	Good	Substantial Confidence	\$495,000.00
Desbuild Incorporated	Acceptable	Satisfactory Confidence	\$516,000.00
Nan Inc.	Good	Substantial Confidence	\$757,000.00

AR, Tab I, Post Business Clearance Memorandum, at 43.

With regard to Nan, the agency determined that its proposal "did not provide [a] complete and clear RFP and code based justification for designing the egress as shown in their proposal." Id. at 26. The agency also found that:

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<sup>4</sup> On August 23, after receiving the agency's notification letter, Nan phoned the agency to discuss the applicability of the IBC to the seed project. The facts of what took place during the phone call are in dispute by the protester and agency. Nonetheless, because the protester did not challenge the adequacy of the agency's discussions, we need not address this factual dispute to resolve the protester's challenges regarding the interpretation of the solicitation.

<sup>5</sup> For the technical evaluation offerors could receive one of the following ratings: outstanding, good, acceptable, marginal, or unacceptable. For the past performance evaluation, offerors could receive one of the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, unknown confidence. AR, Tab Q, Source Selection Plan, at 22-23.

[The] betterments as proposed by Nan are not “minimum requirements” to meet local building codes or regulations for the “seed” project. Checks with the International Building Code (IBC) also reveal that the betterments proposed by Nan are not applicable or required nor can be considered as minimum requirements for the nature, type and scope of the “seed” project. Per section 1-3.2.2 of the UFC [Unified Facilities Criteria] code, such upgrades are ‘highly recommended’ but are not minimum requirements.

Id. Additionally, the agency found that Nan’s proposed price was “not reasonable” based upon its comparison with the independent government cost estimate and other offerors proposed prices. Id. at 41, 47.

Based upon the source selection authority’s best value analysis, P&S Construction, Inc., Innovative Technical Solutions, Inc., and Desbuild Incorporated were selected for ID/IQ contract awards. AR, Tab K, Source Selection Decision, at 2. P&S Construction, as the overall best value offeror, was also selected for the seed project task order. Id. On September 29, the agency notified Nan of its award decision. AR, Tab HH, Award Notification, at 1. Following its October 19 debriefing, Nan filed its protest with our office on October 23.

## DISCUSSION

Nan contends that the agency failed to evaluate the offerors’ proposals for the seed project in accordance with the solicitation’s evaluation criteria. In this regard, Nan asserts that the RFP required compliance with the IBC’s standards for emergency egress and natural ventilation for the internal bedrooms, and that offerors were therefore required to revise the drawings provided in the RFP to ensure compliance with the IBC. For this reason, the protester argues that the awardees’ proposals should have been considered unacceptable because their conceptual design drawings failed to demonstrate compliance with these IBC provisions.<sup>6</sup> Nan concludes that the agency unreasonably waived or relaxed these mandatory solicitation requirements in awarding the ID/IQ contracts.<sup>7</sup>

The Navy maintains that the terms of the solicitation did not require offerors to demonstrate compliance with the IBC’s standards for emergency egress and natural

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<sup>6</sup> Nan’s protest focuses on the agency’s evaluation of proposals with regard to compliance with building codes, not the agency’s best value trade-off decision.

<sup>7</sup> The protester raised various other challenges with regard to the Navy’s evaluation. We have considered all of the protester’s arguments and find none provides a basis to sustain the protest.

ventilation because the work requested for the seed project included only alterations and repairs to an existing building, and thus do not fall under the sections of the IBC cited by the protester.

The evaluation of an offeror's proposal is a matter within the agency's discretion. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. In reviewing a protest of an agency's evaluation of proposals, our Office 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. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. Where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, an interpretation must be consistent with such a reading. Kevcon, Inc., B-406024.3, June 18, 2012, 2012 CPD ¶ 221 at 3. Based upon our review of the record and applicable building codes, we find that the only reasonable reading of the solicitation did not require any additional work for emergency egress and natural ventilation.

The RFP required offerors to submit a technical solution and conceptual drawings based upon detailed specifications provided in the solicitation concerning the seed project. In this regard, the agency provided specific instructions for the repairs and improvements to be provided for the bedrooms including, as follows:

Painting Works – Prepare surfaces, patch deep spot accordingly, apply (1) coat primer/sealer and (2) coats of finish paint to walls and ceiling of (3) bedrooms.

Prepare and Re-varnish Timber Floor at Bedrooms – Perform moderate grinding and provide new stain – varnish finish to existing timber floors and skirting at (3) bedrooms.

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Electrical Works (Master Bedroom 1 & Bedroom 2) Supply and install new socket outlet complete with concealed conduits and cabling. . . . Relocate existing T.V. and Telephone points inside the T.V. console/entertain center.

RFP, Part 3, Seed Project, at 8. The specifications did not mention additional bedroom doors, windows, pathways, or otherwise require offerors to account for additional emergency egress or natural ventilation requirements.

Although the RFP did not expressly require offerors to address emergency egress or natural ventilation requirements, Nan argues that the solicitation nonetheless

required offerors to propose a technical solution and conceptual drawings that complied with the IBC. In this regard, Nan contends that the solicitation language for a contractor to provide a “fully and completely renovated building . . . built in accordance to local and/or International Building Code of Practices and Standards,” should be read to implement the IBC’s provisions for emergency egress and natural ventilation. See RFP, Part 3, Seed Project, at 3. In essence, the protester argues that the requirement of a full renovation obligates the contractor to address any existing building code deficiencies or violations. Specifically, the protester argues that the requirement obligated offerors to propose a technical approach and costs to move doors within the bedrooms to address emergency egress requirements and to upgrade the ventilation systems for the entire building in compliance with IBC chapters 10 and 12. In this regard, IBC chapter 10, section 1029, provides standards for emergency escape and rescue, and IBC chapter 12, section 1203.4, provides standards for natural ventilation. In our view, the protester’s interpretation of the IBC is not reasonable.

The Navy contends, and we agree, that the IBC itself put offerors on notice that the provisions cited to by Nan are inapplicable to the seed project. IBC, chapter 34 provides standards for existing buildings, and states that “[t]he provisions of this chapter shall control the alteration, repair, addition and change of occupancy of existing structures.” IBC, Chapter 34, Existing Structures, Section 3401.1, Scope. The chapter goes on to explain how the provisions of the IBC apply to each type of work specified (alteration, repair, addition or change of occupancy). For alterations to existing buildings, chapter 34, section 3404.1 of the IBC states, “[e]xcept as provided by Section 3401.4 [building materials] or this section, alterations to any building or structure shall comply with the requirements of the code for new construction.” IBC, Chapter 34, Existing Structures, Section 3404.4, Alterations. The code goes on to clarify that in terms of the existing building, “[a]lterations shall be such that the existing building or structure is no less complying with the provisions of this code than the existing building or structure was prior to the alteration.” Id.

Here, the terms of the solicitation provided that the seed project work would be performed on an existing Naval Guest Inns and Suites building. As it pertains to the seed project, the solicitation described the required work in various sections as repairs, improvements, and/or renovations. RFP at 8. The work relating to the bedrooms entailed refinishing floors and walls, and replacing electrical outlets. RFP, Part 3, Seed Project, at 8. Based on the IBC definitions for alterations, repairs, and additions, the Navy contends that the work contemplated by the solicitation would be classified as an alteration-- “[a]ny construction or renovation to



an existing structure other than repair or addition.”<sup>8</sup> See IBC, Chapter 2, Definitions, Section 202, Alterations.

We find that the only reasonable interpretation of the relevant IBC provisions is that, while the alterations must conform to the IBC code, all aspects of the existing building need not be brought up to current code simply because alterations are being made within the building. Thus, Nan’s reliance on chapters 10 and 12 is misplaced because these portions of the IBC are inapplicable where, as here, alterations are performed on an existing building that do not include or encompass any change to the current emergency egress and natural ventilation structures or systems. To the extent that Nan believed that the phrase--full and complete renovation--meant that the scope of work for the seed project would require more work than the specific tasks set forth in the statement of work, we do not find the protester’s argument reasonable.

We further note that if Nan’s interpretation were correct, it would lead to the absurd result of requiring a contractor who performs any work on a bedroom--regardless of scope--to revise the floor plan of the bedrooms to bring them into compliance with the IBC’s emergency egress and natural ventilation codes. We conclude that this is not a reasonable interpretation where the work required under the solicitation does not alter any part of the current bedrooms’ emergency egress or natural ventilation structures or systems.

Additionally, Nan’s assertions with regard to the emergency egress requirements are also misplaced because the solicitation requires that the UFC standards be used, not the IBC chapter 10 standards. In this regard, the UFC’s general building requirements mandate the use of core UFC No. UFC-3-600-01, Fire Protection Engineering for Facilities, in lieu of IBC Chapter 10, Means of Egress. United Facilities Criteria, UFC 1-200-01, General Building Requirements (Nov. 28, 2011), at 3. Thus, the IBC chapter 10 standard cited to by Nan is inapplicable to the seed project because the UFC controls.<sup>9</sup> For these reasons, we find that the agency

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<sup>8</sup> The protester does not dispute that the solicitation contemplates alterations, as compared to repairs or additions, to the existing building.

<sup>9</sup> To the extent that Nan contends, in its comments and supplemental comments, that the awardees’ proposals failed to account for the emergency egress requirements in UFC 3-600-01, this is an untimely ground of protest. As stated above, with regard to emergency egress requirements, the UFC and not the IBC applies. Here, Nan’s initial protest argued only that the solicitation required offerors to propose plans for bringing the bedrooms into compliance with chapter 10 of the IBC, and not UFC 3-600-01. For these reasons, the protester’s arguments regarding the UFC in its comments and supplemental comments are untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2012). In any event, the relevant  
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evaluation was reasonably based upon the requirements of the solicitation, which did not require compliance with the IBC emergency egress and natural ventilation standards.

The protest is denied.

Susan A. Poling  
General Counsel

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section of the UFC--requiring existing facilities to meet the requirements of the National Fire Protection Association 101, Life Safety Code--does not require compliance where, as here, the cost of the anticipated work is less than 50% of the replacement value of the building. UFC 3-600-01, §§ 1-3.1 Existing Facilities, 1-3.2.2 Modernization/Major Investments. Instead, under the circumstances here, the relevant UFC provision applies only to the "maximum extent practical." Id. Thus, the UFC emergency egress provisions were not mandatory solicitation requirements.