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## Decision

**Matter of:** Vigor Shipyards, Inc.

**File:** B-409635

**Date:** June 5, 2014

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Tania Calhoun, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Where protest initially raises broad ground of protest, but fails to provide specific examples of flaws until more than 10 days after agency report is provided to protester, these later, more specific arguments are untimely.

2. Protest that agency improperly revised its independent government estimate in order to find awardee's proposed costs realistic is denied where the record shows that the agency's revision was an effort to ensure that the estimate reflected its actual requirements.

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### DECISION

Vigor Shipyards, Inc., of Seattle, Washington, protests the award of a contract to General Dynamics NASSCO-Earl Industries (Earl), of Portsmouth, Virginia, under request for proposals (RFP) No. N00024-12-R-4321, issued by the Department of the Navy for non-nuclear maintenance, repair, and alteration of aircraft carriers in Puget Sound, Washington. Vigor alleges that the agency miscalculated proposals, failed to engage in adequate discussions, and made an unreasonable cost/technical tradeoff decision.

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

## BACKGROUND

The solicitation, issued on June 12, 2012, anticipated the award of a cost-plus-award-fee/cost-plus-incentive-fee, multi-ship, multi-option contract for various maintenance, repair, and alteration tasks for CVN 68 and CVN 78 Class aircraft carriers in Puget Sound, Washington, over a five-year period. The contractor will be responsible for execution planning and performance of scheduled Planned Incremental Availabilities (PIAs), Dry-docking PIAs (DPIAs), Inter-Availability Planning and Administration (IAPA) and other maintenance on these aircraft carriers.<sup>1</sup>

The RFP provided that award was to be made on a best value basis after an integrated assessment of proposals under three factors--technical capability, past performance, and cost. RFP at 221, 226. Technical capability was more important than past performance, which was more important than cost. Id. at 225. The RFP stated that, overall, technical merit (technical capability and past performance) was more important than cost, but the importance of cost would increase as the difference in overall technical merit among competing proposals decreased. Id. at 226. Accordingly, the RFP advised that the Navy might award the contract to a firm other than the one with the highest technical capability or past performance rating. Id.

A cost realism analysis was to be performed on offerors' proposed estimated costs. RFP at 224-225. This evaluation was to consider proposed cost elements, and to adjust those elements, if necessary, to derive a most probable cost for each offer. Id. Offerors were to submit proposed costs for each PIA and DPIA contract line item based on a notional work package that included specific work items. The RFP also provided an independent government estimate (IGE) for each work item that represented the Navy's estimate of the number of labor hours and material costs required to complete the work item. AR at 5.

The Navy received proposals from three firms by the August 24, 2012 due date, including those from Vigor and Earl.<sup>2</sup> A technical evaluation review panel (TERP) evaluated initial technical proposals, a cost assessment panel (CAP) evaluated

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<sup>1</sup> An "availability" is an interval during which a given ship is made available to the contractor to perform work on the vessel. A PIA is a six-month depot availability that accomplishes planned alterations and maintenance. A DPIA is a twelve-month depot availability that provides an opportunity to perform maintenance that cannot be performed while a vessel is waterborne. An IAPA involves planning and administrative functions for production work to be performed between availabilities. Agency Report (AR) at 2-3, n.1-n.3.

<sup>2</sup> The third offeror withdrew its proposal for reasons not relevant here.

initial cost proposals, and both panels presented their findings to the Best Value Advisory Council (BVAC). AR at 6-8. Both proposals were included in the competitive range and discussions were conducted in early 2013. The TERP and CAP evaluated both firms' final proposal revisions (FPR) and presented their findings to the BVAC. Id. at 8-10.

During the BVAC's deliberations, concerns were raised about the validity of the Navy's IGE in light of certain aspects of Earl's approach to estimating its proposed level of effort. The Navy determined that it could not substantiate the validity of its IGE, and generated a revised IGE that better represented the required effort. This revised IGE was used to prepare an updated notional work package reflecting a reduced level of effort. Both the revised IGE and the new notional work package were provided to offerors as part of a September 13 amendment which requested second FPRs. Both firms submitted second FPRs, and both responded to additional discussion questions. The final evaluation results were as follows:

	<b>Earl</b>	<b>Vigor</b>
<b>Technical Capability</b>	Acceptable	Good
<b>Past Performance</b>	Very Relevant Substantial Confidence	Very Relevant Substantial Confidence
<b>Proposed Cost</b>	\$87,705,481	\$120,732,594
<b>Evaluated Cost</b>	\$94,377,585	\$125,086,650

AR, exh. 61, BVAC Report to the Source Selection Authority (SSA), at 9.

The BVAC considered the findings of both the TERP and the CAP and engaged in a detailed analysis of each proposal, as well as a comparative analysis of both proposals. AR, exh. 61, BVAC Report to the SSA, at 4-12. The BVAC found that Vigor's proposal was "somewhat superior" to Earl's under the technical capability factor, and comparable under the past performance factor. Id. at 10-12. The BVAC found that Earl's evaluated cost would save the government more than \$30 million dollars over the life of the contract, and that, while the evaluated costs for these offerors differed by 33 percent, their respective total proposed levels of effort deviated by less than 1 percent. Id. at 11. The BVAC concluded that the technical advantages of Vigor's proposal were "not significant enough to outweigh the considerable cost premium" associated with its proposal, and recommended award to Earl as the firm submitting the proposal representing the best value to the government. Id. at 12.

The BVAC presented its findings and award recommendation to the SSA. After independently reviewing the pertinent documents and conducting discussions with members of the TERP and the BVAC, the SSA concurred with their conclusions. AR, exh. 63, Source Selection Decision at 3. He explained that the BVAC's trade-off analysis adhered to the solicitation's provision that award might be made to other

than the offeror with the highest technical capability. The SSA stated that, while technical merit is considered more important than cost, there must be:

. . . a justification in the benefit to the Government to pay a premium in cost. The BVAC found that the technical benefits associated with Vigor's proposal did not outweigh the significant premium [30%] in projected cost to the government."

Id. The SSA concurred in the conclusions of the BVAC, and found that the selection of Earl was plainly justified by the firm's evaluated cost advantage. Id.

Award was made to Earl on March 13, 2013, and Vigor received a debriefing on March 20. At its debriefing, Vigor was provided a set of slides and a redacted final CAP report describing in detail the cost realism analysis of its proposal. The firm filed its protest in our Office on March 25.

## PROTEST

Vigor's initial protest made two broad allegations. First, Vigor alleged that the Navy improperly converted this "best value" procurement to a "lowest-cost, technically acceptable," procurement or, put another way, that it improperly "refocused" on cost as a more important evaluation criterion. Protest at 7-10. This section of the protest included numerous quotations from case law but very few specific allegations or facts. Second, Vigor alleged that the Navy failed to conduct meaningful discussions with the firm by not conveying that its proposed cost was a weakness or concern and, in a nod to its initial allegation, by not conveying that cost had become the most important factor. Protest at 11.

The Navy filed its agency report in response to Vigor's protest on April 15. Vigor's comments on the agency report were due within 10 days of that date, or April 25, 4 C.F.R. § 21.3(i) (2014), but the firm asked our Office to extend the due date for the filing of its comments. Our Office agreed to an extension and, in an e-mail confirming that the extended due date was April 30, our Office added this cautionary instruction:

Please be advised that an extension of the comments due date does not toll our timeliness requirements for the filing of new protest contentions. See Exelon Servs. Fed. Group, B-291934, Apr. 23, 2003, 2003 CPD ¶ 86 at 7 n.4.

GAO E-mail to Parties, April 21, 2014.

Vigor filed its comments, along with an affidavit from its consultant, on April 30. On May 2, the Navy filed a motion asserting that the comments contained numerous new and independent supplemental protest allegations not raised in the initial

protest and not filed within 10 days of receipt of the agency report, and asked our Office to dismiss them as untimely. Both Vigor and Earl responded to the motion. For the reasons discussed below, we dismiss the protest in part and deny it in part.

### Untimely Issues

As a general matter, protests other than alleged solicitation improprieties must be filed within 10 calendar days of when the protester knows or should have known its bases for protest. 4 C.F.R. § 21.2(a)(2). Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Planning and Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13. Supplemental protest grounds that amount to “examples” of an initial--general--challenge to the agency’s evaluation must independently satisfy our timeliness requirements where such “examples” involve different factual circumstances, and require a separate explanation from the agency,. Planning and Dev. Collaborative Int'l, supra, citing QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13.

As discussed, Vigor initially alleged only generally that the Navy placed undue emphasis on cost in its source selection decision, thereby converting this “best value” procurement into a “lowest-cost, technically acceptable” procurement. Protest at 7-10. In this section of its protest, Vigor made a general statement that the Navy “failed to perform proper cost realism,” but provided no elaboration on this contention.<sup>3</sup> Protest at 7.

In its comments on the agency report, filed more than 10 days after Vigor’s receipt of the report, Vigor identified numerous specific examples of what it describes as “deficiencies” in the Navy’s cost realism analysis of both proposals. Vigor Comments at 2-10; Declaration of Vigor’s Consultant. All of these specific challenges are untimely because they were raised more than 10 days after Vigor knew the basis for these allegations.

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<sup>3</sup> The firm separately asserted that the cost realism analysis was “also flawed given what occurred.” Protest at 9. It is not entirely clear what the protester means, but the protest elsewhere alleged that (1) the Navy “used its [IGE] to improperly gauge [Earl’s] cost realism and dismiss Vigor’s final proposal,” Protest at 10, and (2) the Navy’s failure to obtain a Defense Contract Audit Agency (DCAA) audit of both offerors’ second FPRs was inconsistent with the solicitation’s terms. Protest at 9. We address these matters below.

Vigor argues that its specific allegations merely amplified its original, general, ground of protest, and were not new and independent allegations, citing our decision in Southwestern Bell Telephone Co.; Northern Telecom, Inc., B-200523.3 et al., Mar. 5, 1982, 82-1 CPD ¶ 203 at 14-16. We disagree. While Vigor's initial protest raised a generalized challenge to the adequacy of the Navy's cost realism evaluation, its comments responding to the agency report raised numerous particularized challenges to the agency's cost realism evaluation. For example, Vigor raised a challenge to the agency's evaluation of Earls' proposed direct labor hours; a challenge to the agency's evaluation Earl's proposed indirect rates; and challenges to the agency's supposedly inappropriate application of a regression analysis in evaluating Vigor's labor pool, indirect rates and manufacturing overhead. Vigor's Comments at 2-7.<sup>4</sup>

Here, Vigor's initial protest ground--that the Navy failed to perform a proper cost realism evaluation--was so broad that the Navy's original report was limited to a generalized response that its cost evaluation was proper. An agency response to Vigor's particularized, later-raised, examples of the agency's allegedly flawed cost realism analysis would require a new, supplemental agency report detailing the facts and circumstances relating to each of Vigor's specific allegations. In these circumstances, Vigor's later-raised allegation must independently satisfy our timeliness requirements. Planning and Dev. Collaborative Int'l, supra, at 6. Since, as noted, Vigor raised these assertions more than 10 days after receiving the agency report, they are untimely.

Vigor's protest also alleged that the Navy did not engage in meaningful discussions with the firm because it was not informed that its proposed cost was a weakness or concern. Protest at 11. In its comments, Vigor abandoned this allegation.<sup>5</sup> Instead, the firm alleged that the Navy engaged in disparate discussions because Earl was given a chance to address its cost calculation methodology during discussions, whereas Vigor was not. Comments at 12. This also is a new and

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<sup>4</sup> We point out as well that the declaration from Vigor's consultant relies, in part, on the CAP report provided to Vigor at its March 20 debriefing. Any allegation arising from that document, to be timely, was required to have been filed with Vigor's initial protest. 4 C.F.R. § 21.2(a)(2).

<sup>5</sup> We note in any case that the Navy did not consider Vigor's proposed cost to be a weakness or a concern. Unless an offeror's proposed cost is so high as to be unreasonable or unacceptable, an agency is not required to tell an offeror during discussions that its proposed cost is high in comparison to a competitor's proposed cost, even where cost is the determinative factor for award. NHIC Corporation, B-310801, B-310801.2, Feb. 12, 2008, 2008 CPD ¶ 67 at 12. This aspect of Vigor's original protest thus lacked merit in any event.

independent issue, distinct from that raised in Vigor's protest, which similarly is untimely for the reasons discussed above.<sup>6</sup>

Finally, Vigor requests that we consider these aspects of its protest under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c). This exception is limited to untimely protests that raise issues of widespread interest to the procurement community which we previously have not considered on the merits. In order to prevent our timeliness rules from becoming meaningless, the significant issue exception to our timeliness requirements is strictly construed and rarely used. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. While we recognize that these matters are of importance to Vigor, these issues are not of such widespread interest to the procurement community as to warrant their resolution in the context of an otherwise untimely protest. Hawker Beechcraft Defense Company, LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4. We therefore decline to invoke the significant issue exception to our timeliness rules here.

#### Revision to the IGE

Vigor's protest alleged that the Navy "used its [IGE] to improperly gauge [Earl's] cost realism and dismiss Vigor's final proposal." Protest at 10. Reading the allegation in context, we understand Vigor to be asserting that the Navy improperly revised its IGE in order to find Earl's cost proposal realistic.

This aspect of Vigor's protest amounts to an allegation of bad faith on the part of the agency. A protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider such allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Vigor has made no such showing here. Instead, the record shows, as discussed below, that the evaluation of Earl's cost proposal brought to light specific inadequacies in the Navy's IGE, and that the Navy reasonably revised its IGE in order to ensure that it reflected its actual requirements.

The record shows that the level of effort proposed in Earl's initial cost proposal conformed to the solicitation's notional work package with the exception of

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<sup>6</sup> In any event, while discussions may not be conducted in a manner that favors one offeror over another, and offerors must be given an equal opportunity to revise their proposals, discussions need not be identical among offerors; rather, discussions need only be tailored to each offeror's proposal. See Federal Acquisition Regulation (FAR) § 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. The record shows that discussions here were tailored to the different concerns raised by each offeror's proposal.

deviations proposed for several work items.<sup>7</sup> AR, exh. 15, Initial CAP Report to the BVAC, at 5. These deviations, grounded in Earl's estimating methodology, were based on historical data and the firm's successful performance of similar requirements. Id. The CAP evaluator thought that Earl's estimating practice was "sound," id. at 7, but recommended obtaining additional data to support the deviations during discussions. Id.

The record further shows that the evaluation of Earl's proposed deviations caused the CAP to look more closely at how the level of effort estimates in the IGE and notional work package were developed. AR, exh. 15, Initial CAP Report to the BVAC, at 10. The CAP found that the IGE was based on a random sample of past work under the incumbent contract and, unlike Earl's approach, [deleted]. Id. at 10-11. In the initial round of discussions, the Navy asked Earl to provide additional historical data to support its proposed deviations. AR, exh. 19, Initial Discussion Questions for Earl, at 1-2. The firm did so, and incorporated the data into its first FPR. In evaluating the FPR, the Navy considered the additional supporting historical data and took no exception to Earl's proposed deviations. AR, exh. 40, CAP report to the BVAC, at 12.

After the CAP presented its findings to the BVAC, the BVAC asked the contracting officer to substantiate the IGE. AR, exh. 42, Memorandum from BVAC Chair to Contracting Officer. The contracting officer was unable to provide data that satisfied the BVAC that the IGE was sufficiently representative of the work to be performed. As a result, the Navy reassessed the entire IGE and developed a new one that more accurately reflected the effort that would be required to complete the notional work package within the period of performance specified for each availability. AR at 10. The revised IGE was used to prepare an updated notional work package, which, in turn, was provided to offerors to use in preparing their second FPRs.

Contracting agencies are required to amend a solicitation if, as here, it does not reflect the agency's actual requirements, including where the issue arises after the receipt of proposals. FAR § 15.206(a); Symetrics Industries, Inc., B-274246, Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. Global Computer Enterprises, Inc.; Savantage Financial Servs., Inc., B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69 at 8. Vigor has given us no basis to question the Navy's actions here. The record shows that, once the Navy realized that its level of effort estimates did not reflect the actual performance period for this solicitation, it exercised informed judgment to ensure that its IGE, and the notional work package included in the RFP, accurately represented the work to be performed. In view of the foregoing discussion, we deny this aspect of Vigor's protest.

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<sup>7</sup> Deviations were permitted with adequate justification. RFP at 202-203.



## Alleged Failure to Obtain Revised DCAA Information

Vigor argues that the Navy's failure to obtain a DCAA audit of the offerors' second FPRs was contrary to the terms of the solicitation. However, the solicitation did not require the Navy to obtain a DCAA audit for each iteration of the cost proposals. The solicitation only states that the government "will obtain and utilize information obtained from the cognizant DCAA office in determining the validity of proposed labor rates and indirect costs projected in the cost proposal." RFP at 224-225. The record shows that the Navy did obtain and use such information here. For example, in evaluating Vigor's second FPR, the record shows that the agency obtained more recent information relating to Vigor's indirect rates than had been used in evaluating its first FPR. AR at 13-14.

## Source Selection Decision

Vigor argues that the Navy improperly converted this "best value" procurement to a "low cost, technically acceptable" procurement. Protest at 7. Vigor contends that Earl's proposal was technically inferior to Vigor's, and the tradeoff analysis placed too much weight on cost. Vigor also asserts that the SSA failed to adequately document his decision because he only summarized the BVAC findings in a short memorandum. Comments at 11.

Source selection officials in negotiated procurements have broad discretion in making cost/technical tradeoffs; the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. Where a cost/technical tradeoff is made, the source selection decision must be documented, and the documentation must include the rationale for any tradeoffs made. FAR § 15.308; The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13.

The final BVAC report includes a section detailing the tradeoff analysis the panel used in arriving at its conclusion that Earl's proposal represented the best value to the government. AR, exh. 61, BVAC Report to SSA, at 10-12. The BVAC went through all of the evaluated major strengths, strengths, and minor weaknesses of each proposal to analyze their substantive features and to compare their merits. The BVAC ultimately concluded, for reasons explained in its report, that Vigor's technical proposal was "somewhat" superior to Earl's (their past performance was comparable), but that this technical advantage was not significant enough to outweigh the considerable cost premium relative to Earl's proposal. Id. at 12.

Vigor does not challenge any aspect of this comparative analysis, but only repeats that its proposal was found technically superior to Earl's and that too much importance was placed on cost. However, the solicitation stated that the

importance of cost would increase as differences in technical merit decreased. RFP at 226. The BVAC report's analysis embodies the reasons for the Navy's conclusion, consistent with the RFP's terms, that Vigor's technical advantage did not outweigh its cost premium. Vigor has advanced no substantive challenge to this underlying analysis.

Finally, Vigor's argument that the source selection decision was insufficiently documented reflects a misunderstanding of what is required. For a proper tradeoff, the record must show that the SSA was aware of the relative technical merits of competing proposals, and specifically considered whether the advantages of a technically superior proposal is, or is not, worth any associated cost premium. See 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 11.

The record here shows that the SSA reviewed all of the detailed reports which, when combined, described the technical advantages and disadvantages of the proposals, their comparability with respect to past performance, and their cost differences. The record also shows that the SSA specifically determined that Vigor's technical advantages were not worth its higher cost. Where, as here, the SSA fully considered all of the underlying evaluation documentation in concluding that a firm's technical advantages do not warrant its higher cost, and where there is no basis in the record to question the reasonableness of the SSA's judgment, our Office has no basis to object to the agency's source selection decision. Marcola Meadows VA LLC, B-407078.2 et al., June 4, 2013, 2013 CPD ¶ 141 at 10.

The protest is dismissed in part and denied in part.

Susan A. Poling  
General Counsel