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Decision

Matter of: Hydraulics International, Inc.

File: B-284684; B-284684.2

Date: May 24, 2000

Alan Dickson, Esq., Paul Burkholder, Esq., and Shlomo D. Katz, Esq., Epstein, Becker & Green, for the protester.

Lee P. Curtis, Esq., Howrey, Simon, Arnold & White, and Donald J. Carney, Esq., and Richard B. Clifford, Jr., Esq., Perkins Coie, for Malabar International, Inc., an intervenor.

John E. Larriccia, Esq., and Sharon A. Jenks, Esq., Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to advise protester during discussions that its price was so high as to make award to the firm unlikely, is denied where contemporaneous record indicates that agency determined that proposed price was reasonable, realistic and complete based on the technical approach; while Federal Acquisition Regulation § 15.306(e)(3) gives contracting officer discretion to inform offeror that its cost/price is too high, it does not require that the contracting officer do so.

2. Protest that agency conducted an improper cost/technical tradeoff is denied where record indicates that agency recognized the technical advantages of the protester's proposal, but reasonably determined that those advantages were not worth its substantially higher price.

DECISION

Hydraulics International, Inc. protests the Department of the Air Force's award of a contract to Malabar International, Inc., under request for proposals (RFP) No. F41608-98-R-13005, for hydraulic test stands (HTS). Hydraulics asserts that the evaluation of proposals was inconsistent with the terms of the solicitation and otherwise unreasonable.

We deny the protest.

The solicitation, issued on November 6, 1998, contemplated the award of a fixed-price requirements contract with a 4-year basic ordering period and pricing for up to 600 units of four types (including 2 diesel models and 2 electric models) of 4-wheeled, trailer-mounted, towable HTSs with purification and automated global control systems.¹ The HTSs are to be used for ground check and maintenance of aircraft hydraulic systems. Specifically, the HTS will provide two or three (depending on the model) independently controlled hydraulic subsystems furnishing up to 5,000 pounds of pressure per square inch, to pressurize aircraft hydraulic systems without the use of the aircraft engines and thus allow the functional check of flight control systems and landing gear operations, and will be capable of purifying the hydraulic fluids in the HTS and the aircraft without the use of external equipment.

Award was to be made to the responsible offeror whose proposal conformed to the solicitation requirements and represented the best value to the government. The solicitation provided that proposals would be evaluated based on the following three evaluation areas: (1) technical, with factors for design (with a stated weight of 60 percent of technical and including subfactors for system design, reliability/maintainability and first article testing) and system production (40 percent and including subfactors for facilities, production plan and quality programs); (2) cost/price, which was to be evaluated for realism, completeness and reasonableness; and (3) general considerations, including the results of the pre-award survey, plant visits, and compliance with RFP terms and conditions. The solicitation stated that "the Technical Area is significantly more important than the Cost/Price Area and the cumulative General Considerations," and that cost/price and general considerations were of equal importance. RFP § M.2.3.

Each factor and subfactor within the technical area was to receive a color/adjectival rating and a proposal risk assessment ("based on the risks

¹ The solicitation also provided for an additional 3-year award period, depending on the contractor's performance and the negotiation of realistic and reasonable pricing.

that are identified with an offeror's proposed approach as it relates to accomplishing the requirements of the solicitation"). RFP § M.6.1.² Further, the solicitation set forth technical evaluation standards that the agency would apply in evaluating proposals; it listed the evaluation elements under each subfactor, provided for a rating of either not met (minus), meets (checkmark) or exceeds (plus) the stated threshold requirements, and cautioned that an offer receiving a minus rating after final proposal revisions (FPR) would be unacceptable. RFP, Technical Evaluation Standards, at 1. The solicitation also provided that the technical and cost/price evaluation areas would be assigned a performance risk "based on the assessment of an offeror's present and past work record to assess confidence in the offeror's ability to successfully perform as proposed." RFP § M.6.2. In this regard, the relevance of each contract, as well as the offeror's performance, was to be considered, and an overall rating of not applicable, low, moderate or high risk was to be assigned. Id.

Six proposals were received in response to the RFP; all were included in the initial competitive range. After conducting written discussions with offerors, the Air Force established a revised competitive range of four proposals. After a further round of written discussions and a round of oral discussions, the agency requested FPRs.

Based on its evaluation of FPRs, as set forth below, the Air Force determined that, although Hydraulics had submitted the higher-rated technical proposal, the price of its proposal was such that Malabar's proposal overall was most advantageous.

² In addition to the overall requirement to evaluate proposal risk, the solicitation also provided under the system design subfactor of the design evaluation factor that "the contractor's design concept will be thoroughly reviewed to ensure minimal program risk." RFP § M.3.1.1.

	Hydraulics	Malabar
TECHNICAL	Low Performance Risk	Not Applicable Performance Risk
DESIGN	Exceptional /Low Proposal Risk	Acceptable /Moderate Proposal Risk
System Design	Exceptional/Low	Acceptable /Moderate
Reliability/ Maintainability	Exceptional/Low	Exceptional /Moderate
First Article Testing	Acceptable/Low	Acceptable/Low
SYSTEM PRODUCTION	Acceptable/Low	Acceptable/Moderate
Facilities	Acceptable/Low	Acceptable/Moderate
Production Plan	Acceptable/Low	Acceptable/Moderate
Quality Programs	Acceptable/Low	Acceptable/Low
GENERAL	No issues	No issues
COST/PRICE	\$62,101,477/ Low Performance Risk	\$38,812,325/ Not Applicable Performance Risk

Hydraulics, which had previously manufactured HTSs for the Air Force, other agencies and foreign customers, submitted the highest-rated technical proposal. In particular, its proposal received an overall exceptional/low proposal risk rating under the design factor (with a weight of 60 percent of the technical area). As noted in the agency's proposal analysis report (PAR), the low risk rating was

based upon maturity of the offered design (prototype in which components have already been integrated, a sealed reservoir has been produced and tested, and interface capability has been proven). The major components (engine, motor, pumps) are commercial off-the-shelf [(COTS)] items, enhancing long-term supportability. In addition, [Hydraulics] has established facilities, quality programs, and an acceptable production plan.

Agency Report, Tab 29, PAR, at 22. In contrast, as acknowledged by the source selection authority (SSA), there were a number of evaluated moderate proposal risk factors associated with the proposal submitted by Malabar, which had not previously manufactured HTSs. According to the SSA,

[w]hile Malabar demonstrated a design that meets or exceeds all requirements, the Government has uncertainty about the possible effect on schedule and performance of a system that has not yet been prototyped or is associated with an offeror's previously produced unit, which demonstrates maturity of design. (The design incorporates a global control system with a microprocessor and software modeled, but not fully developed and a scaled-down model of a [National Aeronautics and Space Administration (NASA)] purification system.)

Additionally, maintainability factors for the system described above are at the component level, not the system level, the lack of which could cause a schedule delay. Production was also a concern due to the non-COTS approach for the global control system and purification system, which may [a]ffect long term supportability. In addition, Malabar's proposal to lease production facilities that are to be constructed after contract award could [a]ffect schedule.

Agency Report, Tab 31, Source Selection Decision, at 4.

Notwithstanding these concerns regarding Malabar's proposal, the SSA testified at the hearing our Office conducted in this matter that he considered the proposal, which received the second highest rating, to be a "very good," "excellent" proposal. Hearing Transcript (Tr.) at 47-48. As for the additional risk associated with Malabar's proposal, the SSA emphasized that "the RFP did not require a prototype, but [instead] a design," and he stated that "in my judgment, overall, this is not a highly complex system, and the Government lead engineer confirms that the design by Malabar, while unique in some respects will function per the Government's requirement." Agency Report, Tab 31, Source Selection Decision, at 6.³ In addition, while the SSA recognized that Malabar had received a "not applicable" for performance risk based on its not having produced HTSs and thus having no relevant technical performance history, he considered it significant that the preaward survey and resumes indicated key personnel with experience in the areas of hydraulic fluid power systems and HTSs. Id. at 5-7.

Most importantly, however, the SSA pointed to the fact that Hydraulics had proposed the highest price--approximately 60 percent, or \$23.3 million, higher than Malabar's.⁴ As the SSA testified at the hearing, while he was "very drawn to the highest technical" and, to get the "Cadillac" the agency had asked for he "would pay a Cadillac price," the dollar difference between the proposals was "staggering" and "I won't pay a Rolls Royce price." Tr. at 36, 50-51, 113. According to the SSA, "there is no way in my mind that I could rationally" explain "that I had bought \$23 million worth of additional goodness that really made a huge difference to us in the Air Force." Id. at 113. Given his view of

³ The SSA also determined with respect to Malabar's use of non-COTS global control and purification systems that the RFP did not address long-term supportability. Agency Report, Tab 31, Source Selection Decision, at 7.

⁴ The prices of the other two proposals, one of which was found to be technically unacceptable, were \$[DELETED] and \$[DELETED]. The remaining technically acceptable proposal received a lower technical rating than either Hydraulics' or Malabar's proposals and, as noted above, was higher priced than Malabar's.

the significance of the technical, risk and price differences between the proposals, the SSA concluded in the source selection decision that “I did not consider the technical benefits proposed by [Hydraulics] in comparison to Malabar warranted paying an additional \$23 million especially considering that a great deal of the delta is due to indirect rates ([overhead], profit and [General and Administrative]).” Agency Report, Tab 31, Source Selection Decision, at 7. Upon learning of the resulting award to Malabar and being debriefed by the agency, Hydraulics filed this protest with our Office.

Based upon our review of the record, including the hearing conducted by our Office, we find no basis to question the source selection decision. We discuss the protester’s principal arguments below.

CORPORATE EXPERIENCE/PAST PERFORMANCE

Hydraulics asserts that the Air Force improperly failed to consider Malabar’s lack of relevant corporate experience and past performance in the manufacture of HTSs. In this regard, the design personnel criterion under the production plan subfactor of the system production factor provided that the proposal would be evaluated “to determine if the production plan describes adequate contractor experience in the successful design of Hydraulic Test Stands and/or items of similar complexity, size, and functionality . . . on past and current contracts held in the last ten (10) years.” RFP § M.3.2.2.2. The design personnel criterion also provided for “an assessment of the qualifications, past experience, and current employment status of key design personnel (including contractor/subcontractors personnel) to be responsible for the design,” and of the relevant aspects of the contractor-generated statement of work (SOW), integrated master plan (IMP) and integrated master schedule (IMS). *Id.* Likewise, the production personnel criterion under the production plan subfactor of the system production factor provided for a determination as to whether the production plan “describes adequate contractor experience in the production of Hydraulic Test Stands and/or items of similar complexity, size, and functionality . . . on past and current contracts held in the last ten (10) years”; an “assessment of the number, experience, and training of production personnel”; and an evaluation of the relevant aspects of the contractor-generated SOW, IMP and IMS. RFP § M.3.2.2.4.

The solicitation as issued also included technical evaluation standard elements for each of these criteria, which established a threshold requirement in each area for a minimum of two past or current contracts within the last 10 years involving the successful design or production of HTSs and hydraulic power supplies, or of equipment of a complexity, size and functionality similar to the HTSs being procured. Technical Evaluation Standards, System Production, Element Nos. 5, 11. The agency subsequently amended the solicitation to delete element Nos. 5 and 11,

viewing them as inappropriate pass/fail restrictions. Amend. No. 0003; Contracting Officer's Statement at 3. Hydraulics maintains, however, that the provision in section M of the solicitation (as well as corresponding requests for relevant experience information in the section L instructions to offerors) for an evaluation to determine whether the production plan describes adequate contractor experience in the successful design and production of HTSs and/or items of similar complexity, size and functionality, established a minimum corporate experience requirement that Malabar failed to meet. RFP §§ L at 7, M.3.2.2.2, M.3.2.2.4.

We disagree. After deletion of the stand-alone, two-relevant-contract minimum set forth in the Technical Evaluation Standards, there remained the applicable solicitation evaluation provisions in RFP section M, that is, the criteria for design personnel and production personnel. RFP §§ M.3.2.2.2, M.3.2.2.4. As noted above, these criteria provided for consideration of, not only relevant corporate experience, but also personnel qualifications and experience and relevant aspects of the contractor-generated SOW, IMP and IMS. In other words, contrary to Hydraulics' interpretation, the revised solicitation evaluation scheme did not provide for a stand-alone pass/fail corporate experience determination; it called for an overall integrated assessment with respect to relevant inputs into the offeror's design and production effort.

In these circumstances, we think it was reasonable for the agency to consider (as the record indicates it did) relevant personnel experience as a substitute for corporate experience in making its overall integrated assessment under the design personnel and production personnel criteria. Tr. at 171-72. In this regard, Malabar's proposal--which indicated experience in designing and manufacturing hydraulic component designs and mobile system designs (primarily aircraft jacks and fluid service equipment)--stated that its senior lead/mechanical engineer (with a masters degree in mechanical engineering) had significant (apparently as much as 30 years) design, development, manufacturing and test experience with Air Force HTSs and other test stands; its chief engineer had 20 years experience in the design, development, manufacture and testing of aircraft maintenance equipment and hydraulic fluid power systems; its vice president for sales and marketing had a bachelor's degree in mechanical engineering and 30 years experience in hydraulic fluid systems, aircraft ground equipment and product support; and its production personnel were experienced in manufacturing mobile aircraft hydraulic equipment. Agency Report, Tab 38, Malabar Present and Past Performance Volume; Tab 35, Malabar Technical Proposal at 50-51, 53-54, 56-57. An overall, integrated acceptable rating in this area was reasonable in light of this personnel experience.

Hydraulics also asserts that the SSA's source selection decision failed to take into account Hydraulics' advantage with respect to technical performance risk, that is, past performance; Hydraulics was rated low risk and Malabar was given a "not applicable" rating based on its lack of corporate past performance on HTS contracts. While the SSA stated in the source selection decision that technical performance risk

“was not a discriminator,” the SSA testified at the hearing that he understood a low technical performance risk rating to be better than a “not applicable” rating; the SSA recognized that, all other things being equal, Hydraulics’ past performance indicated that it was more likely to successfully perform the contract, and he indicated that he was willing to pay more for a low risk rating. Agency Report, Tab 31, Source Selection Decision, at 4; Tr. at 28, 30-31, 33, 37-39, 111, 132. Nevertheless, Hydraulics suggests that the SSA’s testimony that its low risk rating “was not a discriminator of sufficient magnitude that I was going to carry it further” in the evaluation, Tr. at 38, indicates that the SSA improperly failed to account for Hydraulics’ advantage in this regard in making his decision. In our view, Hydraulics mischaracterizes the SSA’s testimony. Fairly read, the SSA’s testimony indicates that the SSA considered this distinction, but found the difference in past performance, insofar as it related to the likelihood of successful contract performance, not to be critical, and certainly not sufficient in the context of his overall integrated source selection decision to alter that decision in favor of Hydraulics. Tr. at 29-31, 60, 111, 133-34.

TECHNICAL

Reliability/Maintainability

Hydraulics challenges the Air Force’s evaluation of the reliability and maintainability of Malabar’s proposed system. In this regard, the solicitation Statement of Objectives (SOO) required that the HTS have a “demonstrable” minimum mean time between failure (MTBF) of 1,000 hours of operation, and a mean time to repair (MTTR) for a major component (electric motor, diesel engine and hydraulic pumps) of no greater than 16 hours and for other components of no greater than 4 hours. SOO §§ 3.11, 3.12(c). Section M of the solicitation provided, under the reliability/maintainability subfactor of the design factor, for an evaluation to determine whether “the contractor’s approach will yield a system design that meets or exceeds” quantitative reliability requirements such as MTBF or quantitative and qualitative maintainability requirements such as MTTR. RFP § M.3.1.2. Offerors were required to include in their proposals “detailed data concerning all reliability quantitative requirements and engineering requirements,” including “a summary of the analysis used to predict” the reliability and MTBF, and “detailed data concerning quantitative and qualitative maintainability requirements,” including “a summary of the analysis used to predict” MTTR. RFP § L.1.2.

Malabar’s proposal indicated a MTBF of [DELETED] hours for diesel and [DELETED] hours for electric HTSs, and a MTTR of [DELETED] labor hours for major components and (as calculated by the agency) an average [DELETED] labor hours for minor components; its proposal received an overall exceptional, moderate proposal risk rating for the reliability/maintainability subfactor of the design factor. Agency Report, Tab 35, Malabar Proposal, Technical Volume, at 38-42; Tab 29, PAR, at 24; Tab 30, Source Selection Evaluation Final Briefing, at 36. Hydraulics’ proposal specified an MTBF of 1,115 hours and MTTRs of 9.25 labor hours for major components and 1.33 labor hours for minor components; its proposal received an overall exceptional, low proposal risk rating for the reliability/maintainability

subfactor. Agency Report, Tab 47, Hydraulics Proposal, Technical Volume, at 30-31; Tab 29, PAR, at 19; Tab 30, Source Selection Evaluation Final Briefing, at 30.

Hydraulics asserts that a system-level analysis of the reliability/maintainability of proposed systems was required and that Malabar's proposal should be rejected or further downgraded for failure to include such an analysis.

In reviewing an agency's evaluation of proposals and source selection decision, our review is confined to a determination of whether the agency acted reasonably and consistent with the stated evaluation factors and applicable procurement statutes and regulations. Main Bldg. Maintenance, Inc., B-260945.4, Sept. 29, 1995, 95-2 CPD ¶ 214 at 4.

Based on our review of the proposals, we find persuasive the determination of the Air Force's technical team leader, who testified that both offerors appeared to use essentially the same approach in predicting reliability/maintainability. The technical team leader testified that the proposals indicated that both offerors appeared to use the same approach of relying on component failure rates from the Department of Defense's Reliability Analysis Center (RAC) to derive a system-level MTBF number. Tr. at 182-83, 187-89; Agency Report, Tab 35, Malabar Proposal, Technical Volume, at 36; Tab 46, Hydraulics Proposal, Executive Volume, at 18; Tab 47, Technical Volume, at 30. Although Hydraulics indicated in its proposal that its prediction was also based on vendor data and its own field data, Hydraulics' proposal as evaluated by the agency did not provide a basis for ascertaining the relative contribution of this data, rather than RAC data, to the overall prediction; the agency thus viewed Hydraulics' prediction as based primarily on RAC data, that is, essentially the same basis as relied upon for Malabar's reliability prediction. Tr. at 187-89; Agency Report, Tab 46, Hydraulics Proposal, Executive Volume, at 18-19; Tab 47, Technical Volume, at 30.

Likewise, both offerors specified component-level MTTR numbers. Although Hydraulics specified an overall system-level MTTR for non-major components, and Malabar did not perform this calculation in its proposal, as demonstrated at the hearing by the technical team leader, Hydraulics' calculation appeared to amount to no more than adding the component MTTRs and dividing by the number of components, such that a comparable figure for Malabar's system was easily calculated. Thus, Malabar's failure to include the specific calculation in its proposal was not significant. Tr. at 177-82, 185-86, 196; Agency Report, Tab 46, Hydraulics Proposal, Executive Volume, at 18-19; Tab 47, Technical Volume, at 30; Tab 35, Malabar Proposal, Technical Volume at 41. Further, to the extent that the evaluated proposals differed with respect to the discussion of the offerors' reliability/maintainability approaches, we note that Malabar's proposal contained significantly more detail than Hydraulics', including, for example, extensive sub-component data and a distinction between reliability/maintainability predictions for electric and diesel HTSs, which were not found in Hydraulics' evaluated

proposal. Agency Report, Tab 35, Malabar Proposal, Technical Volume, at 36-42; Tab 46, Hydraulics Proposal, Executive Volume, at 18-19; Tab 47, Technical Volume, at 30.

The Air Force did recognize a difference between the proposals with respect to the degree of confidence the agency had in the offerors' predictions. The agency had a greater confidence in Hydraulics' reliability/maintainability predictions because its proposal indicated that it had developed a prototype, and thus could calculate its system's overall reliability and maintainability as a function of all of the system components, while Malabar had listed only 95 percent of the system components. As a result, the agency assigned Malabar's proposal a moderate risk rating for the reliability/maintainability subfactor, while assigning Hydraulics' proposal a low risk rating in this regard. Tr. at 40-42, 189-92, 196. Although Hydraulics asserts that the lesser maturity of Malabar's design required that its proposal be further downgraded in the evaluation, we note that the technical team leader testified that "those major components that really contribute the highest to your reliability and your failure rates and maintainability were all factored into" Malabar's predictions, and that the unidentified parts thus were not significant factors. Tr. at 189-90. We conclude that there is no basis to question the reliability/maintainability evaluation ratings.

Purification

Hydraulics argues that Malabar's proposal failed to demonstrate compliance with the solicitation requirements concerning the purification of hydraulic fluid to remove chlorinated solvents (degreasers).

We find the record supports the agency's determination that Malabar's proposal was acceptable in this area. The statement of evaluation criteria generally provided for evaluation (under the hydraulic reservoir and fluid purification system criterion under the system design subfactor of the design factor) of "the contractor's capability to adequately and accurately provide a design that meets or exceeds the test stand's fluid reservoir and fluid purification systems' requirements," and specifically provided that "removal of chlorinated solvents . . . shall be completely detailed in the contractor's presentation." RFP § M.3.1.1.4. As set forth in the applicable Technical Evaluation Standards element, "[t]he standard is met when the proposed design indicates that the purification processing time meets the specification requirements," in this case, the requirement for "[r]emoval of chlorinated solvents to less than 50 ppm [parts per million] (initial content 200 ppm) within a twelve minute per gallon fluid processed run time." Technical Evaluation Standards, Design, Hydraulic Fluid Reservoir and Fluid Purification System, 1.1.4, Element, No. 22. Likewise, the SOO required that the HTS "shall remove chlorinated solvents (degreasers) from all hydraulic fluids in its own system and sub-systems and the aircraft systems to less than 50 parts per million (ppm)." SOO § 3.4.3(e).

Malabar proposed a scaled-down version of the process used by NASA in the space shuttle hydraulic ground support units. Although removal of chlorinated solvents is

not a requirement of the NASA process, Malabar furnished the Air Force with NASA data, and the agency subsequently confirmed with NASA the validity of the data, which indicated that, as a by-product of removing air, water and particulates, the NASA process also removed halogenated (chlorinated) solvents to levels under 100 ppm. In its initial proposal, and in several submissions during discussions responding to agency inquiries, Malabar explained that it would use a kidney loop process similar to the NASA process to purify the hydraulic fluid. According to the technical team leader, this approach, an industry-standard approach also proposed by Hydraulics, involves continuously cycling off part of the hydraulic fluid, passing it through a filter, and then drawing it into a vacuum chamber with a nozzle or spray ring, where the hydraulic fluid is atomized and, because water, air and solvents have different specific gravities than hydraulic fluid, the hydraulic fluid is separated from the contaminants. Tr. at 207-11. Malabar explained to the agency that it would not only downsize the NASA process, but also would modify the NASA approach to achieve finer dispersal, and thus easier, increased solvent removal, by [DELETED]. Agency Report, Tab 35, Malabar Proposal, Technical Volume, at 34; Tab 40, Malabar Discussion Response, July 14, 1999, at # TECH-MAL-007, TECH-MAL-008; Tab 42, Malabar Discussion Response, Oct. 11, 1999, at # TECH-MAL-2; Tab 44, Malabar FPR, at # 3-1.

As explained by the technical team leader, the NASA data (the validity of which was confirmed with NASA) indicated that the NASA process reduces the level of chlorinated solvents in a sample of 100 gallons from 300 ppm to 100 ppm in 240 minutes, or 2.4 minutes per gallon.⁵ The record also indicates that continuing the purification process further reduces contaminant levels. Although the rate of further reductions decreases as the level of contamination decreases, the technical team leader testified that the NASA data clearly indicated that a reduction below 50 ppm

⁵ Hydraulics asserts that there is a significant difference between its and Malabar's purification systems with respect to the speed at which they will reduce chlorinated solvent contamination. The protester notes in this regard data submitted during discussions which indicate a reduction from 200 ppm to 39 ppm at a rate of 2 minutes per gallon. See Agency Report, Tab 55, Discussions Response, Oct. 11, 1999, at # TECH-HYD-2. However, although Malabar stated a goal of reducing the level of chlorinated solvents from 300 ppm to 50 ppm at a rate of 10 minutes per gallon, the NASA data cited above indicated that in fact the NASA process, which Malabar proposed to improve, reduced the level of chlorinated solvents from 300 ppm to 100 ppm at a rate of 2.4 minutes per gallon. Especially in view of the fact that the data indicated that both offerors' proposed systems are likely to significantly exceed the minimum proposal requirements as set forth at Technical Evaluation Standards, Design, Hydraulic Fluid Reservoir and Fluid Purification System, Element No. 22, there is no basis for concluding that the practical differences between the systems in this regard are such that Hydraulics' proposal should have received a higher adjectival rating than Malabar's.

would be achieved under Malabar's approach in significantly less than the required 12 minutes per gallon. Tr. at 224-28; Agency Report, Tab 44, Malabar FPR, at # 3-1.

Hydraulics notes that, while the solicitation requirement against which proposals were to be evaluated in fact was to reduce the level of chlorinated solvents "to less than 50 ppm (initial content 200 ppm) within a twelve minute per gallon fluid processed run time" Technical Evaluation Standards, Design, Hydraulic Fluid Reservoir and Fluid Purification System, Element No. 22 (emphasis added), Malabar stated a goal of reducing the level of chlorinated solvents in a sample of 40 gallons from 300 ppm to 50 ppm in 400 minutes, or 10 minutes per gallon. Agency Report, Tab 44, Malabar FPR, at # 3-1. Again, however, the data indicated that a reduction below 50 ppm in fact would be achieved under Malabar's approach in significantly less than the required 12 minutes per gallon. In any case, our Office will not sustain a protest absent a showing of a reasonable possibility that the protester was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Hydraulics has not shown that it would have altered its proposal to its competitive advantage had it known that the agency would accept a commitment to reducing chlorinated solvents to only 50 ppm, rather than to less than 50 ppm. Thus, there is no basis for concluding that any relaxation of the requirement prejudiced Hydraulics.

Hydraulics claims Malabar advised the agency that "it would use [DELETED] rather than the 'vacuum removal process,'" and that its use of a "wholly different" process from that used by NASA called into question Malabar's and the Air Force's reliance on the performance data for the NASA process. Hydraulics Hearing Comments, May 10, 2000, at 23. Hydraulics' argument is not persuasive. Malabar made clear in its discussions with the agency, referring for example to [DELETED] that it intended to continue to use a vacuum process, but that it would improve fluid dispersion, and thereby purification, through [DELETED]. Agency Report, Tab 43, Verbal Discussions, at 9-10; Tab 44, Malabar FPR, at # 3-1. In addition, the record indicates that downsizing the NASA process "has very little effect on the purification process." Tr. at 222. This being the case, there is no basis for questioning the technical team leader's judgment that Malabar's proposed process is essentially the same as NASA's; there certainly has been no showing that they are so dissimilar as to undermine the validity of the NASA data as a basis for concluding that the proposed Malabar system was likely to satisfy the chlorinated solvent removal requirement. Tr. at 216, 222-24.⁶

⁶ In its comments on the hearing, Hydraulics for the first time argues that the applicable requirement actually is found in SOO § 4.6.29, entitled Hydraulics Purification System Demonstration/Validation, which provides, with respect to the acceptance testing of production units, that the failure of an HTS to purify a sample of 40 gallons so as to remove contaminants, including chlorinated solvents, within
(continued...)

Other Technical Evaluation Issues

Hydraulics challenges other aspects of the technical evaluation. For example, Hydraulics asserts that the Air Force did not adequately take into account in the evaluation the fact that Malabar proposed to subcontract to [DELETED], a [DELETED] company that shares space with a security electronics company, the design and development of the HTS global control and instrumentation system, which includes equipment displays and a custom-designed controller using a microprocessor and three replaceable circuit boards. Agency Report, Tab 35, Malabar Proposal, Technical Volume, at 1, 32-34, 54, Fig. 3. However, the information available to the Air Force, including a site survey undertaken by the Defense Contract Management Command (DCMC), indicated that [DELETED] had been in existence for at least 11 years; its chief engineer/president was an electrical engineer with experience in developing microprocessor-based controls and human interfaces; [DELETED] previously had manufactured similar control systems and produced industrial control test equipment; [DELETED] already had completed a preliminary design of the system and developed a draft vendor list; and, according to the testimony of the technical team leader, the design could be undertaken by a single engineer and the microprocessors and circuit boards could be manufactured by multiple sources. Air Force Supplemental Report, Apr. 10, 2000, attach. 1, DCMC Report, Dec. 15, 1999; Tr. at 231-36, 241-44, 248-51. Given this information, the agency's determination that Malabar's approach to the global control and instrumentation system warranted no worse than a moderate design risk (for immature design) and moderate production risk rating was reasonable. Agency Report, Tab 29, PAR at 25-26; Tr. at 250.

Similarly, Hydraulics challenges the Air Force's determination that Malabar's proposal to construct, after award, a new facility in which to fabricate the HTS production units, a facility different from that in which the first article test (FAT) units were to be fabricated, warranted no more than a moderate risk based on potential production delays. However, since the agency's schedule afforded Malabar some leeway with respect to schedule, in that its FAT report was not due until 517 days after award and its production units were not due until 140 days after receipt of order, we think the agency could reasonably determine that the level of risk was only moderate. Agency Report, Tab 29, PAR at 3-4, 26.⁷

(...continued)

3 hours, that is, at a rate of 4½ minutes per gallon, shall be cause for rejection of the unit. Hydraulics Post-Hearing Comments, May 10, 2000, at 24-25. This argument is untimely, since it was first raised more than 10 days after Hydraulics received a copy of Malabar's proposal and the agency's evaluation thereof on March 8, 2000. 4 C.F.R. § 21.2(a)(2) (2000).

⁷ The agency's schedule appears to be a deviation from that set forth in the solicitation, which allowed only 420 days after award ("receipt of order") for delivery (continued...)

PRICE REALISM

Hydraulics argues that the Air Force failed to perform a reasonable price realism evaluation. As noted above, the RFP provided that an offeror's cost/price proposal would be evaluated to determine if it was realistic, complete and reasonable. Regarding realism, the solicitation provided for "assessing the compatibility of proposed costs with proposal scope and effort," and stated that for the price to be realistic, "it must reflect what it would cost the offeror to perform the effort if the offeror operates with reasonable economy and efficiency." RFP § M.4.4. Offerors were required to include in their proposals "cost, profit and price" for each applicable line item; a "complete description of the philosophy and methodology used in developing cost estimates"; and such specific data as bills of material, direct labor hours and rates, and overhead and indirect rates. RFP § L at 8. Hydraulics asserts that the agency erred in not recognizing that Malabar's proposed price was unrealistically low.

Where, as here, a fixed-price contract is to be awarded, the "realism" of offerors' proposed prices is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. Human Resources Sys., Inc.; Health Staffers, Inc., B-262254.3 et al., Dec. 21, 1995, 96-1 CPD ¶ 35 at 5. However, an agency may, at its discretion, provide for the use of a price realism analysis in a solicitation for the award of a fixed-price contract to assess the risk in an offeror's approach. PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366 at 5. The nature and extent of an agency's price realism analysis are matters within the agency's discretion, Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4, and we will review an agency's price evaluation only to determine whether it was reasonable, consistent with the RFP evaluation criteria, and compliant with the Federal Acquisition Regulation. Sabreliner Corp., B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ __ at __; Trauma Serv. Group, B-242902.2, June 17, 1991, 91-1 CPD ¶ 573 at 4.

In performing its realism analysis here, the agency compared Malabar's price (\$60,400) for the Type III, 2-system diesel HTS--the only one of the four HTS types for which the agency believed it had data from comparable acquisitions--both with the

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of the FAT report, but allowed 240 days from the end of the month in which the order was received for delivery of the production units. RFP § B, Schedule. Hydraulics has not argued that it would have altered its proposal had it been aware of this possibility. Thus, there is no basis for concluding that any relaxation of the requirement prejudiced Hydraulics.

prices offered by the other offerors that submitted FPRs (which included Hydraulics' unit price of \$99,995, as well as unit prices of \$[DELETED] and \$[DELETED] from two other offerors with HTS experience), and with a government estimate (\$55,044) derived from the pricing under a contract for 615 units overall, which was awarded to Hydraulics in 1988. In calculating this estimate, the agency increased the 1991 price for the unit (\$31,578) to account for the increased complexity of the solicited item--including the addition of a hydraulic purification system, microprocessor-based control system, and new Environmental Protection Agency-approved engine--and for relevant price escalation (derived from the Data Resources Indices index for aircraft auxiliary equipment). Agency Report, Tab 28, Price Comparison Memorandum, at 3-5.

Hydraulics argues that the agency improperly failed to take into account higher pricing under several more recent Hydraulics HTS contracts--for some of which it furnished general contract prices and numbers of units as part of its past performance volume--for HTSs that were more comparable to those being procured here. (In his protest submission, the cost consultant retained by counsel for Hydraulics for this protest cites allegedly relevant contracts for 1 to 9 units at up to \$[DELETED] per unit. Hydraulics Comments, Mar. 30, 2000, Ex. 4, at 4-5.)

We find the agency's realism analysis reasonable. The contracts cited by Hydraulics were for no more than 9 units (or 14 units based on counsel for Hydraulics' reference, Tr. at 308). The pricing under these contracts therefore could be viewed as less relevant to the RFP here, which sought pricing for 600 units overall, than the pricing of the earlier contract (as adjusted) for 615 units.

Further, the record indicates that the Air Force also considered in its evaluation the structure of Malabar's offer; for example, the agency asked Malabar during discussions generally to explain its approach to estimating labor hours, and specifically to discuss the learning curve it used. Agency Report, Tab 39, Agency Discussion Letter to Malabar, July 6, 1999, # COST0002; Tab 41, Agency Discussion Letter to Malabar, Sept. 28, 1999, # COST0002. The agency's explanation of its realism analysis indicated that it had evaluated the impact of Malabar's technical approach on its cost/price. Specifically, the report of the agency pricing team stated that

Malabar's proposal was considered complete and realistic based on the compatibility of the proposed costs with Malabar's proposed technical approach to purchase major components such as housing and the global control system rather than manufacturing them, which results in lower labor costs. In addition, some materials/components, such as the [DELETED] are less costly than more traditional approaches, resulting in lower material costs.

Agency Report, Tab 28, Price Comparison Memorandum, at 7. Since the awardee's price was higher than the government estimate--which was based on the most

relevant previous contract price (as reasonably adjusted)--and not seriously out of line with the prices of two of three experienced offerors, and since the agency considered the cost and technical aspects of the proposed contract effort in its realism analysis and concluded that the proposed technical approach was likely to result in cost savings to the contractor, we find that the agency reasonably determined that Malabar's price was realistic.⁸

DISCUSSIONS

As noted above, the SSA viewed the final price difference between Malabar's and Hydraulics' proposals--a difference of approximately 60 percent or \$23.3 million--as "staggering." Tr. at 36. Likewise, after initial proposals, Hydraulics' price (\$62,101,477) had exceeded Malabar's (\$36,615,535) by approximately 70 percent or \$25.5 million. Hydraulics argues that the agency, by not advising it during discussions that it viewed the firm's price as high, violated Federal Acquisition Regulation (FAR) § 15.306(d)(3), which requires a contracting officer to discuss with offerors being considered for award the significant weaknesses, deficiencies, and other aspects of their proposals, such as price, that could be altered or explained to materially enhance the proposal's potential for award. In this regard, we have held that an agency failed to conduct meaningful discussions where it failed to apprise an offeror that its prices was viewed as unreasonably high. Price Waterhouse, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 6-7.

This argument is without merit. As an initial matter, we note that, although the SSA at one point during the hearing characterized Hydraulics' price as "definitely unreasonable," Tr. at 105, the SSA later explained that he did not consider Hydraulics' price to be "inherently unreasonable" such that the firm's proposal was unacceptable. Id. at 317-18, 321. Rather, the SSA testified that "[w]hat we were looking at is magnitude of the technical difference and the magnitude of the cost difference. That's really it. To say that I would not have awarded [to] Hydraulics

⁸ In its March 30, 2000, comments on the agency report, Hydraulics for the first time questioned the realism of specific labor and material costs in the cost data furnished by Malabar in its proposal, a copy of which was included in the agency's early document production on March 8. Where a protester files supplemental protest grounds, each new ground must independently satisfy the timeliness requirement of our Regulations, which do not contemplate the piecemeal presentation or development of protest issues. Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13. This includes the identification of "examples" of flaws in the evaluation generally previously alleged. Id. Such new issues must be filed within 10 calendar days after the protester knew or should have known of them. 4 C.F.R. § 21.2(a)(2). Since Hydraulics did not raise these arguments until more than 10 days after receipt of the relevant documents, they are untimely and not for consideration.

International because of cost is not the case.” Id. at 320. Again, according to the SSA, he concluded that there was no way that he could find “that I had bought \$23 million worth of additional goodness that really made a huge difference to us in the Air Force.” Tr. at 113. The SSA’s testimony in this respect is consistent with the contemporaneous recommendation of the agency evaluators that “[a]ll four offers have been determined to be reasonable, realistic and complete based on the individual technical approaches.” Agency Report, Tab 29, PAR at 37. Likewise, it is consistent with the SSA’s own source selection decision statement wherein he described his decision in terms of a cost/technical tradeoff, stating that “I did not consider the technical benefits proposed by [Hydraulics] in comparison to Malabar warranted paying an additional \$23 million” Agency Report, Tab 31, Source Selection Decision, at 7. It thus appears that the SSA viewed Hydraulics’ price as noncompetitive--rather than unacceptable--given the technical benefits offered by the proposal.

In these circumstances, the agency was not required to advise Hydraulics during discussions that its price was so high as to make award to the firm unlikely. As noted above, the agency issued the solicitation here on November 6, 1998; this was after the January 1, 1998 effective date of the revised discussion rules of part 15 of the FAR. Those revised rules, at § 15.306(e)(3), provide that “the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion.” As we have previously recognized, this language merely gives the contracting officer discretion to inform the offeror that its cost/price is too high--it does not require that the contracting officer do so. See AJT & Assocs., B-284305, B-284305.2, Mar. 27, 2000, 2000 CPD ¶ __ at 8-9; National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ __ at 5.⁹

⁹ On April 3, 2000, the FAR Secretariat issued a proposed revision to FAR § 15.306(d)(3) in which it clarified the contracting officer’s obligations with respect to conducting discussions, explaining that its views in this regard were consistent with GAO’s decisions in Du & Assocs., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156, and MRC Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8. According to the FAR Secretariat, discussions of offerors’ proposals beyond deficiencies and significant weaknesses are a matter for contracting officer discretion. Specifically, the proposed provision states that the contracting officer generally must discuss with offerors being considered for award significant weaknesses, deficiencies, and adverse past performance information to which the offeror has not yet had an opportunity to respond. While the provision indicates that the contracting officer is “encouraged to discuss other aspects of the offeror’s proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award,” it states that the contracting officer “is not required (continued...) ”

COST/TECHNICAL TRADEOFF

Hydraulics argues that the agency conducted an improper cost/technical tradeoff by failing to take into account Hydraulics' technical superiority, and essentially changed the basis for award from best value to one based on low price. It notes in this regard that, during the hearing, the SSA generally described his concept of best value by stating that, "[b]asically in general terms it's buying an acceptable product at the best price," Tr. at 121, suggesting that the agency ignored the fact that price was to be less important than technical considerations.

Our review of cost/technical tradeoff decisions is limited to a determination of whether the tradeoff was reasonable and consistent with the solicitation's evaluation criteria. Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213 at 16. Notwithstanding a solicitation's emphasis on technical merit, an agency properly may select a lower-priced, lower technically-rated proposal if it decides that the cost premium involved in selecting a higher-rated, higher-priced proposal is not justified, given the acceptable level of technical competence available at the lower price. Tidewater Homes Realty, Inc., B-274689.5, Aug. 11, 1998, 98-2 CPD ¶ 40 at 4; Research Triangle Inst., B-278254, Jan. 12, 1998, 98-1 CPD ¶ 22 at 6.

The Air Force's tradeoff decision here was reasonable. As noted above, the superior technical merit of Hydraulics' proposal was fully recognized by the agency during the evaluation as evidenced by the PAR report and the SSA's source selection decision in which the SSA noted, for example, that Hydraulics had "proposed the most highly rated and ranked technical proposal." Agency Report, Tab 31, Source Selection Decision, at 6. Further, the SSA confirmed in his hearing testimony that this recognition of the advantages offered by Hydraulics' proposal extended to the past performance area, where the SSA also recognized that Hydraulics' low technical performance risk rating was better than Malabar's "not applicable" rating such that, all other things being equal, Hydraulics' past performance indicated that it was more likely to successfully perform the contract. Tr. at 28, 30-31, 33, 37-39, 111, 132. As the SSA further testified, "when we got to the end of it, [it] was high technical, low risk against very good technical, moderate risk, and this cost issue that was designed to be lower, but was very--you know, it was very unexpected." Tr. at 134.

Further, notwithstanding the above-quoted remark concerning the tradeoff, the record reasonably read indicates that the SSA in fact conducted a tradeoff between price and non-price considerations. According to the SSA's contemporaneous source selection statement, he "did not consider the technical benefits proposed by [Hydraulics] in comparison to Malabar warranted paying an additional

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to discuss every area where the proposal could be improved." 65 Fed. Reg. 17,582 (2000).

\$23 million. . . .” Agency Report, Tab 31, Source Selection Decision, at 7. As for the actual tradeoff, there is simply no basis to conclude that it was unreasonable for the SSA to determine that the technical advantages of Hydraulics’ proposal were not worth its substantially higher price.

The protest is denied.

Comptroller General
of the United States