



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Bank of America

File: B-287608; B-287608.2

Date: July 26, 2001

Eugene D. Gulland, Esq., John B. Denniston, Esq., Alan A. Pemberton, Esq., Timothy J. Keefer, Esq., and Siobhan E. Dupuy, Esq., Covington & Burling, for the protester.

Rand L. Allen, Esq., Philip J. Davis, Esq., Phillip H. Harrington, Esq., Kevin J. Maynard, Esq., and Derek A. Yeo, Esq., Wiley, Rein & Fielding, for National City Bank of Indiana, an intervenor.

John F. Ruoff, Esq., Defense Finance and Accounting Service, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency knew or should have known that the protester interpreted the solicitation as limiting technical proposals to 100 pages, discussions with the protester were not meaningful when the agency did not advise protester that the solicitation permitted 200 page proposals, declined to advise the protester of the agency's repeatedly expressed concerns that the protester's proposal lacked detail, and advised the protester there were no technical weaknesses in its proposal.

DECISION

Bank of America (BOA) protests the award of a contract by the Department of Defense (DOD), Defense Finance and Accounting Service (DFAS), to National City Bank of Indiana (NCB) under request for proposals (RFP) No. MDA210-00-R-CPB3 to provide banking services for U.S. personnel stationed overseas. BOA protests that NCB's technical proposal failed to comply with the RFP's page limitation provision, that the agency failed to conduct meaningful discussions, and that the agency's cost and technical evaluations were materially flawed.

We sustain the protest due to the agency's lack of meaningful discussions.

BACKGROUND

On January 13, 2000, DFAS published the solicitation at issue, seeking proposals to provide commercial banking services to U.S. personnel stationed overseas under the authority of DOD's Overseas Military Banking Program (OMBP).¹ BOA is currently the incumbent contractor and has been providing these services since 1995; prior to that time, NCB had provided the services under a predecessor contract.

The solicitation contemplated award of a multi-year contract with a 5-year base period and five 1-year option periods.² The agency estimates that the contract will have a total value in excess of [deleted].³ Contracting Officer's Statement at 2. The RFP provided that award would be based on the proposal offering the best value to the government considering cost/price, past performance, and technical factors,⁴ and stated that technical factors were more important than either cost/price or past performance, which were of equal importance. Agency Report, Tab H, RFP § M-6.

The RFP was issued on January 13, 2000 and, as initially published, explicitly advised offerors that technical proposals must not exceed 100 pages, specifically defined a "page" as being not larger than 8 ½ by 11 inches, specified mandatory type-size, spacing, and margins, and stated that each 8 ½ by 11 inch page would be counted as one page. Specifically, as initially issued, RFP § L-1(b) stated:

Technical proposals must be legible, double spaced (personal resumes may be single spaced), typewritten (on one side only), in a type-size

¹ Under the OMBP, DOD provides banking services overseas for military members, civilian employees of DOD and other government agencies, and authorized dependent family members. The OMBP includes approximately 110 military banking facilities and 240 automated teller machines, with operations in nine countries. The OMBP contractor is expected to maintain approximately 170,000 customer accounts, valued at over \$650 million and to annually process approximately \$30 billion in monetary transactions. Contracting Officer's Statement at 2.

² The solicitation also contemplated two 6-month extension options for transition and contract administration close-out.

³ This figure includes the sum of income generated, expenses incurred, and receipt of a fixed fee over the maximum 11-year performance period.

⁴ The RFP identified the following six technical evaluation factors, listed in descending order of importance: banking operations and delivery of products/services; proposal of new and relevant products/technologies/processes (innovations); plan to standardize worldwide infrastructure; transition approach; establish permanent operations center (POC); and investment strategy. RFP § M-4. The RFP also established various subfactors under each evaluation factor.

not smaller than 12 point proportional, on paper not larger than 8 ½ by 11 inches and not to exceed 100 pages for the Technical Proposal and an additional, not to exceed 50 pages, for the attachments and/or exhibits to the Technical Proposal. One inch margins shall be on all sides of the paper. Pages in excess of the aforementioned limitation shall not be read, and the proposal shall be evaluated as if the excess pages did not exist. Some fold-out charts or diagrams may be used within the 50-page limitation for attachments and/or exhibits. Each 8 ½ by 11 page fold-out will be counted as one page (i.e., one fold-out with two pages will be counted as two 8 ½ x 11 pages).

Agency Report, Tab I, Initial RFP at L-192-93.

On February 17, the agency conducted a pre-proposal conference during which agency personnel responded to questions from potential offerors. During this conference, a potential offeror asked whether proposal information regarding innovations and the transition period must be included within the 100-page limitation. The agency spokesperson responded in the affirmative, but noted that the RFP provision requiring that proposals be double spaced “should read double-sided.” Agency Report, Tab I, Transcript of Pre-Proposal Conference, at 46. At the same time, the agency spokesperson advised offerors that they would be required to submit their technical proposals on compact disks (CD), noting that this new requirement would not affect the page limitation. In this regard, the spokesperson stated:

We’re going to request at least one hard copy and a CD. Again, that is still with that page limitation. Don’t think that the CD allows you to do Grapes of Wrath or something. It’s still the same page limitation.

Id. at 47.

On March 9, the agency issued RFP amendment No. 1. Consistent with the advice provided during the pre-proposal conference, that amendment required offerors to submit two copies of their technical proposals on CDs. Also consistent with the statements made during the pre-proposal conference, the amendment repeated the agency spokesperson’s confirmation that information regarding innovations and the transition period was to be included within the 100-page limitation, stating:

Question 77: . . . Request confirmation that the innovation and transition sections are included in the 100-page limitation for the technical proposal.

Answer: Confirmed. However, the 100 pages, double spaced should read double-sided. Double-sided also applies to the 50 pages of attachments.

RFP amend. 1, attach. 20, at 21.

Although RFP amendment No.1 effectively advised offerors that the format of their proposals must be double-sided, nothing else altered the prior description of a “page”; indeed, the amendment specifically repeated the solicitation’s prior reference to a 100-page limitation as well as the provision that each 8 ½ by 11 page would be counted as one page. As revised by amendment No. 1, RFP § L-1(b) now stated:

Technical proposals must be legible, double spaced (personal resumes may be single spaced), *and double sided*, typewritten, in type-size not smaller than 12 point proportional, on paper not larger than 8 ½ by 11 inches and not to exceed 100 pages for the Technical Proposal and an additional, not to exceed 50 pages *double-sided*, for the attachments and/or exhibits to the Technical Proposal. One inch margins shall be on all sides of the paper. Pages in excess of the aforementioned limitation shall not be read, and the proposal shall be evaluated as if the excess pages did not exist. Some fold-out charts or diagrams may be used within the 50-page limitation for attachments and/or exhibits. Each 8 ½ by 11 page fold-out will be counted as one page (i.e., one fold-out with two pages will be counted as two 8 ½ x 11 pages). (*The government acknowledges that the compact disk versions of the Technical Proposal will not print double-sided and instead will print as 200 pages with a possible 100 pages of attachments and exhibits.*)

RFP amend. 1, at L-44.

Despite the fact that, as amended, RFP § L-1(b) repeated the reference to a 100-page limitation and also repeated the statement that each 8 ½ by 11 inch page would be counted as one page, the agency maintains that the amendment’s addition of the requirement that proposals be double-sided, along with the final parenthetical sentence discussing the manner in which the compact disk versions of proposals would print out, effectively put offerors on notice that the page limitation had been doubled.

The closing date for submission of initial proposals was July 19, and BOA and NCB each submitted proposals by that date; their proposals were the only two submitted. BOA’s technical proposal was approximately 100 pages with approximately 50 pages

of attachments;⁵ NCB's technical proposal was approximately 200 pages with approximately 100 pages of attachments.⁶ In short, BOA's proposal essentially reflected the page limitation established in the initial solicitation, while NCB's proposal was approximately double that limitation.

Upon receiving the proposals the agency convened a technical evaluation board (TEB). At the hearing conducted by GAO,⁷ the TEB Chair acknowledged that, upon receipt of the two proposals, the TEB was concerned with their differing lengths as well as with the clarity of the page limitation requirement.⁸ Upon concluding that neither proposal exceeded the contracting officer's interpretation of the amended page limitation provision, the TEB evaluated the proposals using an adjectival rating scheme of "outstanding," "better," "acceptable," "marginal," and "unacceptable," as specified in the solicitation.⁹ NCB's proposal was rated as "better" under three of the six evaluation factors and "acceptable" under the remaining three factors.¹⁰ BOA's proposal was rated as "acceptable" under all six factors.

⁵ BOA's technical proposal contained 101 numbered pages with 58 pages of attachments; however, the 101st page of its technical proposal contained only a single sentence identifying the location of certain attachments.

⁶ NCB's technical proposal contained 192 numbered pages with 96 pages of attachments.

⁷ In resolving this protest, GAO conducted a hearing on the record at which testimony was obtained from the contracting officer, the TEB chair, and a member of the cost review board (CRB).

⁸ The TEB Chair testified: "When we first came in--when the Board first convened, we did find there was a difference in the page limitation to the proposal, and we checked the RFP to see if there was anything wrong with the requirement there. And we also went over and talked to the Contracting Officer to clarify what the requirement was." Hearing Transcript (Tr.) at 188.

⁹ Only the ratings of "acceptable" and "better" were actually used in this procurement. The rating of "acceptable" was defined as "[m]eets all solicitation requirements. Complete, comprehensive, and exemplifies an understanding of the scope and depth of the task requirements as well as the offeror's understanding of the government's requirements." The rating of "better" was defined as "[f]ully meets all solicitation requirements and significantly exceed[s] many of the solicitation requirements. Response exceeds an 'acceptable' rating. The areas in which the offeror exceeds the requirements are anticipated to result in a high level of efficiency or productivity or quality." Agency Report, Tab H, RFP at M-228.

¹⁰ NCB's proposal was rated "better" with regard to [deleted]. Contracting Officer's Statement at 11-12.

As part of the evaluation, the TEB created a “consensus evaluation report” containing narrative support for the ratings given under each evaluation factor. This report repeatedly criticizes BOA’s proposal, commenting under each of the six evaluation factors that the proposal should have contained more detail and/or explanation.

For example, under the [deleted] evaluation factor, [deleted],¹¹ the report criticizes BOA’s proposal with regard to [deleted], stating: “[BOA] does not address [deleted], which the standard establishes as those that must be [deleted]. This expectation, however, is not in the RFP.”¹² Agency Report, Tab K, Consensus Evaluation Report for BOA, at 1. With regard to [deleted], the report states: “They do not explain the [deleted].” Id. at 6. Regarding [deleted], the report states: “[BOA’s] Technical Proposal does not explain how [deleted]. The lack of detail [deleted] could increase the risk of performing this function for the OMBP.” Id. at 10. Finally, with regard to [deleted], the report states: “[BOA’s proposal] does not describe the content of the [deleted].” Id. at 14.

Under the next evaluation factor, [deleted],¹³ BOA’s proposal was similarly criticized for containing less detail and explanation than the agency desired. For example, with regard to [deleted], the report states, “We all know [BOA] can do [deleted]. Little explanation or facts are given to answer the question,” and, more specifically, “[BOA’s] proposal doesn’t provide a [deleted]. It doesn’t indicate what [deleted].” Id. at 16. Similarly, with regard to [deleted], the agency evaluation report states:

[BOA’s] proposal doesn’t identify the [deleted] or the [deleted] that will be used for implementing [deleted] throughout the network. Without this information it is difficult to determine the risk associated with implementation of [deleted] throughout the network.

Id. at 17.

¹¹ With regard to this evaluation factor, offerors were advised that proposals must address, among other things, [deleted].

¹² Throughout the evaluation report, there are references to certain “standards” – for example, the above-referenced “standard” that [deleted]. These “standards” appear to have been drawn from an internal source selection plan, see Agency Report, Tab J; however, as the agency acknowledges in the portion of the evaluation report quoted above, these “standards” were not in the RFP.

¹³ With regard to this evaluation factor, the RFP directed offerors to discuss their approach to [deleted].

Again, in discussing BOA's proposal to provide [deleted], the report states:

Based on what is presented it is difficult to conclude what part of the OMBP needs [deleted]. Is it [deleted]. Is it different for [deleted]? What is the [deleted] needed? Does this involve [deleted]? Does it [deleted]? Will I need [deleted] or can I [deleted]? Will this improve [deleted]? All they say is they can do it, very weak.

Id. at 17-18.

With regard to [deleted], the report states, "Only brief descriptions of the [deleted] and the benefits that would be derived are provided." Id. at 18. Finally, regarding BOA's proposal to [deleted], the report notes "a more detailed explanation could have been given explaining why the proposed [deleted]." Id. at 20.

Regarding the next evaluation factor, [deleted],¹⁴ the report, again, contains multiple criticisms of BOA's proposal for failing to provide specific information. For example, with regard to [deleted], the report states, "BOA indicates that there are [deleted] to be considered, but does not indicate which one they [deleted]," id. at 22, and again:

[BOA's] Technical Proposal does not provide adequate detail to evaluate the realism of [deleted]. Although the proposal states that a [deleted] would make the [deleted] much more efficient and [deleted], the proposal does not provide any information to indicate the significance of the [deleted].

Id. at 23.

Regarding the next evaluation factor, [deleted],¹⁵ the report states [deleted]. The [proposal] does not explain how [BOA] will complete [deleted]," id. at 27, and, with regard to [deleted], the report states, "[BOA] can accomplish this task with little effort. It would have been helpful to see how they proposed to do it." Id. at 29.

¹⁴ Under this evaluation factor, offerors were directed to discuss their approach to [deleted] and to discuss "at a minimum," the [deleted].

¹⁵ Under this evaluation factor, the RFP directed that offerors [deleted] and required that [deleted].

Regarding the next evaluation factor, [deleted],¹⁶ the report states:

Although an easy task to accomplish, they do not attempt to explain any detail of how this will be done. They could have estimated a [deleted].

Id. at 30.

Finally, regarding the final evaluation factor, [deleted],¹⁷ the report states:

The Government gave the bank [deleted] to work with and this bank [BOA] ignored it in their reply. They talk about [deleted] but none are discussed in enough detail for me to see that they can perform under the STANDARD. They can [deleted] but do not tell us any more than necessary.

Id. at 31.

Similarly, under this factor, the report complains that “[BOA] did not give a real complete answer. Yes they can do it, but I expected to be shown how they would accomplish this.” Id. at 32.

Overall, the agency explained that BOA’s technical proposal was rated as merely “acceptable,” because BOA “didn’t take full advantage of [the] opportunity to describe BOA[s] solution.” Agency Report, Tab Z, Debriefing Slides, at 14. In contrast, the evaluation report repeatedly praises NCB’s proposal for the [deleted]. See Agency Report, Tab K, Consensus Evaluation Report for NCB, at 3, 4, 5, 6, 10, 12, 13, 14, 16, 19, 26, 27, 28, 30, 33. At the GAO hearing, the contracting officer testified that a primary distinction between BOA’s and NCB’s technical proposals was the differing levels of detail. Tr. at 27-29.

Following evaluation of initial proposals, the agency prepared discussion questions for each offeror. Despite the fact that BOA’s proposal essentially reflected the RFP’s initial 100-page limitation, and the evaluation report repeatedly expressed concern [deleted] that BOA’s proposal needed additional detail, the agency’s discussion questions did not suggest that BOA might have misunderstood the agency interpretation of RFP amendment No. 1 as having doubled the initial 100-page limitation, nor did the agency raise its repeatedly-expressed concerns regarding the level of detail in BOA’s proposal. Instead, the agency advised BOA that its proposal contained “no identifiable technical weaknesses” and characterized the agency’s

¹⁶ Under this factor, offerors were required to propose a [deleted].

¹⁷ With regard to this factor, the RFP stated [deleted].

concerns as relating “mainly to cost issues.” Agency Report, Tab L, Minutes of Negotiations with BOA, at 1.

Following discussions, both offerors submitted final revised proposals which were again evaluated by the TEB. The technical ratings remained essentially unchanged. NCB’s proposal was rated “better” under the same three evaluation factors, and “acceptable” under the remaining three factors; BOA’s proposal was rated “acceptable” under all six factors. The agency also evaluated each offeror’s cost proposal for cost realism, making various adjustments to each. Based on its final cost evaluation, the agency concluded that NCB’s evaluated cost/price offered a [deleted] advantage over BOA’s cost proposal.¹⁸ Both offerors’ proposals were rated “better” with regard to past performance.

Based on the conclusion that NCB’s proposal was technically superior and offered the lower cost/price, the agency selected NCB’s proposal for award. A contract was awarded on April 5. This protest followed.

DISCUSSION

BOA first protests that NCB’s proposal should have been rejected as unacceptable for failing to comply with the RFP’s page limitation provision, which BOA maintains can only be read as limiting technical proposals to 100 pages. As discussed above, the agency maintains that RFP amendment No. 1 effectively doubled the RFP’s initial 100-page limitation.

Based on our review of the record we conclude that the RFP’s page limitation provision, as finally amended, contains conflicting provisions and is patently ambiguous. There is no dispute that, as initially issued, the solicitation specifically limited technical proposals to 100 pages and further stated (in the context of “fold-out” pages) that each single-sided 8 ½ by 11 inch page would be counted as one page. Additionally, there is no dispute that RFP amendment No. 1 repeated the solicitation’s original reference to a 100-page limitation and also repeated the statement that each 8 ½ by 11 inch page would be counted as one page. Nonetheless, as amended, the solicitation provides that proposals be “double-sided” and contains a parenthetical reference, in the context of discussing the manner in which proposals submitted on CDs will print out, that clearly indicates a 200-page limitation.

¹⁸ This evaluated cost advantage was based on the agency’s calculation that NCB would generate total income of [deleted] and incur total costs, expenses and fee of [deleted], for a total net [deleted]; and that BOA would generate total revenues of [deleted] and incur total costs, expenses and fee of [deleted], for a total net [deleted]. Contracting Officer’s Statement at 16-17.

When faced with a dispute over the terms of a solicitation, we first attempt to read the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Dr. Carole J. Barry, B-271248, June 28, 1996, 96-1 CPD ¶ 292 at 4. Here, we view the amended RFP's retention of the reference to a 100-page limitation, along with the specific provision that each 8 ½ by 11 inch page will be counted as one page, and the agency's pre-proposal conference statement that, despite the requirement to submit proposals on CDs, "[i]t's still the same page limitation," as directly conflicting with the final parenthetical sentence of RFP § L-1(b) which acknowledges that CD versions of proposals will print as 200 pages. Accordingly, the RFP is patently ambiguous.

In situations where solicitations contain patent ambiguities, an offeror has an affirmative obligation to seek clarification prior to the first due date for submission of proposals following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1) (2001); American Connecting Source d/b/a Connections, B-276889, July 1, 1997, 97-2 CPD ¶ 1 at 3. The purpose of our timeliness rule in this regard is to afford the parties an opportunity to resolve ambiguities prior to the submission of offers, so that such provisions can be remedied before offerors formulate their proposals. Gordon R. A. Fishman, B-257634, Oct. 11, 1994, 94-2 CPD ¶ 133 at 3. Where a patent ambiguity is not challenged prior to submission of proposals, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation.

Since BOA did not seek clarification of the patently ambiguous solicitation provision prior to submitting its proposal, it may not now assert that NCB's proposal should have been rejected for failing to comply with BOA's understanding of the page limitation provision. Nonetheless, since the agency subsequently engaged both offerors in discussions, our inquiry does not end there. BOA also protests that, on the basis of the facts presented in this procurement, the agency's decision not to raise the agency's concerns regarding the level of detail provided in BOA's proposal, along with the fact that BOA was not limited by the RFP's initial page limitation, constituted a failure to conduct meaningful discussions. We agree.

In negotiated procurements, contracting officers must generally conduct discussions with all offerors whose proposals are within the competitive range. 10 U.S.C. § 2305 (1994); Federal Acquisition Regulation (FAR) § 15.306. Where discussions are conducted, they must be meaningful; that is, an agency must lead offerors into the areas of their proposals which require amplification or correction, and this obligation is not necessarily altered by the agency's characterization of a proposal as "outstanding," "acceptable," or only "susceptible to being made acceptable." Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430 at 7. While it is true that an agency need not "spoon-feed" an offeror by directing it to each and every item that could possibly be revised to enhance its rating, MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 at 10-11, where an agency has a central concern which affects multiple portions of an offeror's proposal and which, if unaddressed, will effectively eliminate

that offeror from competition, fairness and equity dictate that such concern be brought to the offeror's attention. Eldyne, Inc., *supra*; Price Waterhouse, B-220049, Jan. 16, 1986, 86-1-CPD ¶ 54, *aff'd*, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. This is particularly true where the areas of concern stem from solicitation provisions that are not clear. Cf. Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7-8 (discussions not required regarding solicitation provisions that are detailed and clear).

Here, as discussed above, the RFP provision regarding the page limitation on technical proposals was anything but clear.¹⁹ At the GAO hearing, the contracting officer acknowledged that agency personnel engaged in "quite a bit of discussion" about the ambiguous page limitation provision and whether BOA understood that provision. Specifically, the contracting officer testified:

GAO: [W]hen you, the agency, received initial proposals, and essentially what [you] received [were] proposals from one offeror for a hundred pages or essentially a hundred pages, and the other offeror[']s proposal] was close to 200 pages. Did the issue--did this raise any question in your mind as to the understanding of the parties with regard to the specific issue that the RFP had been amended on? That is, the page limitation?

Contracting Officer: Yes, it did. After the initial technical evaluation, we had quite a bit of discussion on the issue.

GAO: On what the parties understood[?]-

Contracting Officer: I was directly involved in that.

GAO: Whether they did or didn't understand what the page limitation was?

Contracting Officer: Yes.

Tr. at 22.

¹⁹ As noted above, at the GAO hearing, the TEB Chair testified that upon receipt of the two proposals, the TEB was concerned because of their differing lengths and, as a result, reviewed the RFP page limitation provision and discussed the matter with the contracting officer. Tr. at 188-89. Although we do not understand how the TEB could have failed to recognize the conflicting provisions discussed above, it is clear that the TEB members recognized the potential for misunderstanding the page limitation provision.

Since the agency specifically recognized that BOA might not understand the agency's interpretation of RFP amendment No. 1,²⁰ it had an obligation to raise this issue with BOA during discussions. This is particularly true in light of the patent ambiguity created by that amendment and the fact that the differing levels of detail formed a significant basis for distinguishing between the two proposals. More specifically, upon receipt of BOA's proposal, which essentially reflected the solicitation's page limitation requirements prior to amendment, the agency could not reasonably rely on the differing levels of detail as a significant discriminator without calling this matter to BOA's attention during discussions.

Additionally, in light of the multiple criticisms--[deleted]--regarding the level of detail and/or explanation contained in BOA's proposal, even if the page-limitation provision had not been ambiguous, we reject the assertion that the agency could reasonably decline to discuss its repeatedly-expressed concerns with BOA because it viewed BOA's proposal as technically "acceptable."²¹ We believe BOA was not

²⁰ Later in the hearing, the contracting officer offered testimony directly conflicting with his prior recognition of this issue, stating:

BOA Counsel: I think you said you noticed the disparity in lengths between the two technical proposals that were submitted by National City and BOA; correct?

Contracting Officer: Correct.

BOA Counsel: And I thought you said that you also thought that it might have been due to a misunderstanding on Bank of America's part on the page limitation.

Contracting Officer: No, I never said that, and I never—that thought never entered my mind.

Tr. at 39. Particularly in light of the contracting officer's earlier testimony that there was "quite a bit of discussion" regarding this issue, we view as unreasonable the contracting officer's stated failure to recognize that BOA may have misunderstood the page limitation.

²¹ As noted above, an agency's obligation to lead an offeror into the areas of its proposal which require amplification or correction is not limited to portions of the proposal an agency labels as "deficiencies." Eldyne, Inc., *supra*. Here, despite the agency's characterization of BOA's proposal as technically "acceptable," it is clear from the record discussed above that the agency viewed BOA's proposal as containing informational deficiencies, and that this was a central agency concern. Further, in creating the evaluation record prior to conducting discussions, the agency evaluators formulated certain specific questions which could have been

(continued...)

afforded a reasonable opportunity to improve many aspects of its proposal that could have had a significant impact on its rating. Further, based on the evaluation record, it was not reasonable for the agency to lead BOA to believe that its proposal contained “no identifiable technical weaknesses” and that the agency’s concerns related “mainly to cost issues.”²² Agency Report, Tab L, Minutes of Negotiations with BOA, at 1.

In sum, in light of the agency’s failure to advise BOA of its interpretation of the ambiguous page limitation provision, its failure to advise BOA of the agency’s repeatedly expressed concerns regarding the level of detail in its technical proposal, and the agency’s statements to BOA that its technical proposal “contained no technical weaknesses,” we can only conclude that the agency’s discussions were not meaningful.

The protest is sustained.²³

(...continued)

presented to BOA. Inexplicably, the agency declined to advise BOA of these already-articulated concerns.

²² Agencies may not conduct misleading discussions. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6-7; SRS Techs., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6; Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 at 4. Here, advising BOA that its technical proposal “had no identifiable technical weaknesses,” and that the agency’s concerns related “mainly to cost issues” was directly contrary to the agency’s repeatedly expressed concerns regarding the need for additional technical details and/or explanations.

²³ BOA also protests that the agency’s cost and technical evaluations were materially flawed. As noted above, it appears that the agency’s technical evaluators relied on various “standards” which were not disclosed to the offerors, contrary to the fundamental requirement that offerors be advised of the bases upon which their proposals will be evaluated. See 10 U.S.C. § 2305(a)(2)(A) (1994); FAR § 15.304(d); H. J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 at 4. Additionally, with regard to the cost evaluation, the record contains virtually no evaluator worksheets showing the basis for the multiple cost realism calculations and adjustments that were made. In response to the protest and GAO’s request for supporting documentation, the agency submitted various cost evaluation documents which were prepared by agency evaluators after the protest was filed. These post-protest documents contain multiple errors and reflect various mistakes and/or omissions. Indeed, the agency acknowledges the “potential merit” of BOA’s assertions regarding specific cost evaluation errors which improperly increased NCB’s cost advantage by [deleted]. See Agency Post-Hearing Brief at 41-42. In light of our decision that the procurement was otherwise materially flawed, along with our recommendation that the agency amend the solicitation and reopen the procurement, we need not resolve the protester’s assertions regarding the additional
(continued...)

RECOMMENDATION

We recommend that the agency amend the solicitation to clearly communicate all of the technical evaluation standards it intends to apply along with the applicable page limitation, then conduct meaningful discussions with both offerors which include identification of the multiple areas lacking detail, request final revised proposals, and evaluate those proposals consistent with the solicitation's stated requirements. If, as a result of this reevaluation, BOA's proposal is selected for award, the agency should terminate NCB's contract for the convenience of the government and make award to BOA. We also recommend that BOA be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel

(...continued)
evaluation errors. We do, however, expect that, in implementing our recommendation, the agency will review the record to correct any errors and will create and retain appropriate, contemporaneous documentation supporting its reevaluation.