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Comptroller General
of the United States

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Decision

Matter of: Consolidated Engineering Services, Inc.

File: B-291345; B-291345.2

Date: December 23, 2002

William A. Roberts, III, Esq., Timothy W. Staley, Esq., and Jonathan L. Kang, Esq., Wiley Rein & Fielding, for the protester.

John S. Albanese, Esq., and Andrew B. Blumenfeld, Esq., Department of Defense, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the record fails to reasonably support the agency's decision to eliminate from consideration as technically unacceptable the only proposal received from a commercial offeror in the private-sector portion of the competition conducted pursuant to Office of Management and Budget Circular A-76.

DECISION

Consolidated Engineering Services, Inc. (CESI) protests the decision of the Department of Defense (DOD) to eliminate from consideration its proposal to operate, maintain, and repair the Pentagon Heating and Refrigeration Plant (H&RP) in Arlington, Virginia. CESI argues that the agency's decision was unreasonable.

We sustain the protest.

BACKGROUND

The Pentagon H&RP requirements at issue here are for steam production, chilled water production, electrical distribution, steam distribution, chilled water distribution, and sewage. Historically, the annual operating cost of the Pentagon H&RP has been approximately \$5.4 million. Agency Report (AR), Tab 1, Acquisition Plan, at 1. On May 11, 2001, pursuant to the provisions of Office of Management and Budget (OMB) Circular A-76, the agency issued solicitation No. MDA946-00-R-0034 in order to select a commercial offeror to compete against the government's "most

efficient organization” (MEO) under the A-76 cost comparison process.¹ Here, the private-sector competition was conducted in two phases—phase 1 (request for qualifications) and phase 2 (request for proposals). The cost of the phase 2 private-sector proposal selected as representing the best value to the government would then be compared to the cost of the government’s MEO in accordance with OMB Circular A-76. The agency contemplated the award of a fixed-price with award fee contract to the offeror who successfully competed against the MEO.

Phase 1--Request for Qualifications (RFQ)

For phase 1, the agency issued an RFQ under which offerors were to provide written submissions and to make oral presentations regarding two technical evaluation factors—past performance and management approach. RFQ §§ L-3, L-4, at 133-135. With respect to past performance, offerors were required to provide a “Project Master List” of all contracts for operation and maintenance activities, ongoing or completed, within the last 5 years in excess of \$1 million. RFQ § L-4.1.a, at 134. Offerors were also to provide “Relevant Project Summaries,” which were to detail the work performed on five “relevant” contracts selected from the offeror’s project master list. As pertinent here, the RFQ defined “relevant” as follows:

¹ The procedures for determining whether the government should perform an activity in-house, or have the activity performed by a contractor, are set forth in OMB Circular A-76 and the Circular’s Revised Supplemental Handbook (RSH), which have been made expressly applicable to DOD and its military departments and agencies. See 32 C.F.R. § 169a.15(d) (2002). The process set out in the Circular and the RSH broadly encompasses the following steps in conducting the public/private competition. First, after the performance work statement (PWS) has been drafted, the agency ensures, through certification by an independent reviewing official, that the government’s in-house management plan satisfies the requirements of the PWS. See RSH, part I, ch. 3, § I. (The MEO reflects the in-house management plan, which is prepared by a study team and sets out the changes that will be made to the current organization.) Second, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement is conducted. Third, if that competition is done on the basis of a comparative technical evaluation (that is, if a price/technical tradeoff is contemplated), the government’s in-house plan is compared with the winning private-sector proposal to assess whether or not they are based on a comparable level of performance and performance quality—and, if not, to make all changes necessary to make the level of the in-house plan comparable to that of the private-sector proposal. *Id.* § H.3.d, e. Finally, once the playing field is leveled, there is a cost comparison between the private-sector proposal and the in-house plan. *Id.* §§ H, J. This protest involves the private-sector competition only.

those operation and maintenance contracts, ongoing or completed, within the last 5 years, with comparable levels of complexity to the operation and maintenance of the Pentagon H&RP. These may include, but are not limited to, experience with: operation and maintenance of central plant facilities, operation and maintenance of large utility distribution systems, coordination with on-going adjacent renovation projects, integrated environmental management as part of operation and maintenance of facilities.

RFQ § L-4.1.b, at 135.

For the five relevant contracts selected, offerors were to provide, for example, the following information: the relevance to the Pentagon H&RP contract; major systems operated and maintained, to include boilers (number, make, model number, capacity, and fuel type); chillers (number, make, model number, capacity, and refrigerant type); steam distribution systems (sizes and types); chilled water distribution systems (sizes); electrical distribution systems (sizes); and sewage distribution systems (sizes and types). Id.

With respect to management approach, offerors were to describe the management approach they would apply to meet the Pentagon H&RP requirements. RFQ § L-4.2, at 136.

In evaluating phase 1 submissions, the RFQ stated:

Past performance will be evaluated in both Phase 1 and Phase 2. In Phase 1, past performance is evaluated to determine the Government's confidence in the offeror's ability to perform the requirements to operate and maintain the H&RP, based on the offeror's past performance on contracts of a similar size and complexity. Special emphasis is placed on past performance on contracts that are *relevant and recent*. In Phase 2, an evaluation of the Offeror's proposed management team's past performance and experience will be made to ascertain the Government's confidence level in the Offeror's ability to perform the requirements of the contract.

RFQ § M-1.1, at 146.

The RFQ also listed, in descending order of importance, two evaluation factors--recent and relevant past performance and management approach. Recent and relevant past performance was to be evaluated

based on the Government's confidence in the offeror's ability to successfully execute the requirements of operating and maintaining the H&RP, based on the *recency* and *relevance* of the past experience and performance described in the offeror's submission. Relevant contracts

are defined for this solicitation as those with comparable levels of complexity and scope to the operation and maintenance of the H&RP. This may include, but is not necessarily limited to, experience with: operation, maintenance and repair of steam plants, chilled water plants, sewage/wastewater services and major utility distribution systems, which are required to provide utility services 24 hours a day/7 days a week with no interruptions.

RFQ § M-1.2.1, at 146.

Management approach was to be evaluated as

a measure of the Government's confidence in the Offeror's ability to successfully perform the required effort, while ensuring the optimum levels of quality, operational efficiency and continuity of operations. The evaluation of this factor will be based on the Offeror's described approach to the operation and maintenance of the H&RP.

RFQ § M-1.2.2, at 146.

Three firms, including CESI and Chemical & Engineering Services, Inc. (C&E),² submitted phase 1 proposals by June 12. The proposals were individually evaluated by each member of the technical evaluation panel (TEP). The TEP then convened as a group and assigned a final consensus rating to each of the proposals for each of the

² CESI, which was incorporated in 1991, is the professional engineering, operations, and maintenance arm of The Charles E. Smith Companies, which was founded in the 1940s and specializes in, among other things, the development and ownership of more than 50 million square feet of Class A office properties. AR, Tab 5, CESI's Phase 1 Proposal–Cover Letter, June 12, 2001, at 1. CESI states that it is the largest manager and maintainer of federal facilities in the Washington, DC region. Id. at 2. Of significance here, CESI manages the Ronald Reagan Building and International Trade Center which, at 3.2 million square feet, is the federal government's second largest office building (with the Pentagon being the first). Id. CESI also manages, for example, both National Archives buildings, the Treasury's Office of Thrift Supervision, two headquarters sites for the Federal Deposit Insurance Corporation, the Naval Research Lab, the Washington Navy Yard, the main building for the Department of State, Blair House, the regional headquarters for the Federal Bureau of Investigation, and the Secret Service Building. Id. CESI characterizes these facilities as mission-critical. Id. at 2-3.

C&E, a small business concern, is a total facility maintenance company that provides a wide range of operations, maintenance, and engineering services and water treatment products. AR, Tab 4, C&E's Phase 1 Proposal, June 12, 2001, at V.1.

phase 1 evaluation factors. AR, Tab 6, TEC Report for Phase 1 Proposals, at 1. CESI received a “significant confidence” rating for both past performance and management approach; C&E received a “confidence” rating for past performance and a “significant confidence” rating for management approach. Id. at 2.³ For both offerors and for both evaluation factors, the TEC listed “strengths” and “weaknesses” (which were not characterized as “significant” weaknesses). As relevant here, the TEC noted as a weakness that CESI had commercial, as opposed to industrial, experience. Id. at 9.

The source selection authority (SSA) selected CESI and C&E to participate in phase 2 of the competition. With respect to CESI, the SSA determined that the firm demonstrated “excellent overall performance.” AR, Tab 7, SSA’s Undated Memorandum for the File Regarding CESI, at 1. Among other things, the SSA noted that CESI’s master project list and relevant project summaries “indicated across the board experience with equipment and systems of the same capacities and complexity.” Id. The SSA commented that CESI demonstrated “significant experience in providing [operation and maintenance services] for a wide variety [o]f facilities and systems similar to those at the [Pentagon] H&RP.” Id. The SSA concluded that “[c]ollectively, [CESI’s] experience demonstrate[d] a high degree of relevancy and ability to meet the requirement of operating and maintaining a large, complex central plant. . . . [CESI] also demonstrated significant experience in operating and maintaining large utility distribution systems.” Id.⁴

With respect to C&E, the SSA stated, among other things, that the firm demonstrated “excellent overall performance,” and that the firm was an “expert in the industrial water treatment and sewage fields.” AR, Tab 7, SSA’s Undated Memorandum for the File Regarding C&E, at 1. The SSA noted that C&E demonstrated that it “[could] successfully manage multi-million dollar facilities [operation and maintenance] contracts, [and that] all of their contracts were renewed and reissued.” Id. The SSA pointed out that a “[s]trong demonstration of [C&E’s] successful past performance

³ The source selection plan for phase 1 provided that an offeror’s past performance and management approach could receive a rating of high confidence, significant confidence, confidence, unknown confidence (neutral), little confidence, or no confidence. AR, Tab 2, Source Selection Plan for Phase 1, Apr. 30, 2001, app. C, at 22-24. These ratings have the same definitions in phase 1 and phase 2. The relevant definitions are set out in the text later in this decision.

⁴ The SSA’s undated memorandum for CESI basically quotes verbatim from the TEC’s report for phase 1 proposals. In this memorandum, the SSA did not indicate any concerns with CESI’s experience; to the contrary, the SSA adopted the proposal strengths listed by the TEC for CESI. (The SSA did the same things in his undated memorandum for C&E—quotes from the TEC’s report, lists no concerns with C&E’s experience, and adopts the proposal strengths listed by the TEC for C&E.

was the award of 100% of the available award fee from another contract . . . [which] is unusual and requires exceptional performance.” Id. Finally, the SSA stated that C&E demonstrated “excellent knowledge and demonstrated ability to provide a comprehensive water treatment program.” Id.

Phase 2--Request for Proposals (RFP)

On December 21, the agency issued the RFP for phase 2. The RFP stated that phase 2 proposals would be evaluated in the equally important areas of past performance and mission capability. The RFP also provided that past performance and mission capability, when combined, would be considered significantly more important than price. RFP § M-2, at 147.

The RFP described the past performance evaluation factor, which was “[n]ot applicable to [the] government MEO,” as follows:

The Government will evaluate past performance through an integrated analysis of those risks and strengths the Government identifies in the offeror’s recent, current and relevant contract performance. The Government will place more weight and consideration on more relevant and recent past performance information. Essentially, the past performance assessment is the Government’s confidence, based upon the offeror’s performance and experience record, that the offeror will successfully perform the requirements of this acquisition as proposed. For the purposes of this evaluation, the term “offeror” includes the offeror and team members (e.g., subcontractors, key personnel).

RFP § M-3.a, at 147.

The RFP provided that an offeror’s past performance would receive one of the following ratings: high confidence, significant confidence, confidence, unknown confidence, little confidence, or no confidence. The following definitions are relevant to this protest:

Significant Confidence: The Offeror’s past performance is **consistently very good, particularly on recent and relevant projects** as defined in the [phase 1] RFQ. The Offeror **possesses substantial experience** in facilities of comparable complexity. Comments from prior customers, **with few or no exceptions, reflect very good performance** and high levels of customer satisfaction in both operation and maintenance of complex facilities with elevated system availability/criticality requirements. There **is little doubt**, based on demonstrated past performance, that the Offeror will

successfully operate and maintain the H[&]RP **with little Government oversight or intervention.**

Confidence: The Offeror's past performance is **above average, particularly** on recent and relevant projects as defined in the [phase 1] RFQ. The Offeror has **adequate experience** in facilities of comparable complexity. Comments from prior customers, **with few or no exceptions, reflect above average performance** and a moderately high level of customer satisfaction in both operation and maintenance of complex facilities with elevated system availability/criticality requirements. Episodes of poor performance have been infrequent and isolated. The Government has confidence based on demonstrated past performance, that the Offeror will successfully operate and maintain the H[&]RP **with a moderate amount of Government oversight or intervention.**

Unknown Confidence: No performance record identifiable (see [Federal Acquisition Regulation] FAR [§] 15.305). This is a neutral rating. This rating does not hinder nor help the offeror.

Little Confidence: The Offeror's past performance is average or below. The Offeror's performance on recent and relevant projects as defined in the [phase 1] RFQ is acceptable but undistinguished. The Offeror **has limited experience** in facilities of comparable complexity. Comments from prior customers, with few or no exceptions, indicate adequate performance and an acceptable level of customer satisfaction in both operation and maintenance of complex facilities with elevated system availability/criticality requirements. Episodes of poor performance have been recurring or moderately severe. The Government has **substantial doubt**, based on demonstrated past performance, that the Offeror will successfully operate and maintain the H[&]RP with a **substantial amount of Government oversight or intervention.**

No Confidence: The Offeror's past performance is well below average. The Offeror's performance on recent and relevant projects as defined in the [phase 1] RFQ has been deficient in one or more ways. The Offeror[s] past performance in facilities of comparable complexity **is unacceptable**. Comments from prior customers, with one or more exceptions, are generally negative and indicate a pattern of poor performance and customer dissatisfaction in both operation and maintenance of complex facilities with elevated system availability/criticality requirements. Episodes of poor performance have been frequent, recurring and severe. The Government has extreme doubt that the Offeror will successfully perform the required

effort. **Regardless of the degree of the Government oversight or intervention, successful performance is doubtful.**

RFP § M-3.b, at 147-48.

The RFP continued by describing the past performance evaluation factor as follows, in relevant part:

The Government will also be evaluating the experience of the Offeror with the type equipment and the complexity of the systems that are represented at the [H&RP] (see [§] L-5.1.2) to assess the Offeror's ability to perform the requirements of operating and maintaining the plant. The more experience an Offeror has with equipment and systems similar to those at the H&RP, the more relevant that past performance will be considered and thus, the higher the Government's confidence will be in the ability of the Offeror to properly operate and maintain the H&RP in accordance with the requirements of this solicitation. Conversely, [t]he lack of experience will also be considered and shall have an adverse effect on the Government's confidence in the Offeror[s] ability to operate and maintain the H&RP.

RFP § M-3.c, at 148-49.

As referenced above, § L-5.1.2 of the RFP stated that phase 2 past performance submissions were distinguishable from those submitted in phase 1 in that they concentrate on "specific past performance experience related to equipment and systems of similar size and complexity to that of the Pentagon [H&RP]," whereas phase 1 past performance submissions focused on corporate experience with similar size facilities and the qualifications of project personnel. RFP § L-5.1.2, at 139. In phase 2, the RFP at § L-5.1.2 required an offeror to demonstrate experience with 13 specific types of equipment and systems, for example, experience in (1) "operating large centrifugal chiller[s] (>1000 tons)"; (2) "operating and maintaining large dual fuel boilers (>20,000 lbs./hour @>100 psig)"; (3) "operating and maintaining underground steam distribution system experience"; and (4) "operating and maintaining large (>10,000 gallons/day) sewage lift stations." Id. at 139-140.

In phase 2, for purposes of assessing the relevance of an offeror's past performance, the RFP referred back to the phase 1 definition of relevance (set out above) at § L-4.1.b of the RFP. RFP § M-3.c(i), at 149.

In evaluating an offeror's phase 2 proposal under the mission capability evaluation factor, the RFP advised that a firm's written proposal and oral presentations (both equally weighted), including responses to impromptu scenarios, would be considered. RFP § M-4.a, at 150. The RFP stated that a firm's mission capability

would be assigned one of the following ratings: high confidence, significant confidence, confidence, unknown confidence, little confidence, or no confidence. As relevant here, the “confidence” rating was defined as follows:

The Offeror’s mission capability approach is above average. The proposed method of operating and maintaining the H[&]RP leaves confidence that optimum levels of quality, operational efficiency and continuity of operations will be achieved with some Government oversight.

RFP § M-4.b, at 150.

The RFP stated that an offeror’s proposed price would be evaluated for fairness and reasonableness, as well as to determine the offeror’s understanding of the requirements as reflected in the RFP. RFP § M-6.a, at 153.

Finally, the RFP provided that the cost of the phase 2 private-sector proposal selected as representing the best value to the government would be compared to the cost of the government’s MEO. RFP § M-2, at 146.

On June 11, 2002, CESI, as the prime contractor, and C&E, as its subcontractor, submitted a phase 2 proposal. AR, Tab 11, CESI’s Phase 2 Proposal–Cover Letter, June 10, 2002, at 1. (This was the only phase 2 proposal received.) The TEC evaluated CESI’s phase 2 proposal. For past performance, CESI received a “little confidence” rating and for mission capability, CESI received a “confidence” rating. AR, Tab 13, TEC Consensus Evaluation Report, Aug. 1, 2002, at 8. For both past performance and mission capability, the TEC consensus evaluation report listed “strengths” and “weaknesses” (which were not characterized as “significant” weaknesses) in CESI’s proposal; under the sections in the TEC consensus evaluation report for “deficiencies” and “areas requiring clarification,” the TEC inserted the word “none” in each instance. Id. at 12-14, 19-21.

In its narrative for past performance, the TEC stated:

After considering all of the offeror’s (both prime contractor and subcontractor) past experiences, the evaluation panel can barely qualify this offeror. But when applying the Government’s ‘relevant’ criteria to the offeror, the TEC could not qualify this offeror.

Id. at 3.

In assigning the “little confidence” rating to CESI’s proposal in the area of past performance, the TEC concluded that CESI had “limited experience on equipment and systems of similar size and complexity of that found in the Pentagon [H&RP].” Id. at 4. The TEC recommended as follows:

The evaluation team, after a thorough evaluation of the proposal, cannot recommend further consideration of [CESI]. The past performance cited by the offeror falls so far short of the requirements cited in the RFP that [CESI] would be ill served by continuing to expend bid and proposal costs pursuing this A-76 competition. The team reaches this conclusion with reluctance but the criteria cited in the RFP applied in the manner cited in Section M, commands the conclusion that [CESI] has no past performance that even approaches the size and complexity of the Pentagon H&RP. [CESI's] experience in maintaining the smaller and less complex commercial grade chillers, boilers and electrical distribution systems used in commercial office space, requires a fundamentally different skill set than operating and maintaining the larger and more complex industrial equipment found in the H&RP.

.....

The evaluation team has little confidence in [CESI's] ability to perform and therefore recommends the elimination of [CESI] from further consideration.

Id. at 9.

Following the completion of the TEC's consensus evaluation report, the SSA was briefed. By letter dated August 7, the SSA advised CESI that its proposal was eliminated from further consideration. More specifically, the SSA stated as follows:

This evaluation revealed that the great majority of your experience is in smaller and less complex commercial applications. Your past performance in the commercial setting, while praiseworthy, is of limited relevance to an industrial facility like the Pentagon H&RP. This lack of experience in large-scale industrial applications did not allow the technical evaluation committee to develop the requisite confidence in your ability to perform to permit further consideration of your proposal.

AR, Tab 14, SSA's Letter to CESI, Aug. 7, 2002.

Following its debriefing, CESI filed this protest.

ISSUE AND ANALYSIS

As stated above, CESI was the only commercial offeror to submit a proposal during the phase 2 portion of the private-sector competition. Contrary to the agency's position that CESI's phase 2 proposal was technically unacceptable based on the

firm's record of past performance, CESI argues that its proposal was technically acceptable in all respects and, therefore, should be allowed to compete against the government's MEO. CESI maintains that nothing in the contemporaneous evaluation record reasonably supports the agency's decision to eliminate its proposal from consideration.

In reviewing a protest against an agency's proposal evaluation, we will consider whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 2. In order to understand why the agency rejected CESI's phase 2 proposal as technically unacceptable, our Office conducted a hearing in which the representative of the TEC, the contracting officer, and the SSA testified.

In rejecting CESI's phase 2 proposal as technically unacceptable, the agency relied on the conclusions of the TEC and the SSA that CESI's experience does not qualify the firm for award.⁵ In this respect, the agency concludes that "[CESI's] experience in maintaining the smaller and less complex commercial grade chillers, boilers and electrical distribution systems used in commercial office space, requires a fundamentally different skill set than operating and maintaining the larger and more complex industrial equipment found in the H&RP." AR, Tab 13, TEC Consensus Evaluation Report, at 9; see also AR, Tab 14, SSA's Letter to CESI ("[CESI's] past performance in the commercial setting . . . is of limited relevance to an industrial facility like the Pentagon H&RP."). However, we do not believe that the contemporaneous evaluation record reasonably supports the agency's conclusion.

Regarding the phase 2 evaluation of an offeror's past performance, the RFP stated that the agency would evaluate the offeror's experience with the type equipment and the complexity of the systems represented at the Pentagon H&RP, with specific reference to 13 types of equipment and systems described in § L-5.1.2 of the RFP. RFP § M-3.c, at 148-49.⁶ In its phase 2 proposal, CESI addressed its experience with

⁵ Under the RFP's past performance evaluation factor, the agency appears to be more concerned with CESI's alleged lack of relevant experience, rather than the quality of its performance; the agency neither received, nor was aware of, any negative past performance reports for CESI. Hearing Transcript (Tr.) at 115.

⁶ To the extent the agency argues that § C of the RFP describes "the type equipment and the complexity of the systems" at the Pentagon H&RP, Agency's Post-Hearing Comments, Nov. 19, 2002, at 3-4, we point out that § M-3.c of the RFP specifically referenced § L-5.1.2, not § C. Moreover, at the hearing, in response to GAO's question concerning where in the RFP a private-sector offeror was supposed to look to find out what the agency was looking for in terms of equipment and systems similar to those at the Pentagon H&RP, the representative of the TEC responded, "[§] L-5.1.2." Tr. at 54. As explained by the TEC representative, "[t]he size and complexity [in § L-5.1.2 of the RFP] in some cases is 50 times smaller than what you
(continued...)

each of these requirements. At the hearing, the representative of the TEC could not point to any requirement, as defined in § L-5.1.2, that CESI did not meet. In fact, the TEC representative confirmed that CESI satisfied each of the 13 requirements as defined in § L-5.1.2 by having at least one record of past performance for each of the listed requirements. Tr. at 102-03, 106.⁷ The TEC representative also confirmed that the agency neither received, nor was aware of, any negative past performance reports for CESI, while the contracting officer confirmed that weaknesses in CESI's proposal were not characterized as significant; that there were no noted deficiencies in CESI's proposal; and that there were no areas in CESI's proposal requiring clarification. Tr. at 115, 124, 126.

Under the terms of the RFP, CESI's phase 2 proposal was never found technically unacceptable. While CESI's proposal under the past performance evaluation factor

(...continued)

experience at the Pentagon; in other cases about a quarter to a half." Tr. at 36. When asked why § L-5.1.2 was written in that manner (i.e., less than what the actual requirements were at the Pentagon), the TEC representative responded, "[t]o try to get as much competition as possible." Id.

⁷ At the hearing, the TEC representative initially argued that CESI failed to meet the § L-5.1.2 requirement for "operating and maintaining underground steam distribution system experience" based on the firm's experience with the National Archives underground steam distribution system because that system was not connected to boilers that were greater than 20,000 lbs./hour @ >100 psig. Tr. at 103-06. However, it was pointed out to the TEC representative that § L-5.1.2 of the RFP listed two separate requirements--the first for large dual fuel boilers ">20,000 lbs./hour @ >100 psig" and the second for "underground steam distribution system experience," without any corresponding numerical threshold. Tr. at 167-68, 170-74. When queried about where the RFP stated that in order to meet the underground steam distribution requirement, an offeror had to "have a boiler make something greater than 100 pounds," the TEC representative responded, "That's an interpretation, mine." Tr. at 167. In any event, the TEC representative stated that even if CESI did not meet the underground steam distribution requirement, this alone would not have been enough to find CESI's proposal technically unacceptable. Tr. at 106.

We also note that to the extent the agency would have liked to have seen CESI satisfy all of the § L-5.1.2 requirements at a single facility, the agency concedes that experience at a single facility was not a requirement of the RFP. Tr. at 93-94. Further, the TEC representative testified that there is "no other facility that . . . has everything that the Pentagon has; and so for competition, [the agency] wrote [the] spec to leave the door open as much as [it could]." Tr. at 94; see also Tr. at 175-76. However, the agency does not contend that the specifications, even if relaxed in that way, do not reflect its needs.

received a “little confidence” rating, which was defined in the RFP as “acceptable but undistinguished,” this is not an “unacceptable” rating and, in fact, the agency concedes that a rating of “little confidence” is “definitionally an acceptable rating.” Agency’s Post-Hearing Comments at 9.⁸ The agency even concedes that “there is a logical defect between a rating of ‘Little Confidence’ and the decision to exclude [CESI’s] proposal from further consideration.” *Id.* The bottom line is that CESI’s proposal in the area of past performance was determined technically acceptable in accordance with the RFP’s evaluation scheme.

With regard to the agency’s basis for the rejection of CESI’s phase 2 proposal—that CESI lacked “industrial” experience—it is significant that under phase 1, with the same records of experience, CESI, as well as C&E, each individually received accolades, as quoted above, from the same SSA who subsequently eliminated the phase 2 proposal of the team of CESI and C&E from further consideration. In rejecting CESI’s phase 2 proposal on the basis that CESI had commercial, but not industrial, experience, we find that the agency used an evaluation factor—“industrial” experience—that was not set forth in either § L or § M of the RFP, a point that the agency ultimately concedes. Tr. at 36-37; Agency’s Post-Hearing Comments at 3. (It is clear from the record that when referring to “industrial” experience, the agency meant the actual Pentagon H&RP requirements. AR, Tab 13, TEC Consensus Evaluation Report, at 9; AR, Tab 14, SSA’s Letter to CESI.) The agency further acknowledges that it would be difficult for a commercial offeror to establish experience with the actual Pentagon requirements and, for this reason, the RFP was written in a manner not only to meet the agency’s needs, but also to achieve competition. *See* Tr. at 94, 175-76.

Finally, the record does not contain any meaningful explanation from the agency addressing why “industrial” experience at the Pentagon is considered so materially different from CESI’s “commercial” experience at, for example, the Ronald Reagan Building and International Trade Center. While the agency posits that “in reality, the Pentagon is used to and demands almost zero outage [of its heating and refrigeration plant systems],” Tr. at 13, the agency has not shown why the same cannot reasonably be said for any of the other government facilities successfully operated, maintained, and repaired by CESI, for which, again, there were no reported problems with CESI’s actual performance.⁹ As explained above, the agency structured the experience

⁸ Under the terms of the RFP, only the “no confidence” rating was defined as “unacceptable” in terms of an offeror’s record of past performance.

⁹ To the extent the agency believes that there is a material difference in the Pentagon heating and refrigeration plant requirements, as compared to similar requirements performed by CESI at other locations, the agency was aware of the alleged shortcoming in CESI’s experience as early as the evaluation of CESI’s phase 1 proposal, as discussed above. Nevertheless, the agency did not raise this matter with CESI until it eliminated the firm’s phase 2 proposal from further consideration.

requirements in the RFP so as to obtain proposals from commercial offerors which had experience similar to (as opposed to identical to) the Pentagon H&RP requirements, and, consistent with the agency's approach in that regard, CESI's proposal had been favorably evaluated as acceptable throughout the entire private-sector competition. In our view, the agency lacked a reasonable basis to decide, in the penultimate step of this public/private competition, to depart from the RFP's stated evaluation scheme and to impose a standard that eliminated CESI's proposal (and that presumably would have eliminated any private-sector firm's proposal) from the competition, thus preventing the agency from moving forward to a public/private cost comparison.

CONCLUSION AND RECOMMENDATION

On this record, where the agency has failed to provide any reasonable basis to support its decision to reject CESI's technically acceptable phase 2 proposal, we sustain the protest and recommend that the agency reinstate CESI's proposal into the competition¹⁰ and compare its proposal with the proposal of the government's MEO in accordance with the procedures set forth in OMB Circular A-76 and the Circular's RSH. We also recommend that CESI be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2002). CESI's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.¹¹

Anthony H. Gamboa
General Counsel

¹⁰ Since CESI submitted the only technically acceptable proposal, there was no basis for the agency to conduct a price/technical tradeoff to determine best value.

¹¹ In light of our decision and recommendation, we need not address CESI's other arguments involving, for example, the agency's evaluation of CESI's oral presentations under the mission capability factor (for which CESI's proposal received a "confidence," *i.e.*, above average, rating); the agency's failure to consider CESI's price; and the agency's failure to conduct meaningful discussions/exchanges in the area of past performance.