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Decision

Matter of: SAMS El Segundo, LLC

File: B-291620; B-291620.2

Date: February 3, 2003

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Eric J. Marcotte, Esq., and Scott A. Schipma, Esq., Winston & Strawn; and Mark R. Hartney, Esq., Allen Matkins Leck Gamble & Mallory, for LA Air Force Base SMC, LLC, an intervenor.

John D. Inazu, Esq., and James A. Harley, Esq., Department of the Air Force, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office has bid protest jurisdiction to consider protest where, notwithstanding the concomitant sale of government real property, the transaction includes the procurement of property or services by the government.
2. Protest that contracting agency improperly evaluated selected offeror's technical proposal is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation criteria.
3. Where solicitation provides for evaluation of past performance on the basis of projects completed within the 5 years preceding the closing date for receipt of proposals, agency properly elected not to consider selected offeror's past performance outside this 5-year period.
4. Protest challenging agency's source selection decision is denied where the record shows that the decision was reasonable and consistent with the stated "best value" evaluation criteria; the source selection authority reasonably determined that the proposals were technically equal, notwithstanding the assigned evaluation ratings, and that the selected offeror's proposal represented a lower overall cost to the government.

DECISION

SAMS El Segundo, LLC (SES) protests the selection of LA Air Force Base SMC, LLC (Kearny) under a request for proposals (RFP) issued by the Space and Missile Systems Center (SMC), Air Force Space Command, Department of the Air Force, for the Systems Acquisition Management Support (SAMS) project.¹ SES argues that the agency's evaluation of the offerors' proposals as well as the agency's selection decision in favor of Kearny were improper.

We deny the protests.

BACKGROUND

Section 2861 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (the Act), Pub. L. No. 106-398, 114 Stat. 1654 (2000), authorizes the Secretary of the Air Force to convey, by sale or lease, all or part of the real property at Los Angeles Air Force Base (LAAFB), California; the Act also provides that the only consideration that the Air Force can receive for the conveyed real estate is "the design and construction on [unconveyed] property . . . of one or more facilities to consolidate the [SMC] mission and support functions." As originally enacted, the statute also established that if the consideration received by the Air Force (*i.e.*, the value of the facility constructed) exceeded the value of the real property conveyed, then the agency could "lease back" the facility from the developer for a period up to 10 years, with the Air Force taking title to the facility at the end of the lease period. *Id.* § 2861(c).

On July 17, 2001, the Air Force issued an RFP for the SAMS project. The initial RFP stated, in broad terms, the agency's desire to exchange up to 57 acres of LAAFB real property for approximately 580,000 square feet of office space.² Phase I RFP at 3.

¹ SES was alternatively known and referred to during the selection process as "Mar Ventures." Likewise, LA Air Force Base SMC, LLC, a joint venture comprised of Kearny Real Estate Company, Catellus Development Corp., and Morgan Stanley Real Estate Fund, was alternatively known and referred to during the selection process as "Team SMC," or "Kearny."

² The RFP specified the parcels of real property that Air Force planned to convey: approximately 42 acres in El Segundo, California (known as Area A); approximately 13 acres in Hawthorne, California (known as the Lawndale Annex); and approximately 3.7 acres in Sun Valley, California (known as the Armed Forces Radio and Television Service Broadcast Center). In return, the successful offeror would construct the new SAMS facilities on the remaining portion of LAAFB—approximately 52 acres in El Segundo, California (known as Area B). Phase I RFP at 4; see also Pub. L. No. 106-398, § 2861(a).

The RFP also informed offerors that the selection process for the SAMS project would occur in three phases. In Phase I, the Air Force intended to select no more than five offerors who demonstrated the highest probability of success.³ In Phase II, in which offerors were to submit detailed business and technical proposals for the actual execution of the SAMS project, the Air Force intended to select the offeror proposing the best value to the agency. Phase I RFP, app. D, SAMS Source Selection Process, at 4. In Phase III, the agency planned to conduct final negotiations with the selected offeror to finalize the remaining financial contingencies and to complete the administrative details of implementing all agreements for award to the selected offeror. The solicitation established that the Phase III negotiations would be “administrative in nature and [would] not encompass issues that affect the basis for the [Phase II] source selection decision.”⁴ Id.

Six offerors submitted proposals in response to the Phase I RFP. Among the Phase I offerors selected by the Air Force for participation in Phase II were SES and Kearny.⁵

On January 24, 2002, the Air Force issued the Phase II RFP for the SAMS project, with its modified objective of exchanging up to 57 acres of LAAFB real property for approximately 560,000 square feet of office space at no additional cost. It is the competition under this solicitation that is the subject of this protest. The solicitation notified offerors that the basis for the Phase II selection decision would be “best value,” based on the integrated assessment of the evaluation factors, and could involve the tradeoff of cost and noncost factors. Phase II RFP at 9. The RFP identified the following evaluation factors, in descending order of importance, and subfactors, of equal importance within each factor:

³ The Phase I selection decision was based on two evaluation factors, in descending order of importance: past performance and preliminary project concept. Phase I RFP at 14.

⁴ If, for whatever reason, the Air Force and the selected offeror were unable to complete Phase III negotiations within 90 days, then the agency could either reschedule the milestones or select a new offeror. Id.

⁵ The third offeror selected by the agency for participation in Phase II, Lennar/Barker Pacific LLC, withdrew from the competition prior to the Phase II selection decision.

1. Cost to the Air Force ⁶	
2. Financial Strategy	
3. Facility Capability	
	A. Building Core and Shell
	B. Tenant Improvements
	C. Integration with Area B Facilities
4. Project Management	
	A. Project Execution Plan
	B. Project Management Team
5. Proposal Risk	
6. Past Performance	

Id. at 9-10. The solicitation expressed the relative importance of the cost factor by stating as follows:

Affordability of the project is a major consideration of this source selection. The goal is to achieve no additional cost to the Air Force. Therefore, affordability is defined as the combination of “cost to the Air Force” and “financial strategy” employed by an offeror, which minimizes the additional funds the Air Force would have to provide.

NOTE: Funding for the SAMS project is not currently available; neither has it been programmed in the Air Force budget. Any requirement for funding, in addition to the land to be conveyed, is unattractive from a budgetary perspective.

Id. at 13.

Although termed “cost to the Air Force,” the agency contemplated that the cost gap set forth in an offeror’s Phase II proposal would in fact become the basis of a fixed-price contract between the selected offeror and agency for the construction of the proposed SAMS facility through Phase III administrative negotiations. The solicitation informed offerors that resolution of the Phase III administrative details and execution of the real estate agreements were contingent upon satisfactory evidence that the successful offeror had, among other things, “[o]btained a firm commitment for both construction and permanent financing, on the terms set forth

⁶ The cost factor did not evaluate the total cost of the SAMS project, but rather, the additional cost to the Air Force (*i.e.*, the possible need to expend appropriated funds) over and above the value of the conveyed land in order to acquire the required facility. Agency Report (AR), Nov. 27, 2002, at 5; Contracting Officer’s Statement at 1. Accordingly, the parties refer to cost as the “cost gap.”

in the Successful Offeror's [Phase II] proposal" Phase II RFP, app. D, SAMS Source Selection Process, at 16. Additionally, at a hearing that our Office conducted on the protests, the person who served as both the Air Force chief evaluator and SAMS project manager testified that the Phase III negotiations would result in a fixed-price relationship between the parties, such that the agency's liability was limited to the selected offeror's Phase II cost gap. Hearing Transcript (Tr.) at 76-81.

SES and Kearny each submitted initial Phase II proposals by the March 25 closing date, and final proposal revisions by the August 6 closing date. An Air Force source selection evaluation team (SSET) evaluated and rated the proposals as to the financial strategy, facility capability, project management, and past performance factors utilizing a color-coded descriptive rating system: blue, green, yellow, and red. The solicitation described the color ratings as follows:

Color	Rating	Rating (for Past Performance)
Blue	Exceptional	Exceptional/High Confidence
Green	Acceptable	Very Good/Significant Confidence
Yellow	Marginal	Satisfactory/Confidence
Red	Unacceptable	Marginal/Little Confidence

Phase II RFP, app. D, SAMS Source Selection Process, at 9-12. The RFP also established that the proposal risk factor would be rated as high, moderate, or low, and that the cost factor would not be color rated but would be evaluated for "completeness," "reasonableness," and "realism." Id. at 12-14.

As set forth above in the discussion of the unique statutory framework of the SAMS project transaction, the Act established that if the value of the office facility to be constructed exceeded the value of the LAAFB real property conveyed, then one means by which the Air Force could overcome the cost gap was to "lease back" the facility from the developer for a period up to 10 years.⁷ During Phase II, the Air Force observed that SES had submitted an alternate proposal in which the offeror's financial strategy was contingent upon a 30-year leaseback period. On July 26 the Air Force formally suggested to the congressional representative for the district in which LAAFB is located, certain "technical corrections" to the original Act, to include permitting a leaseback period of up to 30 years. AR, Tab 39, Letter from Air Force to Offerors Regarding Proposed Legislative Changes, at 2. At the time of both the agency's final evaluation of proposals and the Phase II selection decision,

⁷ Although not expressed in the Act, other options available to the Air Force to overcome a cost gap were to make total payment using appropriated funds to the selected offeror upon the completion of construction, or to reduce the size of the SAMS facility prior to construction.

however, the statutory changes sought by the Air Force for the SAMS project had yet to be enacted into law.⁸

On August 20, the SSET briefed the agency source selection advisory council (SSAC) as to its evaluation and ratings of the proposals of Kearny and SES, which were as follows:

Factor					
	Cost (in millions)	Financial Strategy	Facility Capability	Project Management	Past Performance
SES	\$29 (10 yr lease) \$13 (30 yr lease)	Blue	Blue	Blue	Blue
	Risk (10 yr lease)	Moderate	Low	Low	N/A
	Risk (30 yr lease)	High	Low	Low	N/A
Kearny	\$13 (10 yr lease)	Green	Blue	Blue	Blue
	Risk	Moderate	Low	Low	N/A

AR, Tab 9, Briefing to the SSAC, at 15.

The SSET determined the overall cost for each proposal as follows:

Costs & Funding Sources (in millions)	SES (10 Year Lease)	SES (30 Year Lease)	Kearny (10 Year Lease)
Total Project Costs	\$112.5	\$112.5	\$115.5
Land Value	\$62.6	\$62.6	\$54.7
Tax Increment Financing	\$22	\$38.6	\$47.7
Brownfields Grant	N/A	N/A	\$2
Cost Gap	\$27	\$11	\$11
AF Management Reserve	\$2	\$2	\$2
Gap with Management Reserve ⁹	\$29	\$13	\$13

⁸ On December 2, subsequent to both the Air Force's selection of Kearny and SES's filing of its protest, the president signed into law the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002), section 2841 of which revised the Act so as to permit leasebacks for up to 30 years for the SAMS project.

⁹ The overall cost gaps for each proposal were rounded down to the nearest whole number as part of the SSET's briefing. Tr. at 191-94. Specifically, the cost gaps were (continued...)

Id. at 7, 13, 17.

The SSET chairman informed the SSAC of his view that both offerors had submitted exceptional proposals that were substantially equal in terms of non-cost factors. AR, Nov. 27, 2002, at 7, Contracting Officer's Statement at 7; Tr. at 72. At the conclusion of the briefing, the SSET recommended that the agency's selection decision be based on existing statutory authorization, and therefore, that Kearny should be selected, as its cost gap was manageable and not contingent on potential legislative amendments. AR, Tab 9, Briefing to the SSAC, at 20-21.

On August 23, the SSAC (and the SSET) briefed the agency source selection authority (SSA). While accepting the SSET's evaluations and ratings of the offerors' proposals, the SSAC chairman recommended the selection of SES contingent on enactment of 30-year leaseback authority (by the end of fiscal year 2002), and the selection of Kearny if the legislation did not pass.¹⁰ AR, Tab 10, Briefing to the SSA, at 31, 33, 35. The SSA did not immediately make a decision, believing that the selection of the recommended proposal, SES's 30-year leaseback proposal, would be premature and unsupportable based on existing legislation. AR, Tab 43, SSA Email Messages, at 1-2; Tr. at 217-18.

Subsequent to the briefing and prior to a source selection decision being made, certain events transpired. SES's proposal had included the idea of "swapping" a portion of one LAAFB-conveyed parcel for a slightly larger adjacent tract of land occupied by the Federal Aviation Administration (FAA).¹¹ On September 13 and 24, SES notified the contracting officer that the FAA land swap had fallen through, in whole or in part, because of the FAA's security concerns. AR, Tab 48, SES Letter Regarding FAA Land Swap; Tab 50, SES Clarification Letter Regarding FAA Land Swap. Consequently, the Air Force determined that the cost gap for SES's alternative proposals had increased to \$14.4 - \$14.9 million for the 30-year leaseback option, and \$30.9 million for the 10-year leaseback option. Additionally, as of the end of fiscal year 2002, Congress had yet to enact any change in SAMS project leaseback

(...continued)

\$13.1 million for Kearny's proposal, \$13.3 million for SES's 30-year lease proposal, and \$29.9 million for SES's 10-year lease proposal.

¹⁰ The SSAC chairman believed that SES's superior design aesthetics for the SAMS facility, particularly a stand-alone conference center, made SES the best value among offerors that were otherwise equal as to cost and noncost factors. Tr. at 60-62, 244.

¹¹ SES planned to exchange 2 acres of conveyed LAAFB land, improved by SES with a single level 250 stall (above grade) parking deck, to the FAA in return for 4 acres of FAA land, for a net value increase of \$ 1.6 million. Supplemental AR, Tab 3, SES Final Proposal Revision, Financial Strategy, at II-7.

authority. As a result of the revision to SES's cost gap, and the fact that amended statutory authorization for the SAMS project had yet to be obtained, the SSAC chairman informed the SSA that he had changed his recommendation and now recommended the selection of Kearny. Tr. at 460-61.

On September 30, the SSA determined that the proposals of Kearny and SES were essentially equal as to all noncost factors, and that Kearny's proposal represented a lower overall cost to the Air Force. Based on an integrated assessment of all evaluation factors, the SSA determined that Kearny's proposal represented the best value to the Air Force. AR, Tab 12, Source Selection Decision, at 4. These protests followed.

In its original and first supplemental protests, SES raises numerous issues that can be grouped into two categories. First, in various ways, SES alleges that the agency's evaluation of Kearny's proposal, other than as to cost-related factors, was improper. Second, SES alleges that the agency's selection decision was unreasonable and not in accord with the RFP's stated award scheme.¹² Although we do not here specifically address all of SES's complaints about the evaluation of proposals and the agency's selection decision, we have fully considered all of them and find that they afford no basis to affect the agency's selection decision.

THRESHOLD ISSUES

Our analysis begins with the question of whether this protest is within the jurisdiction of our Office, a matter we raise, even though no party has challenged our jurisdiction here. The authority for our Office to decide bid protests is based on the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), and provides for consideration of challenges to solicitations by federal agencies for offers for contracts for the procurement of property or services, as well as challenges to the award or proposed award of such contracts. 31 U.S.C. § 3551(1). Our Office has previously determined that where a contractual transaction includes the delivery of goods or services to the government, the contract is one for the procurement of property or services within the meaning of CICA, and therefore is encompassed by our bid protest jurisdiction. See Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 6; Government of Harford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81 at 4. As the SAMS project transaction involves the government's acquisition of a facility (in this instance, valued in excess of \$100 million), we conclude that the contract to be awarded here is one for the procurement of property and is within our bid protest jurisdiction.

¹² In a second supplemental protest (B-291620.3), SES raises another issue, contending that the agency's evaluation of Kearny's proposal as to cost and financial strategy was improper. We intend to address this protest in a separate decision to be issued shortly.

Separate from the question of our jurisdiction is the question of what competition requirements apply (and, in particular, whether CICA's standards for full and open competition apply). We need not resolve that question with regard to the Act here, because the protest issues raised by SES all challenge the propriety of the agency's actions in light of the terms of the solicitation. We note, however, that there is a legal presumption that CICA's competition requirements apply "except in the case of procurement procedures otherwise expressly authorized by statute." 10 U.S.C. § 2304(a)(1) (2000); see Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2002 CPD ¶ __ at 10. Here, the Act is silent as to the applicability of CICA and it does not establish any alternative procurement procedures (other than the general framework cited earlier in this decision).

EVALUATION OF KEARNY'S PROPOSAL (OTHER THAN AS TO COST)

SES argues that the Air Force's evaluation of Kearny's proposal under both the facility capability and the past performance factors was irrational and unsupported. Specifically, SES contends that because of Kearny's planned use of "Flexirock" as its exterior building material for the SAMS facility, the SSET's rating of Kearny's proposal as exceptional as to facility capability was unreasonable. SES also argues that the Air Force incorrectly rated Kearny's past performance as exceptional/high confidence in light of the bankruptcy filing of Kearny's architect, which the agency learned about prior to the Phase II selection decision.

The evaluation of proposals is a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method for accommodating them. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. Our review of the record, including the written proposals, the pleadings, and testimony taken during the hearing in this matter, provides us no basis to find the Air Force's evaluation here unreasonable or otherwise objectionable.

The RFP set forth various building requirements and design guidance for the construction of the SAMS facility. With regard to building materials, the solicitation established a list of "approved and recommended architectural materials for LAAFB" that included, among other things, "exterior cement plaster." Phase II RFP, app. A, SAMS Complex Facility Requirements and Design Guide, at 12. The solicitation also created minimum durability requirements for the constructed SAMS facility; for exterior walls/primary weather-barrier elements, the RFP required a "minimum 50 years functional and aesthetic service life, excluding joint sealers." Id. at 84. While

the facility capability factor consisted of three subfactors—building core and shell, tenant improvements, and integration with Area B facilities—an offeror's choice of exterior building material was evaluated only under the first subfactor, and was not part of the agency's evaluation of proposals under the latter two subfactors. Tr. at 34-36, 46-47.

In its final proposal revision, Kearny changed the building material it planned to use for the exterior for the SAMS facility to Flexirock, which the proposal described as a "modified cement plaster system." AR, Tab 7, Kearny's Final Proposal Revision, Vol. III, Facility Capability, at 4. The SSET recognized and took into account in the final evaluation of proposals Kearny's change to Flexirock for its exterior building material.¹³ Tr. at 36-39. The SSET determined that Flexirock, a brand name for a specific type of exterior cement plaster system application, constituted an approved building material that also met the RFP's durability requirements.¹⁴ Tr. at 38-40, 49. The agency found that Kearny's use of Flexirock met, but did not exceed, the solicitation's requirements in all regards. Tr. at 40.

The SSET also determined, as part of its evaluation with regard to the building core and shell subfactor, that other aspects of Kearny's proposal did exceed the RFP's requirements and constituted strengths. These included: a tailored architectural design which did an excellent job of portraying the state-of-the-art concept sought in the RFP; the "dynamics and articulation" of the SAMS facility; the high quality of facility aesthetics; the site layout and landscaping (including an integrated conference center and stand-alone child development center); a "brace frame" structural system for the buildings; and the conveyance to the Air Force of an adjacent parcel of Kearny-owned land, which significantly improved LAAFB force protection, parking, and traffic flow. AR, Tab 10, SSA Briefing, at 24-25; Tr. at 24-31. Based on the identified strengths, the SSET rated Kearny's proposal as exceptional as to the building core and shell subfactor. Similarly, the SSET evaluated and rated Kearny's proposal as exceptional with regard to the tenant improvements and integration with Area B facilities subfactors, thereby resulting in an overall rating of exceptional as to facility capability.

We find no basis to question the agency's evaluation here. The record demonstrates that the Air Force reasonably determined that Kearny's proposal was rated as exceptional as to facility capability notwithstanding Kearny's planned use of

¹³ While the SSET had deemed Kearny's original exterior building material (concrete panels mounted on a steel support frame) to be a strength, Kearny's change to Flexirock resulted in the SSET eliminating this strength from its evaluation of Kearny's final proposal. Tr. at 36-37.

¹⁴ The SSET chairman, who was familiar with Flexirock, made multiple visits to a nearby building that used Flexirock in its design to ascertain its performance. Tr. at 48-49, 54.

Flexirock as the exterior building material. The SSET determined that Flexirock met the solicitation's requirements in all regards. Moreover, it was not Kearny's use of Flexirock that was the basis for the agency's evaluation rating with regard to the building core and shell subfactor. The agency identified numerous strengths in Kearny's proposal, which together justified the agency's exceptional rating for this subfactor. Lastly, as Kearny's use of Flexirock was not part of either the tenant improvements or integration with Area B facilities subfactors, we find no basis to question these aspects of the agency's facility capability evaluation.

SES does not challenge any of the strengths identified in Kearny's proposal, or dispute that an offeror's choice of exterior finish was only part of the building core and shell subfactor evaluation. Instead, SES argues that (1) during discussions, in which the offerors each proposed various "deletive items" to the agency in an effort to reduce the cost gap, the Air Force informed SES that the proposed use of exterior insulation and finish system (EIFS) was not a desirable, quality exterior building material; and (2) Flexirock is a little-used EIFS-type material that is, in fact, inferior to EIFS. Accordingly, SES alleges that the agency failed to treat offerors equally by accepting Kearny's proposed use of Flexirock while discouraging SES from proposing use of EIFS. We disagree.

In the course of developing the solicitation, the Air Force did determine that EIFS was not an acceptable building material because of moisture retention problems, and intentionally excluded it from the approved materials list. Tr. at 50-51, 55. Also, during Phase II discussions when SES suggested the replacement of the its planned exterior building material with EIFS, the agency did state that this was not an acceptable deletive item even if it resulted in a cost gap reduction to SES's proposal. AR, Tab 31, Agency Briefing Regarding SES's Proposed Deletives, at 3. However, the protester has offered no evidence for its assertion that Flexirock is an EIFS-type material or that it is inferior to EIFS, and we therefore find the agency's assessment unobjectionable.¹⁵

SES also protests that the agency's evaluation of Kearny's proposal as to the past performance factor was improper. Specifically, SES argues that given the Chapter 11 bankruptcy filing of Kearny's architect, Nadel Architects, Inc., the SSET's rating of Kearny's proposal as exceptional as to past performance in the Phase II evaluation process was unreasonable. We disagree.

The Air Force first evaluated each offeror's past performance in Phase I of the SAMS project selection process. There, the Phase I RFP required offerors to "[d]escribe a

¹⁵ At the hearing our Office conducted, the agency brought in examples of both Flexirock and EIFS to demonstrate that Flexirock, a portland cement-based product, was not similar to EIFS, a product consisting of a polystyrene foam base with a synthetic stucco finish.

minimum of two [qualifying] projects, individual or phased development, completed within the last five (5) years, where the offeror served as the primary developer.” Phase I RFP at 9-10. The initial solicitation also informed offerors that the agency’s evaluation of past performance “will assess the confidence in the offeror’s ability (which includes, if applicable, the extent of its subcontractors, teaming partners involved), to successfully accomplish the proposed project based on the offeror’s demonstrated relevant past and present work record.” *Id.* at 14. As part of the Phase I evaluation of proposals, the SSET rated Kearny’s past performance as exceptional.

The Phase II RFP informed offerors that the agency’s evaluation of past performance would be carried forward from Phase I. However, the solicitation established that the Phase I past performance evaluation would be “updated if necessary if additional information [became] available.” Phase II RFP at 10. The RFP also set forth a list of reportable events that “if any occur, must be reported at once by an offeror responding to this solicitation,” to include the “[b]ankruptcy/reorganization of any of the participating entities of offeror’s proposal.”¹⁶ Phase II RFP, app. B, Basic Instructions for Proposal Preparation and Notice to Offerors, at 9.

On September 5, SES informed the Air Force of its finding that Kearny’s architect, Nadel, had filed for bankruptcy prior to the submission of Phase I proposals. Contracting Officer’s Statement at 13. The Air Force subsequently learned that Nadel had filed for Chapter 11 bankruptcy reorganization in August 2001 as the result of a civil judgment in which Nadel was found partially liable for the negligent administration of a 1986 project that resulted in a defective building. AR, Tab 45, Letter from Nadel to Kearny Regarding Bankruptcy, at 1-2. Although the agency did not learn of Nadel’s bankruptcy until after completing its final evaluation of proposals, the Air Force reconsidered its evaluation of Kearny’s past performance.¹⁷ The SSET determined that the event which resulted in Nadel’s bankruptcy filing could not properly be considered as part of the past performance evaluation of offerors because it was outside of the 5-year performance period established by the

¹⁶ The solicitation also informed offerors that, “[f]ailure to report [a listed event] would result, at the sole discretion of the Air Force, in an immediate disqualification of the submitting Offeror from this process.” *Id.*

¹⁷ The Air Force separately determined that Kearny’s failure to inform the Air Force about Nadel’s bankruptcy was a “serious integrity issue,” but one that ultimately did not warrant the disqualification of the offeror. AR, Nov. 27, 2002, at 11; Contracting Officer’s Statement at 14; Tr. at 366-67; AR, Tab 46, SSAC Briefing Slides, at 2.

solicitation.¹⁸ Contracting Officer's Statement at 14. Ultimately, the SSET determined that no change to Kearny's past performance rating was warranted.

An agency's evaluation of past performance, like the evaluation of other aspects of an offeror's proposal, is a matter within the discretion of the contracting agency and will not be disturbed unless unreasonable or inconsistent with the terms of the solicitation or applicable statutes and regulations. See Jacobs COGEMA, LLC, supra; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3. Where a solicitation contemplates the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Systems Mgmt., Inc.; Qualimetrics, Inc., B-287032.5, B-287032.6, Nov. 19, 2001, 2002 CPD ¶ 29 at 4-5. From our review of the record, there is no basis to object to the agency's evaluation.

Here, the agency fully considered Nadel's bankruptcy and its impact on Kearny's past performance evaluation prior to its source selection decision. The contracting officer determined that Nadel was but one of Kearny's subcontractors, and not a financial backer of the Kearny proposal. Tr. at 369-70. The agency also concluded that the lawsuit that resulted in Nadel's bankruptcy was not related to building design, but to construction administration—a function that Nadel would not be performing for Kearny as part of the SAMS project. Tr. at 374. Moreover, as the solicitation provided for the evaluation of past performance on the basis of projects completed within the last 5 years, the agency properly determined that Nadel's 15-year old performance was not relevant to the past performance evaluation here. See Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124 at 3. Accordingly, we find the agency's evaluation of Kearny's past performance to be both reasonable and consistent with the solicitation.

SOURCE SELECTION DECISION

In addition to challenging the evaluation of proposals, SES protests the agency's source selection decision. SES argues that the Air Force's selection of Kearny's proposal as representing the best value to the government was unreasonable, disregarded the technical superiority of SES's proposal, and departed from the source selection plan as set forth in the solicitation. We preface our discussion here by briefly reviewing SES's proposal and the agency selection decision.

The RFP established that under the financial strategy factor, the agency would evaluate each offeror's ability to demonstrate an effective financial plan for the

¹⁸ The Air Force also concluded that the extent to which Nadel's bankruptcy affected the ability of Nadel, or Kearny, to perform was a matter of contractor responsibility, not past performance. Contracting Officer's Statement at 14.

SAMS project, to include the ability to secure a complete financing package and to raise all required equity. Phase II RFP at 13. The ability of an offeror to maximize the value of the land conveyed by the Air Force, thereby making the cost gap to the agency as small as possible, was an important part of the financial capability evaluation. SES's financial strategy for the SAMS project involved many different structuring, financing, and development aspects in an effort to fund the construction of the new SAMS facility at minimum cost to the Air Force. Two specific aspects of SES's financial strategy of relevance here are the residential development of the Lawndale Annex and the offeror's cost savings sharing provisions.

As set forth above, one of the three parcels of real property that the Air Force planned to convey to the selected offeror was the Lawndale Annex, consisting of approximately 13 acres located in Hawthorne, California. At the time the Air Force issued the Phase I RFP, the Lawndale Annex was zoned by the City of Hawthorne for heavy industrial use, although that zoning was then inconsistent with the City's "general plan." AR, Tab 23, Letter from City of Hawthorne to Air Force Regarding Zoning, at 2. While the Air Force had previously tried to have the City of Hawthorne rezone the Lawndale Annex to permit residential development, those efforts had been sporadic and unsuccessful. In fact, the contracting officer acknowledged that when the Air Force debriefed SES regarding the offeror's Phase I proposal in which residential development of the Lawndale Annex was contemplated, the agency believed that there was "no way" that the City of Hawthorne would agree to the idea. Contracting Officer's Statement at 15.

In response to the offerors' initial Phase II proposals, in which both Kearny and SES planned for the residential development of the Lawndale Annex, the Air Force again pursued the rezoning issue with the City of Hawthorne. Beginning in April 2002, the SAMS project manager and an Air Force real estate consultant met repeatedly with City of Hawthorne officials to discuss the zoning/general plan conflict over use of the Lawndale Annex. AR, Nov. 27, 2002, at 12. On June 4, the LAAFB commander formally requested that the City of Hawthorne permit residential use for the Lawndale Annex. AR, Tab 26, Letter from Air Force to City of Hawthorne Mayor Regarding Lawndale Annex Zoning, at 1. On July 8, the City Council of the City of Hawthorne held a public hearing in which it approved the rezoning of the Lawndale Annex so as to permit residential development. AR, Tab 28, Hawthorne City Ordinance No. 1745, July 8, 2002, at 1-2.

Both before and after submission of its initial Phase II proposal, SES also worked with the City of Hawthorne to achieve residential use for the Lawndale Annex. On or about January 31, 2002, SES provided the City of Hawthorne with a detailed tax analysis showing the benefits of residential use versus retail/commercial use; SES also provided the Air Force with a copy of its analysis. Protest, Oct. 28, 2002, at 20; Contracting Officer's Statement at 15. The protester asserts, and the contracting officer agrees, that SES's determined efforts resulted in persuading the City of

Hawthorne to reverse its position and permit the residential use of the Lawndale Annex.¹⁹ Protest, Oct. 28, 2002, at 20; Contracting Officer's Statement at 15.

The SSET subsequently recognized the benefit to the agency of SES's initiative and effort with regard to the development of the Lawndale Annex. In the narrative presentation of its evaluation to the SSA, the SSET stated that a strength of SES's proposal under the financial strategy factor was that SES "[m]aximized value of the Lawndale property; proactively worked with [the City of] Hawthorne to pursue residential zoning." AR, Tab 10, SSA Briefing, at 17.

A second aspect of SES's financial strategy related to the type of contractual arrangement and cost the offeror proposed to the Air Force. As set forth above, the cost factor did not evaluate an offeror's total cost for the SAMS project, but only the incremental cost to the Air Force for construction of the SAMS facility over and above the value of the land conveyed to the selected offeror. Additionally, it was the agency's intent and all parties' understanding that the cost gap proposed by the offeror selected in Phase II would become the basis of a fixed-price contract after completion of administrative negotiations in Phase III.

SES's final proposal revision not only set forth the offeror's cost gap for the SAMS project, but also identified and quantified various contingencies included within that cost.²⁰ Supplemental AR, Tab 3, SES Final Proposal Revision, Cost and Financial Strategy, at II-2. As part of its financial strategy, SES then proposed that in addition to agreeing to a guaranteed maximum price, which provided the Air Force with the benefits of a fixed-price contract, it would establish a cost savings sharing arrangement as follows:

Should the overall project cost net of revenues be less than projected, the Air Force would receive 60% of unused contingency and other savings until a zero gap is reached, and 40% thereafter, such amounts to be calculated after [the construction subcontractor's] share in any savings of the portion of contingency allocated to the construction contract.

Supplemental Agency Report, Tab 3, SES Final Proposal Revision, Executive Summary, at I-2. SES's savings sharing arrangement made more than \$5 million in savings potentially available to the Air Force. AR, Tab 10, SSA Briefing, at 18.

¹⁹ SES estimates that residential use of the Lawndale Annex increased the value of the property to the Air Force by as much as \$18 million. Protest, Oct. 28, 2002, at 20.

²⁰ SES's proposal stated that its cost gap was calculated after inclusion of a \$4.1 million Area B cost contingency, a \$3.9 million additional contingency for land sale and bond price fluctuation, and a \$4 million interest rate hedge cost. Id.

The agency evaluators were not of one mind in the evaluation of SES's cost savings sharing provisions as part of the financial strategy factor. The SSET chairman believed that the savings sharing provisions of SES's proposal did not add benefit to the agency because the savings were speculative in nature and would only be realized during the design and construction of the SAMS facility—at a point too late to be used to reduce the cost gap. Tr. at 74-75, 89, 111. By contrast, the SSET member who served as chief for the financial strategy evaluation factor believed that SES's cost savings sharing idea was a benefit even if it did not reduce the cost gap because it effectively created a partnership between the Air Force and the offeror for the management of costs during contract performance. Tr. at 402. Ultimately, the SSET chairman deferred to the view of the factor chief on this point. Contracting Officer's Statement at 7. The SSET members agreed that SES's cost savings sharing provision was the determining strength that resulted in SES's exceptional rating.²¹ Tr. at 74-75, 401, 407-08.

In its narrative presentation to the SSA, the SSET also identified SES's cost savings sharing provisions as a strength under the financial strategy factor. Specifically, the SSET stated that SES's proposal provided the agency with the benefits of a fixed-price contract together with the sharing of cost savings and revenue increases. AR Tab 10, SSA Briefing, at 17. The SSET also explained in greater detail the potential for \$5 million in savings, the speculative nature of the savings, and how any savings would be realized only during construction and would not reduce the SAMS project cost gap. AR, Tab 10, SSA Briefing, at 18; Tr. at 403-04, 463-64. The SSET also informed the SSA of its conclusion that SES's savings sharing provision was the financial strategy strength that “drove the [exceptional] rating.” Tr. at 401, 462-63.

While the SSA adopted the SSET's conclusion that SES's and Kearny's proposals were essentially equal under the facility capability, project management, proposal risk, and past performance factors, he rejected the SSET's view as to the financial strategy factor.²² AR, Tab 12, Source Selection Decision at 3-4; Tr. at 493. Regarding that factor, where the SSET had rated Kearny as acceptable and SES as exceptional, the SSA stated:

²¹ The Air Force determined, based on a September 19 clarification letter, that Kearny's proposal also contained a cost savings sharing arrangement, Supplemental AR, Tab 21, Letter from Kearny to Agency, Sept. 19, 2002, at 2; Tr. at 105-07; agency evaluators found Kearny's savings sharing arrangement was also speculative in nature and not as well defined as that proposed by SES. Tr. at 110, 114-15, 246.

²² The SSA determined that although SES's proposal was viewed as having better aesthetics, this difference was not a decisive factor in his selection decision in light of the equivalent ratings received by the two offerors under the facility capability factor and subfactors. AR, Tab 12, Source Selection Decision, at 3.

The SSET rated [SES's] financial strategy exceptional because it included a cost sharing structure. While both offerors provided a guaranteed maximum price, [SES] proposed sharing unused contingencies 60% - 40% with the Air Force until a zero gap is reached, and 40% thereafter. Kearny also proposed cost sharing of tax increment financing, which would bring cost savings to the project. The Kearny strategy was acceptable and would add benefit to the Air Force; however, their concept was not as well defined. Although the SSET found [SES's] financial strategy to be exceptional because of this cost sharing arrangement, I did not consider this to be a discriminator as the contingency nature of the cost savings made them speculative.

AR, Tab 12, Source Selection Decision, at 3. The SSA's conclusion in this regard may have determined the outcome of the competition, and therefore, its reasonableness is a key issue to this protest. It was because he concluded that the proposals of SES and Kearny were essentially equal as to all noncost factors, and that the cost gap for Kearny's proposal (\$13.1 million) was smaller than the cost gap for either of SES's alternate proposals (\$30.9 million under a 10-year leaseback, and \$14.4 - \$14.9 million for a 30-year leaseback), that he determined that the selection of Kearny represented the best value to the Air Force. Id. at 3-4.

In its protest SES argues that the SSA improperly disregarded the SSET's evaluation of proposals and unreasonably determined that the proposals of Kearny and SES were essentially equal as to financial strategy, notwithstanding SES's higher evaluation rating. Citing to the rating differences between the proposals, SES argues that the SSA improperly downgraded its evaluated advantage under the financial strategy factor. SES also argues that while the RFP provided that the SSA could make cost/technical tradeoffs, the solicitation did not permit the SSA to alter the evaluation ratings of offerors.

Adjectival ratings and point scores are but guides to, and not substitutes for, intelligent decision making. See Shumaker Trucking & Excavating Contractors, Inc., supra. They are tools to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. Jacobs COGEMA, LLC, supra; PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12. Those officials have broad discretion in determining the manner and extent to which they will make use of, not only the adjectival ratings or point scores, but also the written narrative justification underlying those technical results, subject only to the tests of rationality and consistency with the evaluation criteria. Development Alternatives, Inc., B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54 at 9; Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364 at 4. Where, as here, a higher-level official determines that the lower-level evaluators' ratings do not reflect the actual technical value of proposals and the selection decision is protested, the agency must show that its ultimate determination is reasonable, with sufficient detail to permit our Office to review the determination for reasonableness. See KPMG Consulting LLP, B-290716,

B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 13; Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6.

Contrary to the protester's assertions, the SSA possessed the inherent authority to reject, in whole or in part, the evaluations performed by the SSET on his behalf; this authority does not flow from the solicitation. The SSA also provided a detailed written analysis supporting his findings, based not only on the offerors' adjectival ratings, but also on the SSET's narrative discussion and oral presentation explaining those adjectival ratings. AR, Tab 10, SSA Briefing; Tr. at 452-54. Under most of the RFP's evaluation criteria, the SSA reasonably determined that the SSET's evaluation ratings accurately reflected the essential equivalency between the SES and Kearny proposals. As to financial strategy, the SSA properly looked behind the adjectival ratings to determine whether significant technical differences existed such that SES's proposal was technically superior regardless of the assigned ratings. PRB Assocs., Inc., B-277994, B-277994.2, Dec. 18, 1997, 98-1 CPD ¶ 13 at 12. The SSA reasonably determined that the strength that resulted in SES's evaluated advantage--its cost savings sharing provision--was too speculative in nature to constitute a discriminator between the offerors. While SES argues that the SSA should not have regarded its cost savings sharing provisions as speculative, in our view, this amounts to mere disagreement with the agency's evaluation, which does not render it unreasonable. KPMG Consulting LLP, *supra*.

The protester also argues that the SSA failed to acknowledge and/or give it credit for various strengths in its proposal identified by the agency evaluators. Specifically, SES asserts that, as evidenced by his source selection decision, the SSA ignored SES's superior design aesthetics for the SAMS facility as well as its innovative approach for the residential development of the Lawndale Annex. SES alleges that by disregarding these key SES advantages, the agency failed to follow the RFP evaluation plan and unreasonably selected Kearny. We disagree.

There is no requirement that an SSA restate each of an offeror's strengths when comparing proposals, and nothing unreasonable about the decision to not elevate any of these strengths to the selection decision. Medical Dev. Int'l, B-281484.2, Mar. 29, 1999, 99-1 CPD ¶ 68 at 14. Here, the record shows that, in considering whether any of the differences between the two proposals amounted to discriminators, the SSA had received and reviewed the SSET's findings in full, which described both aspects of SES's proposal to which the protester now refers. As evidenced by his selection decision, the SSA was fully aware of the view that SES's proposal had superior design aesthetics. Quite simply, the SSA did not fail to take this aspect of SES's proposal into account; instead, he reasonably determined that this difference was not a discriminator, or decisive factor, in his selection decision. The fact that the protester believes that its design aesthetics, even though not an evaluation factor or subfactor, were an important discriminator between the two proposals is, again, an expression of mere disagreement. As to SES's innovative idea for the residential development of the Lawndale Annex, which was determined a strength, the fact that the SSA did not specifically mention this feature does not

mean he did not consider it, and there is no requirement that he give SES the credit the protester apparently believes it was due.

As the SSA reasonably determined that the proposals of SES and Kearny were essentially equal as to all noncost factors, and that the cost gap for Kearny's proposal was smaller than the cost gap for either of SES's alternate proposals (so that no cost/technical tradeoff analysis was needed), we see no basis to find unreasonable the SSA's selection of Kearny's offer as representing the best value to the Air Force. The fact that no tradeoff analysis was required as part of the source selection decision here does not negate the fact that the agency properly adhered to the RFP's best value selection basis. See Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 6.

Lastly, SES contends that the agency must now "re-perform," or reconsider, its selection decision in favor of Kearny. As explained above, subsequent to the agency's Phase II selection decision, and still prior to the contract award that will occur subsequent to the Phase III administrative negotiations, Congress enacted legislation that now authorizes a 30-year leaseback period for the SAMS project. Citing to our decision in Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD ¶ 133, SES argues that where, as here, a material change occurs prior to contract award, the agency must reevaluate proposals in light of that material change before proceeding with the planned award.

In Dual, which involved the procurement of flight training systems, the awardee represented in its proposal that its flight simulation division and its employees would perform the contract work. The agency's evaluation of proposals relied upon those representations. Prior to contract award, the awardee entered into an agreement to sell its flight simulation division and to transfer the affected employees to the acquiring company; this was a material change to the awardee's proposal. Because the awardee never advised the agency of the impending sale, the agency never evaluated the awardee's actual employees and facility capabilities as they existed at the time of award. Consequently, our Office determined that the agency's evaluation, as well as source selection determination which was based entirely upon the results of the evaluation, were flawed.

We find our decision in Dual inapposite to the circumstances here. In Dual, the material change in circumstances (*i.e.*, the impending sale of the awardee's facility) occurred prior to the agency's selection decision and caused the propriety of that decision to be placed into doubt. By contrast, the "material change" in the SAMS transaction (*i.e.*, the enactment of revised authority) occurred after the Air Force's selection decision and does not cast doubt on the propriety of the decision already made. While the agency has not yet made contract award here, given the unique nature of the SAMS project transaction, we recognize the agency's need for finality in its selection decisions. In our view, while the Air Force has the discretion to reconsider its selection decision, there is no requirement that it do so. In any event, we fail to see how reconsideration of its source selection decision in light of the

amended statutory authorization could reasonably be expected to result in a different outcome, given that the agency already evaluated and considered SES's alternative 30-year leaseback proposal as part of its source selection decision, based on anticipation of modified SAMS project authority; the agency already determined that Kearny's proposal had a smaller cost gap than either of SES's alternative proposals; and the proposals were otherwise found to be essentially equal.

The protests are denied.

Anthony H. Gamboa
General Counsel