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Decision

Matter of: DRS C3 Systems, LLC

File: B-310825; B-310825.2

Date: February 26, 2008

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DIGEST

1. Protest alleging that firm had developed governmentwide standard applicable to the item being procured, thereby having an unfair informational advantage over other competitors, is denied where record establishes that firm did not have a role in developing the relevant governmentwide standard.

2. A competitive advantage that derives from an offeror's previous performance under a government contract is not an unfair competitive advantage that agency is required to neutralize.

3. Contracting agency engaged in meaningful discussions where agency advised protester of specific weaknesses regarding lack of a selected software architecture approach; agency was not required to also afford the protester an opportunity to cure proposal defects first introduced either in response to discussions or in a post-discussion proposal revision.

4. Protest challenging the evaluation of technical proposals is denied where the record establishes that the agency's evaluation was reasonable and consistent with the evaluation criteria.

5. Protest that past performance evaluation was unreasonable is sustained where record shows that: the findings in the agency evaluation report were not consistent

with the information upon which the findings were based; the agency evaluators could not remember whether they evaluated and gave proper consideration to adverse past performance information regarding the awardee; and the agency did not properly assess the relevance of the offeror's prior contracts.

DECISION

DRS C3 Systems, LLC protests the award of a contract to General Dynamics Advanced Information Systems (GD) under request for proposals (RFP) No. N00024-06-R-5103, issued by the Naval Sea Systems Command (NAVSEA), Department of the Navy, for common enterprise display system (CEDS) display consoles. DRS argues that the agency's evaluation of offerors' proposals and subsequent source selection decision were improper. DRS also contends that the agency's discussions with the protester regarding its proposal were not meaningful, and that GD had an impermissible organizational conflict of interest.

We sustain the protest in part regarding the agency's evaluation of GD's past performance and deny the remainder of the protester's allegations.

BACKGROUND

On April 17, 2006, the agency issued the RFP for the CEDS display consoles.¹ The CEDS display console is a workstation configuration comprised of display screens, furniture (e.g., console mounting brackets, chair), human/machine interface devices (e.g., keyboard, mouse, joystick), and a common electronics module (CEM), including both a network interface and graphics processor. In general terms, the RFP's statement of work (SOW) required the contractor to design, develop, produce, and support an enterprise family of display systems to be implemented across platform systems on Navy surface and subsurface ships. Agency Report (AR), Tab 1, CEDS Source Selection Plan, at 5.

The RFP also informed offerors that the CEDS display console procurement would occur in two phases. In Phase I, the Navy intended to award multiple fixed-price contracts for the preliminary design of the display consoles. In Phase II, in which Phase I awardees were to submit detailed business and technical proposals for the actual execution of the CEDS display console project, the Navy intended to select the offeror proposing the best value to the agency.² *Id.* at 5-6. On December 13, the

¹ The RFP established two categories of CEDS display systems—display consoles and remote displays—for which the Navy made separate award determinations. DRS's protest here concerns only the Navy's CEDS display consoles procurement.

² The awarded Phase I contracts also served as the solicitation for Phase II proposals: they each included a SOW, a CEDS system requirements document (SRD), instructions to offerors regarding the submission of proposals, and evaluation (continued...)

agency awarded Phase I preliminary design contracts to both GD and DRS. It is the Navy's subsequent evaluation of offerors' Phase II proposals and source selection decision that is the subject of DRS's protest here.

The Phase II RFP contemplated the award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract including both fixed-price and cost-reimbursement-type contract line item numbers (CLIN) for a CEDS display console first article unit, up to 601 production units, as well as associated spares, logistics, and various program, technical, engineering, and training services over a 4-year performance period. RFP § B; amend. 3, at 2. In addition to price, the RFP identified (in descending order of importance) technical approach, management approach and capabilities, and past performance as the nonprice evaluation factors, along with numerous subfactors, of equal importance within each factor. Id., amend. 1, Instructions to Offerors, at 61-65. The solicitation also established that the nonprice factors, when combined, were significantly more important than price.³ Id. at 61. Award was to be made to the responsible offeror whose proposal was determined to represent the "best value" to the government, all factors considered. Id. at 58.

Both GD and DRS submitted proposals by the April 12, 2007 closing date. A Navy source selection evaluation board (SSEB) evaluated offerors' proposals as to the nonprice factors and subfactors using an adjectival rating system that was set forth in the RFP: outstanding; very good; satisfactory; marginal; unsatisfactory; and with regard to the past performance factor, neutral. Id., amend. 2, at 5-6. An agency cost evaluation team separately reviewed offerors' price and cost submissions.

After completing its initial evaluation, the agency decided that discussions with offerors were necessary, and established a competitive range consisting of the GD and DRS proposals. The Navy conducted written discussions with both offerors, followed by the offerors' submission of final proposal revisions (FPR) by August 16. The Navy's final evaluation ratings of the GD and DRS proposals were as follows:

(...continued)

factors for award. AR, Dec. 19, 2007, at 4. For purposes of this decision, further references to the RFP and/or solicitation refer to the Phase II procurement. Additionally, so as to avoid confusion, the citations within this decision will refer to the "RFP" for CEDS Phase II rather than to the Phase I contracts in which the relevant solicitation provisions are located.

³ We note that another section of the RFP stated that overall technical merit was more important (as opposed to significantly more important) than total evaluated price. Id. at 67.

	GD	DRS
Technical Approach	Outstanding ⁴	Very Good
Management Approach and Capabilities	Outstanding ⁵	Very Good
Past Performance	Outstanding	Outstanding
Evaluated Cost/Price	\$64,809,680	\$80,884,381

AR, Tab 20, Final SSEB Report, at 1-51; Tab 21, Final Cost Evaluation Report, at 1-40.

Importantly, the Navy's evaluation was as much about determining the number of strengths and weaknesses within the offerors' proposals as it was the assigned adjectival ratings. The SSEB found that GD's proposal had 42 strengths (31 major, 11 minor) and no weaknesses under the technical approach factor, 35 strengths (17 major, 18 minor) and no weaknesses under the management approach and capabilities factor, and 16 strengths (13 major, 3 minor) and no weaknesses under the past performance factor. By contrast, the SSEB determined that DRS's proposal had 38 strengths (17 major, 21 minor) and 3 weaknesses (1 major, 2 minor) under the technical approach factor, 29 strengths (17 major, 12 minor) and 2 weaknesses (1 major, 1 minor) under the management approach and capabilities factor, and 19 strengths (13 major, 6 minor) and no weaknesses under the past performance factor. Id., Tab 20, Final SSEB Report, encl. 1, SSEB Briefing Slides, at 13, 16.

On September 7, the SSEB and cost evaluation teams briefed the agency source selection advisory council (SSAC) as to their respective ratings and findings of the offerors' proposals. The SSAC adopted the evaluation findings and ratings without exception and subsequently recommended that contract award be made to GD. Id., Tab 22, SSAC Report, at 1-6. On October 10, after having reviewed the evaluation reports, findings, and recommendations, the source selection authority determined that GD's higher technically rated, lower-priced proposal represented the best value to the government. Id., Tab 23, Source Selection Decision. This protest followed.

⁴ As explained in detail below in footnote 20, during the course of the protest the Navy conceded certain evaluation errors. In light thereof, GD's proposal under the technical approach factor appears to merit a "very good" rather than an "outstanding" rating.

⁵ As with GD's rating under the technical approach factor, given the errors which the Navy concedes occurred, GD's proposal under the management approach and capabilities factor also appears to merit a "very good" rather than an "outstanding" rating.

DISCUSSION

DRS's protest raises numerous challenges to the Navy's evaluation of offerors' proposals. First, the protester alleges that GD had an impermissible organizational conflict of interest that the Navy failed to recognize and take into account in its evaluation of proposals. Second, DRS alleges that the agency failed to engage in meaningful discussions with the firm regarding its technical proposal. Third, the protester contends that the Navy's evaluation of offerors' proposals under the technical and management factors was in various ways improper. Fourth, DRS contends that the Navy performed a flawed cost evaluation of GD's proposal. Lastly, DRS argues that the agency's evaluation of GD's past performance was improper.⁶ As detailed below, we find that the Navy's evaluation of GD's proposal under the past performance factor was improper. Although we do not here specifically address all of DRS's remaining arguments, we have fully considered all of them and find that they are without merit.

Organizational Conflict of Interest

DRS first protests that GD had an organizational conflict of interest (OCI) which the Navy overlooked. Specifically, the protester contends that, with respect to a key CEDS requirement relating to "separation kernels," GD gained inside knowledge and helped to shape this same requirement as the prime contractor for the National Security Agency (NSA) high assurance platform (HAP) program. Despite this allegedly unfair competitive advantage on GD's part, the protester argues, the Navy failed to consider or to mitigate this OCI. Protest, Nov. 19, 2007, at 11-12.

The RFP included both the SOW, which established the contract requirements, and SRD, which established the performance, design, development, and test requirements for the CEDS display console itself. The SRD was developed entirely by the Navy, with no support from GD or any other contractor. AR, Dec. 19, 2007, at 5; Tr. at 22-24. One of the most significant SRD requirements was that regarding the separation kernel. RFP amend. 1, SRD § 3.6.2.3. A separation kernel is essentially a piece of software that creates independent and isolated software program execution environments (*i.e.*, "partitions") so as to keep separate, but process simultaneously, information from different security classifications (*e.g.*, "secret," "top secret") under the same operating system. *Id.*; Tr. at 31-32. The partitions within a separation kernel do not know that other partitions exist, and the information within any one partition cannot be transferred or shared across

⁶ In its original protest DRS also argued that the Navy had made a cardinal change to GD's contract by substantially changing the quantity of CEDS display consoles. DRS Protest, Nov. 19, 2007, at 29-30. At a hearing conducted by our Office as part of our review of the protest, DRS acknowledged that it had abandoned this issue. Hearing Transcript (Tr.) at 257.

partitions. Relevant to the protest here, the SRD separation kernel requirement stated that “the candidate operating system shall meet the requirements of the ‘U.S. Government Protection Profile for Separation Kernels in Environments Requiring High Robustness.’” RFP amend. 1, SRD § 3.6.2.3.

The U.S. Government Protection Profile for Separation Kernels in Environments Requiring High Robustness, also referred to as the separation kernel protection profile (SKPP), is the governmentwide standard for separation kernel operating environments. The record reflects that, beginning in December 2002, the SKPP standard was developed by NSA in support of the F-22 Raptor and Joint Strike Fighter military aircraft programs. AR, Tab 27, NSA Declarations, at 1. The NSA working group that created the SKPP standard consisted of government employees with assistance from MITRE (a federally-funded research and development center) and the Naval Post Graduate School. Additionally, external input to the SKPP standard has been limited to those parties that responded to draft versions of the document that were released for public comment, and did not include GD. Id.

In July 2006, prior to the Navy’s award of Phase I preliminary design contracts for the CEDS program, GD was awarded a separate contract by NSA for the HAP program. GD Comments, Dec. 31, 2007, exh. 2, HAP contract, exh. 3, HAP Statement of Work. In general terms, the HAP program involved the development of a next-generation secure computing workstation and architecture for the military’s Special Operations Command in which information from different security levels could be processed simultaneously. GD’s work on the HAP program required it to deliver to NSA various computing architecture documents, software, running systems, and related program documents. Importantly, none of GD’s work on the HAP program involved the development or the delivery of NSA’s SKPP standard. AR, Tab 27, NSA Declarations, at 2. Further, NSA has not used, nor does it intend to use, any of GD’s work on the HAP program for the development of the SKPP standard. Id.

The record shows that while both CEDS and the HAP program involve processing information from multiple security levels simultaneously, the two programs apply different separation technologies and approaches; the requirements in the two programs here are also qualitatively different. CEDS requires, at a minimum, the ability to simultaneously and separately process information from six different security classifications under the same operating system, while the HAP program involves separating information in two adjacent levels of security classification. CEDS involves a real-time operating system (i.e., the results of one process are available in time for the next computing process which requires the previous result) and the HAP program does not. Further, while CEDS utilizes separation kernel technology that is to be certified by NSA against the most rigorous security assurance requirements, the HAP program does not involve the use or adaptation of a separation kernel, or mandate compliance with the same security assurance requirements. RFP amend. 1, SRD § 3.6.2.3; GD Comments, Dec. 31, 2007, exh. 3, HAP Statement of Work, attach. A, Declaration of Bill Ross, at 4-8. In sum, from the

record before us, it appears that to the extent that GD was familiar with separation kernel technology, it was not as a result of its work on the NSA HAP program.⁷

Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible. Federal Acquisition Regulation (FAR) § 9.504(a)(1). The FAR provides that an OCI exists when, because of other activities or relationships with other persons or organizations, a person or organization is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage. See FAR § 2.101. Situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, are generally associated with a firm's performance of a government contract and can be broadly categorized into three groups: (1) unequal access to information cases, where the primary concern is that a government contractor has access to nonpublic information that would give it an unfair competitive advantage in a competition for another contract; (2) biased ground rules cases, where the primary concern is that a government contractor could have an opportunity to skew a competition for a government contract in favor of itself; and (3) impaired objectivity cases, where the primary concern is that a government contractor would be in the position of evaluating itself or a related entity (either through an assessment of performance under a contract or an evaluation of proposals in a competition), which would cast doubt on the contractor's ability to render impartial advice to the government. Mechanical Equip. Co., Inc. et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 18; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13. DRS's allegation concerning GD here is primarily that it had an unfair competitive advantage as a result of its work under the HAP contract.

We find DRS's central assertion—that as the HAP contractor GD improperly gained inside knowledge and helped to shape the separation kernel standards applicable to the CEDS procurement—to be unfounded. As a preliminary matter, there is no evidence (and DRS does not assert otherwise) that GD had a role in the development of the actual CEDS separation kernel requirements. Further, GD's work on the HAP program did not result in the offeror having a role in the development of NSA's SKPP standard. As set forth above, the record clearly reflects that the HAP program did not involve the use of separation kernel technology, none of GD's work on the HAP

⁷ During the course of the protest, GD provided statements demonstrating that its expertise in separation kernel technology was the result of its long-time involvement in the design of information assurance systems such as encryption equipment. In 1999, as a result of an independent research and development (IR&D) project, GD employees filed a patent application for a mathematically analyzed separation kernel. [Deleted] GD Comments, Dec. 31, 2007, attach. A, Declaration of Bill Ross, at 4-5.

program involved the development or the delivery of NSA's SKPP standard, and none of GD's work product from the HAP program was used by NSA for the development of the SKPP standard.⁸ Further, GD's work on the HAP program was not directly applicable to the much more difficult technology and security assurance requirements set forth in the CEDS SRD: at most, GD's work on the HAP contract taught the offeror what would not work for the CEDS procurement. There is simply no merit to DRS's allegation that GD helped to shape the NSA separation kernel standards that applied to the CEDS procurement, and any exposure that GD had to separation kernel technologies and the corresponding NSA standard was a competitive advantage that the Navy had no duty to neutralize. Gonzales Consulting Servs., Inc., B-291642.2, July 16, 2003, 2003 CPD ¶ 128 at 7; Government Bus. Servs. Group, B-287052 et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

DRS also argues that GD's own technical proposal indicates that the offeror had gained inside information and would be able to influence the NSA SKPP standard. Specifically, the protester points to the following excerpt from the GD proposal:

[Deleted]

* * * * *

[Deleted]

AR, Tab 6, GD Proposal, vol. II, Technical Proposal, at II-4.12.

As a preliminary matter, we note that the protester selectively quotes from GD's proposal here and does not set forth the full, page-length discussion. Further, DRS's reliance on this portion of GD's proposal is misplaced. As discussed above, neither the HAP program nor the CEDS procurement has any role in shaping the NSA SKPP standards and corresponding certification process. We fail to see how the portion of GD's proposal to which the protester cites here suggests otherwise.

DRS also asserts that it was denied a briefing by NSA regarding separation kernel technology, but that such a briefing occurred between NSA and GD, thereby providing GD with an unfair competitive advantage. DRS Comments, Dec. 31, 2007, at 10-11.

⁸ We acknowledge that our findings here are based largely on statements provided by the government and GD employees. However, we see no basis (nor does DRS provide one) to question the accuracy of the statements.

GD's proposal, as part of its separation kernel trade studies analysis, included a statement that [deleted].⁹ AR, Tab 6, GD Proposal, vol. II, Technical Proposal, at II-1.358. By contrast, during the CEDS solicitation process, NSA denied a DRS request for a meeting involving the parties' technical representatives. DRS Protest, Dec, 31, 2007, exh. 8, Email from NSA to DRS.

The record does thus indicate that NSA denied DRS's request for a meeting (presumably regarding separation kernel standards and certification), while GD, as the HAP program contractor, was able to brief NSA on its efforts in developing software separation kernel technology. DRS fails to explain, however, how GD's briefing of NSA (rather than the other way around) provided GD with access to any information that it did not already possess. Further, GD's statement in its proposal to the Navy that NSA had expressed support for its software separation kernel technology and would begin planning to fold it into the HAP program in no way establishes unequal access to information or an unfair competitive advantage on GD's part.

Lack of Meaningful Discussions

DRS protests that the agency failed to hold meaningful discussions with it. Specifically, the protester alleges that the Navy's technical evaluation found only one major weakness in DRS's final proposal—that its proposed separation kernel architecture would violate the SRD requirements for a POSIX-compliant operating system.¹⁰ DRS contends that the Navy never raised this purported weakness with it during discussions. The protester argues that as its proposal explicitly identified its separation kernel architecture, the Navy had a duty to raise any concerns associated with DRS's choice of separation kernel architecture in order for the discussions to be meaningful. Protest, Nov. 19, 2007, at 17-19.

The SRD stated, with regard to the CEDS CEM processing subsystem:

The Display Console hardware shall be capable of loading and supporting any conventional POSIX compliant operating system, which complies with the operating system requirements called out in the [Open Architecture Computing Environment] Technologies and Standards, Sections 4.5 and 5.5. [. . . , and]

⁹ This briefing appears to have occurred in the context of GD being the current HAP program contractor.

¹⁰ POSIX, or portable operating system interface for Unix, refers here to the Navy's open software architecture initiative of ensuring that the CEDS system does not adversely affect any host application software with which it would interface. Tr. at 48-49.

* * * * *

The [operating environment] OE shall be POSIX compliant. The OE shall be designed to maintain compatibility and interoperability between previous and current configurations of equipment.

RFP amend. 1, SRD §§ 3.6.2.1(b)(2)(a), (b)(3)(c).

DRS submitted its technical proposal as part of its initial submission on April 12. DRS's initial proposal did not identify a specific separation kernel vendor or architecture; rather, the proposal identified three possible separation kernel vendors, [deleted], that it was considering.¹¹ AR, Tab 5, DRS's Proposal, vol. II, Technical Proposal, at C-II-221 thru 226. The SSEB evaluated DRS's initial proposal as very good under the management approach and capabilities factor, and as satisfactory under the technical approach factor, and identified various strengths and weaknesses supporting its rating determinations. AR, Tab 11, Initial SSEB Report, at 28-40. The SSEB considered DRS's lack of a definitive separation kernel architecture approach to be a major weakness under both of these evaluation factors.¹² Specifically, the SSEB stated: "The lack of a separation kernel approach will impact the schedule thereby adding risk to the program to meet schedule milestone (i.e., [Critical Design Review], [Test Readiness Review], [Production Readiness Review])," and "Without the selection [of a] separation kernel vendor [DRS's] architecture approach may not be achievable within schedule requirements." Id. at 32, 39.

After making its competitive range determination, the Navy conducted discussions with each offeror, including DRS. Among the list of discussion issues regarding DRS's technical and management proposal, the agency stated:

1. The lack of a selected Separation Kernel approach will impact the schedule thereby adding risk to the program to meet schedule milestone (i.e., Critical Design Review, Test Readiness Review, and Production Readiness Review. This was determined to be a weakness. [. . . , and]

¹¹ DRS's initial proposal also did not identify the specific [deleted] separation kernel product in which it was most interested; instead, DRS listed [deleted] as potential options here. AR, Tab 5, DRS's Proposal, vol. II, Technical Proposal, at II-C-221.

¹² The record indicates that the Navy's use here of the term "major weakness" was synonymous with "significant weakness," that is, a flaw in an offeror's proposal that appreciably increases the risk of unsuccessful contract performance. See FAR § 15.001.

* * * * *

3. Without the selection of a Separation Kernel vendor, the architecture approach may not be achievable within the schedule requirements and was determined to be a weakness.

Id., Tab 14, Agency Discussions with DRS, Encl. 1, List of Discussion Issues, at 1.

In its response to the Navy's discussion questions, DRS addressed the issue of a lack of a selected separation kernel architecture as follows:

Based on our detailed analysis to date, we now have a more specific viewpoint of the [deleted] products. As a result, we firmly believe that it is in our best interest to advance a specific [separation kernel] solution. The specific [deleted] product that we are selecting is the [deleted] solution.

Id., Tab 15, DRS Letter to Navy, encl. 1, Responses to Discussion Items, at 2.

The SSEB considered DRS's discussion responses and subsequent FPR as part of its final evaluation of offerors' proposals. The evaluators determined that DRS's response here generally alleviated the agency's original concern of schedule risk associated with the offeror's lack of a selected separation kernel approach. Id., Tab 20, SSEB Final Report, at 37, 45. However, the SSEB found that DRS's choice of separation kernel [deleted] also caused a new concern, namely that the proposed use of [deleted] as the separation kernel architecture would violate the SRD requirements requiring a POSIX-compliant operating system. The agency considered this to be a major weakness in DRS's final proposal, affecting the offeror's evaluation ratings under various subfactors and both the technical and management prime factors.

Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. See FAR § 15.306(d)(3); American States Utils. Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 6. We review the adequacy of discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Northrop Grumman Info. Tech., Inc., B-290080 et al., June 10, 2002, 2002 CPD ¶ 136 at 6. When an agency engages in discussions with an offeror, the discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. Where proposal defects are first introduced either in a response to discussions or in a post-discussion proposal revision, an agency has no duty to reopen discussions or conduct additional rounds of discussions. L-3 Commc'ns Corp., BT Fuze Prods. Div., B-299227,

B-299227.2, Mar. 14, 2007, 2007 CPD ¶ 83 at 19; Cube-All Star Servs. Joint Venture, B-291903, Apr. 30, 2003, 2003 CPD ¶ 145 at 10-11.

We conclude that the Navy's discussions with DRS were meaningful. As set forth above, the discussions expressly informed DRS of the specific weaknesses that the SSEB had identified in its initial proposal. Further, the record clearly reflects that the specific significant weakness which DRS claims that the Navy failed to mention in discussions was first introduced in DRS's discussion responses and was not part of its initial proposal. As a result, the Navy had no obligation to conduct additional rounds of discussions in order to permit the offeror to address this matter. See L-3 Commc'ns Corp., BT Fuze Prods. Div., *supra*.

DRS does not dispute that its original proposal did not identify its selection of a specific separation kernel architecture, nor does it argue that the Navy's discussions failed to accurately convey the proposal weaknesses originally identified by the SSEB. Nevertheless, DRS alleges that the Navy's discussions were not meaningful insofar as the agency knew that [deleted] was DRS's design choice before discussions with offerors had "closed."¹³ Thus, DRS argues, the Navy did not need to "reopen" discussions here in order to advise DRS that the agency viewed its design choice as a weakness or deficiency. DRS Comments, Dec. 31, 2007, at 17-19.

As a preliminary matter, we see no basis to conclude that discussions closed on any date other than the date on which offerors' responses were due (August 6); the fact that, a week later, the agency confirmed the due date for FPRs has no bearing on this issue. Further, we recognize that there may be certain situations where, given the manner in which the discussions are held, the agency may not remain silent when an offeror introduces a matter during discussions which the agency regards as a proposal defect. *E.g., Voith Hydro, Inc.*, B-277051, Aug. 22, 1997, 97-2 CPD ¶ 68 at 3 (where, in written response to an area of weakness identified by agency, protester introduced a new weakness, and agency and protester thereafter engaged in oral discussions, agency was required to advise offeror that it regarded the new matter as a weakness). This case does not involve such a situation. The record here reflects that the Navy's discussions with offerors were conducted in writing, and did not at

¹³ The record reflects that the Navy conducted discussions in writing by sending each offeror a letter containing discussion questions on July 20; the agency also requested that offerors submit their discussion responses in writing by August 6. AR, Tab 14, Navy Discussions with DRS; Tab 16, Navy Discussions with GD. DRS submitted its discussion responses on August 6, *id.*, Tab 15, DRS Discussions Responses, and on August 13 the Navy confirmed an earlier notice to the offerors that FPRs were due by August 16. DRS Protest, Dec. 31, 2007, exh. 9, Navy Email to Offerors. DRS argues that the agency's discussions with offerors did not close until the day on which the Navy confirmed the FPR closing date (August 13), rather than the date upon which discussion responses were due (August 6).

any point involve back-and-forth exchanges of information. Further, the SSEB did not complete its evaluation of DRS's discussions responses, and first identify DRS's selection of [deleted] as a proposal defect, until September 13, well after discussions had ended and FPRs had been submitted. In sum, under the circumstances here, the agency was not required to conduct additional discussions regarding this defect. Operational Res. Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 12; MD Helicopters, Inc.; AgustaWestland, Inc., B-298502 et al., Oct. 23, 2006, 2006 CPD ¶ 164 at 48 n.47.

Evaluation of GD's Technical Proposal

DRS protests that the Navy's evaluation of GD's technical proposal was improper. The protester argues that the agency should have rejected GD's proposal as technically unacceptable because it failed to comply with all SRD requirements. DRS cites to two specific CEDS display screen requirements--those involving the display of acoustic "waterfall" (*i.e.*, flicker-free) data¹⁴ and color resolution--that GD's proposal allegedly failed to meet.¹⁵ Based on these specific instances of noncompliance, the protester maintains, the Navy should have found GD's proposal technically unacceptable overall and ineligible for award. DRS Protest, Nov. 19, 2007, at 19-22.

In reviewing an agency's evaluation, we will not reevaluate technical proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and procurement statutes and regulations. Urban-Meridian Joint Venture, B-287168, B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 2. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. Our review of the record here shows the agency's evaluation of GD's proposal to be unobjectionable.

The solicitation informed offerors that proposals were to be sufficiently detailed so as to enable the agency to make a thorough evaluation and to arrive at a sound determination as to whether or not the prospective offeror would be able to perform

¹⁴ Acoustic waterfall display refers to the graphical representation of noise data (*i.e.*, sonar) with respect to time. As time progresses, data is added to the top of the display screen and the existing data moves down. An improper display screen can flicker or flash over time, thereby causing eyestrain and/or headaches to the operator who is monitoring the acoustic waterfall display. Tr. at 170-73.

¹⁵ DRS originally alleged that GD's proposal also was noncompliant with the CEDS SRD requirement for hard-mounting. DRS Protest, Nov. 19, 2007, at 22. The protester subsequently withdrew this aspect of its challenge to the agency's evaluation of GD's technical proposal. DRS Protest, Dec. 31, 2007, at 20.

in accordance with the stated requirements. RFP amend. 1, Instructions to Offerors, at 42. The RFP also stated that “[i]f one (1) or more of the evaluation Factors or Subfactors are determined to be Unsatisfactory, the entire proposal may be rendered technically unacceptable and ineligible for award.”¹⁶ Id. at 74 (emphasis omitted).

The SRD contained hundreds, if not thousands, of requirements for the CEDS system. SRD section 3 established the actual CEDS system requirements while SRD section 4 established the test standards by which the Navy would verify the successful offeror’s compliance with the section 3 requirements. Tr. at 176, 183-84. Relevant to the protest here, the SRD included the following requirements regarding the CEDS display screens:

Acoustic Data. The screens shall be suitable for displaying acoustic “waterfall” data.

1. The screen shall be capable of displaying dense high-contrast shifting images (such as a sonogram “waterfall” output) without causing eyestrain to an operator as defined by MIL-STD-1472 and ASTM F1166. [. . . , and]

* * * * *

ECDIS-N. The display console shall be Electronic Chart Display and Information System – Navy (ECDIS-N) certifiable. Graphics capabilities shall be compatible with and meet the requirements to display navigation applications [in accordance with Operational Navy Instruction] 9420.2 (ECDIS-N performance requirements).

RFP amend. 1, SRD §§3.6.1.1(d)(1), 3.6.2.1(e)(7). The SRD’s display screen requirements were not new or developmental in nature; the Navy had used similar standards for its predecessor display console system, the Q70, which the contractor there had been able to successfully achieve. Tr. at 173.

GD’s technical approach proposal, consisting of more than 500 pages, included sections which addressed both the “waterfall” data display and color resolution requirements. Specifically, the proposal described GD’s [deleted], as well as the various functional and performance properties of its display consoles in relation to the SRD requirements. AR, Tab 6, GD’s Proposal, vol. II, Technical Proposal, at II.1.106 thru 112, 296 thru 302. GD’s proposal also expressly represented that its

¹⁶ The RFP defined “unsatisfactory” as follows: the proposed approach indicates a lack of understanding of the program goals and the methods, resources, schedules and other aspects essential to performance of the program; numerous weaknesses and deficiencies exist; and the risk of unsuccessful contract performance is high. Id. at 74.

display screens would be suitable for displaying acoustic waterfall data in accordance with SRD § 3.6.1.1(d), and provided information as to how GD would achieve the requirement.¹⁷ Id. at II.1.112. Further, GD's proposal represented that its display screens would comply with the color requirements of ECDIS-N and applicable Navy instruction. Id., app. B, Requirements Verification Test Matrix, at 23; Tab 32, GD Prime Item Development Specification, at 86.

The record shows that, when evaluating offerors' proposals, the SSEB clearly considered certain SRD requirements to be more challenging than others. The evaluators believed the separation kernel requirements to be very demanding insofar as the work here was almost developmental in nature and had not been achieved before. Tr. at 32-33. By contrast, the SSEB did not consider the CEDS display screen requirements to be as difficult to meet. Tr. at 179-80. The evaluators were aware that the display screen requirements here were similar to those successfully achieved on the Navy's prior Q70 display system, that GD had previously produced display systems which displayed acoustic waterfall data for Navy attack submarines, and that several other commercial companies produced display systems that met SRD requirements. Tr. at 173-75. In light of this information, as well as the market surveys that the Navy had performed prior to release of the RFP here, the evaluators were not significantly concerned about the ability of offerors to meet the SRD display screen requirements. See Tr. at 179-81, 189.

The SSEB determined that GD's proposal met or exceeded all solicitation requirements. AR, Tab 20, Final SSEB Report, at 11-25. Relevant to the protest here, the evaluators found that GD's proposal met (but did not exceed) the SRD display screen requirements regarding both acoustic waterfall display and color resolution. Tr. at 171. The SSEB concluded that, given the perceived degree of difficulty of the display screen requirements here as well as the information provided by GD in its proposal, the offeror both understood and expressly agreed to comply with the SRD requirements. Tr. at 233-34.

We conclude that the agency's evaluation of GD's technical proposal was reasonable and consistent with the stated evaluation criteria. As a preliminary matter, DRS confuses the actual SRD requirements with the standards by which the Navy would later test the successful offeror's CEDS system for compliance. It was only SRD section 3 that established the actual requirements which offerors' proposals were to address, and there was simply no requirement that proposals also address the SRD test verification standards. Additionally, while the RFP required proposals to provide sufficient detail to determine whether the offeror would be able to perform

¹⁷ Additionally, the requirements verification test matrix portion of GD's proposal also represented that its display screens would comply with the SRD requirements regarding acoustic waterfall data. Id., app. B, Requirements Verification Test Matrix, at 5.

in accordance with the stated requirements, the RFP did not require offerors to demonstrate that they had already achieved the SRD requirements in order to be found technically acceptable. The record reflects that GD's proposal addressed both of the SRD requirements that DRS claims were lacking.¹⁸

DRS argues that GD's proposal should have been found to be technically unacceptable because it did little more than recite, or "parrot back," the SRD requirements in these two specific areas. The protester maintains that an offeror's ability to quote a specification verbatim does not establish technical compliance. DRS Comments, Jan. 18, 2008, at 30.

A proposal with significant informational deficiencies may be found technically unacceptable, and an offeror's extensive parroting of an RFP's requirements may be considered as evidence of the offeror's failure to demonstrate a clear understanding of those requirements. See Government Telecomms., Inc., B-299542.2, June 21, 2007, 2007 CPD ¶ 136 at 5; Wahkontah Servs., Inc., B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 7. Here, however, the record reflects that GD's proposal was extremely detailed in nature, fully demonstrating that the offeror understood and would meet the CEDS requirements. While GD's proposal may not have been as detailed in these two specific areas as it was in other parts, we have no basis to conclude that the agency's determination that GD's proposal was technically acceptable was unreasonable.¹⁹ We find DRS's challenge to the Navy's evaluation amounts to mere disagreement with the agency's judgment and, thus, does not establish that the evaluation was unreasonable. JAVIS Automation & Eng'g, Inc., B-293235.6, Apr. 29, 2004, 2004 CPD ¶ 95 at 5.

Evaluation of DRS's Technical Proposal

DRS protests that the Navy's evaluation of its technical proposal was improper in various ways. The protester primarily argues that DRS was treated unequally in the evaluation process.²⁰ DRS maintains that in many instances, under both the technical

¹⁸ DRS also argues that GD's proposed approach to meeting the display screen acoustic waterfall data requirements will not work "as a matter of science." DRS Comments, Jan. 18, 2008, at 29-30. Even if we assume that GD's proposed approach here will ultimately not meet all display screen requirements without modifications, however, that does not mean that the agency miscalculated the offeror's proposal.

¹⁹ The record also reflects that the Navy's evaluation of proposals was even-handed in this regard: in those instances where DRS's proposal also agreed to comply with the SRD requirements without providing details as to how, the SSEB likewise did not find this to be a deficiency or weakness. Tr. at 143.

²⁰ DRS's protest also raised other issues regarding the evaluation of its technical proposal, many of which were resolved by the agency's acknowledgment of error. In
(continued...)

and management factors, the Navy failed to recognize various aspects of DRS's proposal as strengths even though DRS's proposal was identical to that of GD and the agency determined that GD's proposal warranted strengths in these same areas. Although we do not address all of the protester's arguments regarding the agency's evaluation of its proposal, including all the alleged "unrecognized DRS strengths," we have fully considered them all and find no basis upon which to sustain the protest.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5; CRAssociates, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63 at 5. Our review of the record confirms that the Navy evaluated offerors' proposals equally under the technical and management factors, and that the difference in evaluation ratings here was not the result of unequal treatment by the agency but instead stemmed from the agency's recognition of differences in the offerors' proposals.

For example, DRS argues that because the Navy found GD's proposal to have several major strengths for its separation kernel solution [deleted], the agency should have likewise found similar strengths in DRS's proposal. Protest, Dec. 31, 2007, at 31-33. The SSEB determined that GD's proposal warranted strengths in this area because the offeror had established [deleted] in which the GD [deleted] the separation kernel software architecture needed for the CEDS system. AR, Tab 6, GD Proposal, vol. II, Technical Proposal, at II.1-358; Tab 19, GD FPR, at 1; Tab 20, Final SSEB Report, at 15, 23-24; Tr. at 52-66. The evaluators believed that GD's [deleted] would result in [deleted] solution, thereby reducing the risk associated with providing and certifying the separation kernel architecture. AR, Tab 20, Final SSEB Report, at 15, 23-24; Tr. at 56. By contrast, the SSEB determined that although DRS's FPR included [deleted].

(...continued)

its report to our Office, the Navy conceded that because GD [deleted], the awardee's proposal should have received similar major weaknesses under the technical and management factors for failing to comply with the SRD requirement for a POSIX-compliant operating system. AR, Dec. 19, 2007, at 28. The Navy also acknowledges that, with regard to the System Test and Qualification subfactor, DRS's proposal should have received a rating of "outstanding" rather than "very good." Id. at 32. Lastly, the Navy admits that DRS's proposal should have received two additional major strengths--equivalent to those given to GD--for data rights and open architecture assessment tool. Id. at 35; Tr. at 261-62. In sum, the Navy acknowledges that DRS's proposal merited two additional major strengths and that GD's proposal should have received two major weaknesses. In accordance with the RFP's stated evaluation scheme, the acknowledged errors would appear to result in the GD and DRS proposals having equivalent overall ratings of "very good" under both the technical approach and management approach and capabilities factors.

AR, Tab 18, DRS FPR, at II.C-234f, 1; Tr. at 57-62. Additionally, as DRS's proposal did not reflect an [deleted], the fact that the offeror planned to [deleted] did not alleviate the SSEB's concerns that the [deleted] development of hardware and software could increase performance risk. Tr. at 61-62.

In our view, the agency's evaluation of DRS's proposal here was reasonable and consistent with the stated evaluation criteria. First, the SSEB reasonably judged GD's [deleted] to be of value to the agency, thereby warranting strengths in this regard. Further, the SSEB reasonably determined that DRS's proposal did not evidence the same [deleted] as existed in GD's proposal. The agency reasonably determined that the proposals of GD and DRS were different in this regard and in light thereof, rated the proposals differently.

Cost/Price Evaluation

DRS protests that the Navy failed to perform a proper evaluation of GD's cost and price proposal. Specifically, the protester alleges that the agency's cost analysis failed to adequately consider whether the awardee's proposed costs were realistic to perform the work required by the RFP. In conjunction with its assertion that GD's proposed display glass fails to meet all SRD requirements, DRS alleges that the cost of SRD-compliant glass is [deleted] greater than that proposed by GD and that this accounts for approximately [deleted] of the cost difference between the offerors' proposals.²¹ The protester also maintains that GD's technical noncompliance would result in cost increases to the Navy during contract performance, and the agency's failure to reasonably determine GD's realistic costs adversely affected the resulting source selection decision.²² DRS Protest, Nov. 19, 2007, at 27-28.

The reasonableness of an agency's cost or price evaluation is directly related to the financial risk that the government bears because of the contract type it has chosen.

²¹ DRS bases its figure here on the alleged higher cost of SRD-compliant display glass, the fact that three pieces of glass were required for each CEDS display console, and the requirement of 601 CEDS production units. DRS Protest, Nov. 19, 2007, at 28 n.4. The protester provides no further support for its computation.

²² DRS also originally asserted that the Navy's cost evaluation was flawed because GD had offered "cheap versions of major cost drivers" (e.g., trackball, keyboard, joystick) and that GD's labor rates for program services appeared understated. DRS Protest, Nov. 19, 2007, at 27. The agency addressed all aspects of its evaluation of GD's cost/price proposal in its report to our Office. AR, Dec. 19, 2007, at 35-39. As DRS's comments did not again raise these aspects of the Navy's cost evaluation of GD's proposal, see DRS Comments, Dec. 31, 2007, at 62-63, we regard these issues as abandoned. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 4 n.4.

When an agency evaluates proposals for the award of a cost-reimbursement contract (or cost-reimbursement portion of a contract), an offeror's proposed costs of contract performance are not considered controlling because, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. FAR § 16.301-1; Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 9. Consequently, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs represent what the contract performance should cost, assuming reasonable economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13; The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. By contrast, when an agency evaluates proposals for the award of a fixed-price contract (or fixed-price portion of a contract), in which the government's liability is fixed and the contractor bears the risk and responsibility for the actual costs of performance, see FAR §16.202-1, the analysis of an offeror's price need only determine that the price offered is fair and reasonable to the government (i.e., price reasonableness), and focuses primarily on whether the offered price is higher--as opposed to lower--than warranted.²³ See CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4; WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 4 n.2.

As set forth above, the RFP contemplated the award of an ID/IQ contract including both fixed-price and cost-reimbursement CLINs, as follows:²⁴

²³ Likewise, a realism analysis is not ordinarily part of an agency's price evaluation because of the allocation of risk associated with a fixed-price contract. AST Envtl. Inc., B-291567, Dec. 31, 2002, 2002 CPD ¶ 225 at 2. To the extent an agency elects to perform a realism analysis in the competition for a fixed-price or fixed-price incentive contract, its purpose is not to evaluate an offeror's price but to assess risk or to measure an offeror's understanding of the solicitation's requirements; the offered prices may not be adjusted as a result of the analysis. FAR § 15.404-1(d)(3); Puglia Eng'g of California, Inc., B-297413 et al., Jan. 20, 2006, 2006 CPD ¶ 33 at 6.

²⁴ The RFP's other CLINs were either not separately priced, or expressly not part of the agency's cost and price evaluation. RFP § B at 1-7.

CLIN	Supply or Service	Contract Type
0003	First Article Unit	Cost Plus Award Fee
0005	Production Units - Year 1	Fixed Price Incentive ²⁵
0006	Production Units -- Years 2 thru 4	Firm Fixed Price
0007	Spares & Installation Checkout Hardware	Firm Fixed Price
0008	Performance Based Logistics	Firm Fixed Price
0010	Program Services	Cost Plus Award Fee
0011	Technical & Engineering Services	Cost Plus Award Fee
0013	Training Services	Time and Materials

RFP § B, at 1-7. The RFP also informed offerors how the agency would perform its cost/price evaluation and specified the unit quantities to be considered for each CLIN (e.g., CLINs 0005 and 0006 involved a total of 601 CEDS display consoles and 127 CEMS). RFP amend. 3, at 3.

The Navy's cost/price evaluation of the GD and DRS FPRs, as corrected, was as follows:²⁶

CLIN	GD Proposed	GD Evaluated	DRS Proposed	DRS Evaluated
0003	[deleted]	[deleted]	[deleted]	[deleted]
0005/0006	[deleted]	[deleted]	[deleted]	[deleted]
0007/0008	[deleted]	[deleted]	[deleted]	[deleted]
0010	[deleted]	[deleted]	[deleted]	[deleted]
0011	[deleted]	[deleted]	[deleted]	[deleted]
0013	[deleted]	[deleted]	[deleted]	[deleted]
Total	\$67,960,422	\$67,958,161	\$84,335,367	\$84,313,512

AR, Dec. 19, 2007, at 38; AR, Tab 21, Final Cost Evaluation Report, at 33-40.

As shown above, the offerors' evaluated costs/prices were essentially the same as those the offerors proposed. In fact, the only instance where the agency took exception to the costs and prices as proposed and made certain minor adjustments

²⁵ As contemplated here, a fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. See FAR § 16.403-1.

²⁶ In its report to our Office, the Navy acknowledged certain computational errors in its final cost evaluation report. AR, Dec. 19, 2007, at 38. DRS's protest does not challenge the propriety of these adjustments.

was with regard to cost-reimbursement CLIN 0003, the first article unit. AR, Tab 21, Final Cost Evaluation Report, at 8-11.

DRS maintains that the Navy's cost realism evaluation of GD's proposal was unreasonable, not because GD's proposed costs are unrealistic in comparison to the particular methods of performance and materials described in the offeror's technical proposal, but rather because GD's proposed costs are unrealistic in comparison to the work to be performed (specifically, the SRD display glass requirements). The protester alleges that because GD's proposed display glass was noncompliant and would thereby result in cost increases to the government for the entire duration of the CEDS program, the Navy failed in its duty to perform a proper cost realism evaluation. We disagree.

As a preliminary matter, we note that most of the CLINs here either did not involve display glass or were fixed-price in nature. Specifically, CLINs 0010, 0011, and 0013 do not involve display glass. Further, the majority of CLINs which involve display glass (0005 thru 0008) are fixed-price, thereby establishing contractual limits on the Navy's cost liability. In fact, the only CLIN that both involves display glass and is cost-reimbursement in nature is CLIN 003, the First Article Unit. By contrast, DRS's assertion that approximately [deleted] of the cost difference between the offerors' proposal is attributable to GD's noncompliant display glass is based on consideration of the fixed-price production units. Quite simply, the cost-reimbursement portion of the CEDS procurement involving display glass, for which DRS alleges the Navy failed in its duty to perform a proper cost realism analysis, was limited to the first article unit. Moreover, as DRS's assertion that the Navy failed to perform a proper cost realism analysis of GD's proposal is factually premised on the claim that the awardee's technical proposal was noncompliant, as we have determined that the Navy's technical evaluation of GD's proposal was reasonable, we also find no merit in the protester's indirect challenge here to the agency's technical evaluation of proposals.

Past Performance Evaluation

DRS challenges the agency's evaluation of GD's past performance. The protester maintains that the Navy failed to properly consider various adverse past performance information regarding GD when conducting its evaluation. DRS also argues that various strengths which the SSEB identified in its evaluation of GD's past performance are inconsistent with the underlying past performance information regarding the awardee. DRS argues that, in light thereof, the agency's decision to rate GD's past performance as "outstanding," and equivalent to that of the protester, was inconsistent with the RFP's stated evaluation criteria. The protester also contends that it was prejudiced as a result of the Navy's flawed past performance evaluation here.

As a general matter, the evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3; OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offerors' past performance. Clean Harbors Env'tl. Servs., Inc., *supra*. As detailed below, the agency's past performance evaluation here did not meet this standard.

The RFP instructed offerors, with regard to past performance, to demonstrate "how the proposed team's past experience and quality performance on programs of similar complexity make it qualified to execute the CEDS program (describe relevant and pertinent past performance for prime and major subcontractors)." RFP amend. 1, Instructions to Offerors, at 58. Offerors were also required to submit relevant experience—that is, contracts on-going or completed in the previous 5 years that involved work similar to the CEDS procurement in terms of technology, type of effort (development, production, and maintenance), contract scope, schedule and risk—for evaluation.²⁷ *Id.* at 60. Additionally, as part of its evaluation of offerors' past performance, the agency reserved the right to obtain information from sources other than those provided by the offerors. *Id.* at 58.

The NAVSEA contracting officer gathered and provided to the SSEB the offerors' past performance information. The past performance information regarding GD consisted of both contractor performance assessment reports (CPAR) and past performance questionnaires for the offeror itself and its proposed subcontractors.²⁸ AR, Tab 6, GD Past Performance Information. Relevant to the protest here, the GD past performance information also included a CPAR for General Dynamics [deleted]

²⁷ The RFP also established that, with regard to the past performance evaluation factor, the agency would assign a rating of "neutral" where the offeror was found not to have relevant past performance. *Id.* at 74.

²⁸ The GD past performance information consisted of: one CPAR for GD business unit [deleted]; three CPARs for proposed subcontractor [deleted]; two CPARs for proposed subcontractor [deleted]; one CPAR for proposed subcontractor [deleted]; and two past performance questionnaires each for GD, [deleted]. AR, Tab 6, GD Past Performance Information.

regarding its performance of the Navy's multifunctional cryptographic systems (MCS) contract.²⁹

The MCS CPAR was very negative in its assessment of the contractor's performance. Specifically, GD [deleted] received ratings of "unsatisfactory" for the areas of technical (quality of product), schedule, and cost control, and "marginal" for management. Id., MCS CPAR, at 2. The CPAR found the reliability of the delivered MCS product to be of concern: "Given the number of software defects and performance issues with the baseline, the government began to question the viability of the product in terms of long-term performance and reliability for the Fleet." Id. at 3. The CPAR also found program schedule growth to be of concern: numerous software problems and extensive regression testing periods caused repeated delays resulting in the government questioning "the viability of the product and the loss of confidence in the program that it would achieve the planned capability performance for MCS." Id. The CPAR also found cost control to be a significant concern: "The government's concern with the contractor's cost projections was based on the contractor's inability to adequately estimate the remaining efforts; this has been an on-going issue throughout the life of the program." Id. Additionally, notwithstanding the contractor's view that the problems experienced here resulted from Navy-furnished information and equipment, the CPAR reflects that the agency reviewing official agreed with the agency assessing official's evaluation here. Id. at 4-5.

The SSEB rated GD's past performance as "outstanding" overall and determined that the awardee's proposal had 16 strengths (13 major, 3 minor) and no weaknesses under this evaluation factor. Among the various strengths the SSEB found relating to GD's past performance were:

- Majority (three out of four) CPARs reviewed for the Contractor, rated [deleted] as exceptional or very good in technical, product performance, systems engineering, logistics support/ sustainment, schedule, cost control and management (Major).
- Contractor provided 8 non-[contract data requirements list] deliverables which provided advanced insights into the Contractor's management plans and processes (i.e., QA Plan, Program Management Plan and Risk Plan) (Major).
- GD[] met schedule for Phase I deliverables, and provided drafts of 8 deliverables not required yet for Phase I (e.g., [quality assurance] plan, SEMP, T&E Plan), thus reducing risk of on-time delivery of awarded contractor for Phase II (Major).

²⁹ The MCS contract involved the design, development, fabrication, testing and fielding of a programmable, multi-channel, multiple independent levels of security (MILS) cryptographic device for the Navy's Virginia- and Seawolf-class submarines.

AR, Tab 20, Final SSEB Report, at 30. Importantly, the SSEB's report did not mention the adverse CPAR ratings regarding the MCS contract. The agency evaluation report also did not indicate to what extent, if at all, the agency considered the relevance of the past performance information received regarding GD. Id.

In its protest, DRS argued that the Navy had improperly disregarded adverse past performance information regarding GD. The protester maintained that the agency evaluation report failed to recognize and take into account the MCS CPAR, even though it was relevant to every past performance subfactor. DRS argued that the Navy's failure to take this adverse past performance information regarding the awardee into account constituted a departure from the stated evaluation criteria that was prejudicial to DRS. Protest, Dec. 31, 2007, at 53-58.

In its report to our Office, the Navy originally argued that the SSEB had reasonably disregarded the MCS CPAR as part of its evaluation of GD's past performance. The agency contended that only two specific divisions of General Dynamics--[deleted]--would be involved in performing the CEDS work here, while the MCS CPAR involved another GD division--[deleted]. Because the past performance information involved a General Dynamics division that would not be performing work on the CEDS project, the agency argued, it was reasonable not to consider this information as relevant in the evaluation of the awardee's past performance.³⁰ AR, Jan. 11, 2008, at 34.

In its comments to the agency report, DRS provided information to demonstrate that GD [deleted] was in fact [deleted]. Specifically, GD [deleted] had been merged by the parent company into [deleted] "with the integrated unit continuing to operate as [deleted]." DRS Comments, Jan. 18, 2008, at 20. Quite simply, DRS argued, the specific General Dynamics division mentioned in the adverse MCS CPAR was one of the two General Dynamics divisions that the agency acknowledged would be performing the CEDS work here. Thus, the protester maintained, the Navy's stated factual basis for not considering the MCS CPAR was completely inaccurate. Id. at 19-20.

At the hearing conducted by our Office, the SSEB chairman originally testified that the agency evaluators did not see and did not consider the MCS CPAR as part of their evaluation of GD's past performance. Tr. at 203-05. The Navy, however, subsequently introduced evidence that the MCS CPAR had in fact been considered by the SSEB in its evaluation of GD's past performance insofar as the evaluation

³⁰ The agency also furnished a declaration from the SSEB chairman stating that the evaluators had considered only past performance information for the divisions of General Dynamics that would actually perform work under the CEDS contract, namely [deleted], as well as proposed subcontractors. AR, Tab 31, Declaration of SSEB Chairman, at 1.

report included specific findings that could only be attributable to the MCS CPAR.³¹ Id. at 366-70. The SSEB chairman stated, however, that he still had no recollection of ever having considered the MCS CPAR as part of the agency's evaluation of GD's past performance. Id. at 361, 368-69, 376. For example, the following exchange took place with the SSEB chairman:

Q: [C]orrect me if I'm wrong. You stated you don't remember considering the GD CPARs on MCS, correct?

A: I believe I stated I don't recall seeing it.

Q: Do you recall evaluating it?

A: If I didn't see it, how can I actually evaluate it?

Q: You mentioned that you had a conversation with the deputy on the SSEB, is that correct?

A: Yes.

* * * * *

Q: And your recollection of that discussion with the deputy was that he also did not remember this CPARs?

A: That's what he told me.

Q: If you don't remember seeing it and the deputy doesn't remember seeing it, how do you know that you gave it proper consideration in the agency's past performance evaluation of GD?

A: I don't know.

Id. at 407-08.

At the hearing conducted by our Office, the SSEB chairman also discussed how the evaluators considered the relevance of offerors' past performance information. At one point the lead evaluator indicated that the determination of whether an offeror's past performance was similar to the work to be performed was based on whether it involved the delivery of equipment: "We would look at the CPARs. We looked at the work. If it was similar in terms of they were producing a piece of equipment, we

³¹ In response to questioning from the agency, the SSEB chairman concluded that two of the strengths identified in the evaluation report regarding GD's past performance (i.e., "[t]he Contractor developed, produced and certified a MILS system on a submarine without benefit of required [government-furnished equipment/government-furnished information] GFE/GFI (Major)," and "[t]he contractor managed to certify a MILS system installed on a submarine without benefit of the required GFE/GFI which is perceived as a risk reducer to meeting the separation kernel requirement (Major)") derived from the contractor's rebuttal in the MCS CPAR. Tr. at 366-69; AR, Tab 20, Final SSEB Report, at 30.

would count that as being similar.” Id. at 214. At another point, the following exchange occurred with the SSEB chairman:

Q: Did you give some references or some CPARs more weight than others because they were – they were the same or similar, they were more relevant to the work here?

A: I believe we evaluated and gave credit for every CPARs we received.

* * * * *

Q: I’ve looked at the SSEB report. . . . I did not see in here the agency’s –the agency saying that some of the references were more relevant than others. Am I missing anything?

A: No. We treat[ed] them all equally.

Q: Regardless of relevance? And what if it was really good past performance, but it has nothing to do with the technology of CEDS. How much weight do you give that? Do you think that that should be weighed equally to something that is highly relevant and high quality?

A: No.

Id. at 211-13.

The SSEB chairman also indicated that at least one of the strengths identified in the agency’s report regarding GD’s past performance was inaccurate. As set forth above, the SSEB report considered as a major strength the fact that a majority (i.e., three out of four) of the CPARs for proposed subcontractor [deleted] rated its performance as either exceptional or very good. The SSEB chairman acknowledged that this finding was inaccurate, and that instead two of the four CPARs for [deleted] had rated its performance as either outstanding or very good. Id. at 404.

We conclude that the agency’s evaluation of GD’s past performance was not reasonable or consistent with the stated evaluation criteria. Of foremost concern, the record indicates that the Navy failed to give meaningful consideration to all the relevant past performance information that it possessed regarding GD. The evaluation report reflects that the SSEB was aware of, and apparently considered to some degree, the CPAR regarding the MCS contract. The agency cannot provide an explanation, however, as to why the contractor’s self-serving rebuttal (which the Navy reviewing official for the MCS CPAR did not accept) merited two major strengths, while the extremely adverse information and ratings regarding the contractor’s performance in the areas of technical, schedule, cost control, and management were completely ignored. Tr. at 378. Additionally, the SSEB chairman admits having no recollection that he ever saw or considered the MCS CPAR and, as

a result, we cannot say that the Navy gave proper consideration to this adverse past performance information in its evaluation.³² We fail to see how the agency can properly evaluate an offeror's past performance when its evaluators admittedly do not remember if all the past performance information was in fact considered.

The record also reflects that the Navy failed to adequately consider the relevance of GD's past performance information as part of the evaluation. An agency is required to consider the similarity or relevance of an offeror's past performance information as part of its evaluation of past performance. See FAR § 15.305(a)(2) (the relevance of past performance information shall be considered); United Paradyne Corp., B-297758, Mar. 10, 2006, 2006 CPD ¶ 47 at 5-6; Clean Harbors Envtl. Servs., Inc., supra.

The RFP here instructed offerors to provide past performance information that was "relevant and pertinent," and later defined "relevant" as similar to the CEDS procurement in terms of technology, type of effort, contract scope, schedule, and risk. RFP amend. 1, Instructions to Offerors, at 60, 62. The record does not reflect that the agency adequately considered whether GD's past performance information was in fact similar to the CEDS procurement in accordance with the RFP.

The CPARs and questionnaires upon which the SSEB based their evaluation of GD's past performance furnished adjectival ratings and narratives regarding the quality of an offeror's performance in various areas. The contemporaneous evaluation report does not indicate that the agency went beyond considerations of quality and also considered the relevance of the offerors' past performance references. The SSEB's evaluation findings regarding GD concern the quality of the offeror's prior performance and indicate equal consideration of the offeror's past performance references without regard to relevance. Further, at the hearing conducted by our Office, the SSEB chairman's statements were, at best, ambiguous as to the agency's consideration of relevance. Specifically, the lead evaluator indicated that the SSEB gave equal consideration to all the offeror's past performance references, irrespective of relevance, and that the determination of what past performance was deemed "similar" was based simply on whether the prior work involved producing a piece of equipment. As the RFP required the agency to determine whether an offeror's past performance was similar to the CEDS procurement in terms of technology, type of effort, contract scope, schedule, and risk, we conclude that the agency did not properly consider the relevance of GD's past performance in its evaluation.

³² Further, the record reflects that this is more than just the faulty memory of a single individual: the SSEB chairman stated that his deputy also had no recollection of having seen or considered the MCS CPAR as part of the Navy's evaluation.

The record also reflects various inaccuracies in the SSEB report regarding GD's past performance. As detailed above, the SSEB chairman admits that one of the strengths given to GD—that a majority of the CPARs for [deleted] rated it as exceptional or very good—was factually inaccurate. Moreover, the two strengths given to GD related to its MCS CPAR are redundant, as well as based entirely on assertions by the contractor with which the Navy reviewing official there did not agree. In addition, GD received a major strength for certain CEDS document deliverables that provided insight into the contractor's management plans and processes—a fact that has nothing to do with past performance. In sum, several of the SSEB's specific findings regarding GD's past performance are without factual justification.

The Navy argues that notwithstanding any deficiencies in its evaluation of GD's past performance, the protest here should not be sustained because DRS was not prejudiced. Specifically, the agency maintains that given GD's significant advantage over DRS in the technical approach factor,³³ and the relative importance of the technical approach and past performance evaluation factors, it is impossible for DRS to be found technically superior to GD overall, thereby requiring a price/technical tradeoff which the agency did not originally have to make. In support thereof, the agency points to the fact that it was GD's undisputed technical advantages (*i.e.*, strengths that existed only in GD's proposal) upon which the SSAC exclusively relied for its determination that GD's proposal was technically superior to that of DRS. Accordingly, the Navy argues, none of the alleged deficiencies regarding the agency's evaluation of GD's past performance can possibly change the conclusion that GD's proposal was technically superior overall to that of DRS. AR, Feb. 14, 2008, at 2-11, 22-24.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

We recognize that GD's proposal was found to have technical strengths that DRS's did not, and that the RFP established that the technical approach factor was more important than the management approach and capabilities factor, which in turn was more important than the past performance factor. However, as detailed above, the record shows that the Navy's evaluation of GD's past performance was fundamentally flawed: it failed to adequately consider all relevant information; it

³³ The Navy also contends that, with regard to the management approach factor, the offerors' proposals are substantially equal, although GD maintains a comparative advantage based on one additional minor weakness in DRS's proposal. AR, Feb. 14, 2008, at 2.

failed to adequately consider the relevance of the offeror's past performance information; and several of the identified strengths are factually inaccurate and/or redundant. In light of these significant deficiencies in the agency's evaluation of GD's past performance, we simply cannot reasonably determine what GD's rating--or its strengths and weaknesses--should have properly been here. By contrast, in light of the errors which the Navy concedes occurred in other aspects of its evaluation of GD's proposal, it appears that the GD and DRS proposals have equivalent overall ratings of "very good" under both the technical approach and management approach and capabilities factors, and DRS received an "outstanding" rating for its past performance. Consequently, as we cannot determine that GD's proposal would remain technically superior overall, we conclude that the agency's actions here were prejudicial to the protester.

RECOMMENDATION

We recommend that the agency reevaluate offerors' past performance, giving due consideration to all relevant information as well as the relevance of the offerors' prior and current contracts and, based on that reevaluation, make a new source selection determination. If, upon reevaluation of proposals, DRS is determined to offer the best value to the government, the Navy should terminate GD's contract for the convenience of the government and make award to DRS. We also recommend that DRS be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, limited to the costs relating to the ground on which we sustain the protest. 4 C.F.R. § 21.8(d)(1) (2007). DRS should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Gary L. Kepplinger
General Counsel