



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

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

Decision

Matter of: MCT JV

File: B-311245.2; B-311245.4

Date: May 16, 2008

Terence Murphy, Esq., Patrick H. O'Donnell, Esq., and J. Bradley Reaves, Esq., Kaufman & Canoles, P.C., for the protester.

Michael Katchmark, Esq., Michael C. Laurence, Esq., Gary A. Bryant, Esq., and Brett A. Spain, Esq., Willcox & Savage, P.C., for Metro Machine Corp., the intervenor.

Rhonda L. Russ, Esq., Naval Sea Systems Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where, due to concerns about their negative effect on contract performance, the solicitation instructed offerors not to propose unrealistically low costs, and the awardee capped its indirect rates at levels that the agency concluded were significantly below its costs, protest is sustained because the agency failed to consider performance risk associated with the awardee's decision to cap its indirect rates.

2. Discussions with protester regarding allocation of labor hours in its cost proposal were not meaningful where the discussions did not communicate that the agency was concerned about the protester's inconsistent allocation of labor hours between its technical proposal and cost proposal.

DECISION

MCT JV protests the award of a contract to Metro Machine Corp. under request for proposals No. N00024-07-R-4006, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for maintenance and modernization work on LSD 41/49 Class ships (Navy amphibious assault ships, commonly referred to as Dock Landing Ships) homeported in Norfolk, VA. MCT JV challenges NAVSEA's cost realism and technical evaluations of its own proposal and of the proposal submitted by Metro.

We sustain the protest.

Background

On December 15, 2006, NAVSEA issued the RFP, providing for the award of a cost-plus-award-fee “multi-ship, multi-option (MSMO)” contract for planning and performance of extended drydocking work, referred to as “availabilities,” in support of the “Midlife Sustainment Program” for LSD Class ships homeported in Norfolk, VA.¹ Agency Report (AR) at 1, 3. Generally, under an MSMO contract, each ship availability is a separate option under the contract. In this case, the RFP provided for the award of a base contract for the planning for the first scheduled availability, the USS Gunston Hall (LSD-44)—the actual maintenance and modernization work was an option under the base contract. In addition, the RFP provided for options for six additional availabilities and the associated execution planning for these availabilities over a 6-year period. RFP § B, Schedule of Supplies or Services and Prices. In addition, as it relates to the protest, the RFP included a 40 percent small business subcontracting requirement for each availability and further specified that a “small business offeror” is “not exempt” from the subcontracting requirement. RFP at 68.

Offerors were informed that NAVSEA would make award to the offeror whose proposal represented the best value to the government based on its evaluation of offerors’ proposals under two categories, technical and cost, with overall technical merit being more important than cost. Within the technical category, the RFP listed three factors in descending order of importance: (1) management capability, (2) resource capabilities, and (3) past performance. The past performance factor was further divided into four equally important subfactors: (1) technical, (2) schedule, (3) management, and (4) cost. In evaluating proposals under the management capability and resource capabilities factors, the agency assigned adjectival ratings of outstanding, very good, satisfactory, marginal, and unsatisfactory. The adjectival scheme used to rate offerors’ past performance differed slightly, with the agency assigning ratings of outstanding, good, satisfactory, neutral, marginal, or unsatisfactory.

Regarding its evaluation under the resource capabilities technical factor, as it relates to the protest, the RFP required offerors to describe the facility resources available to the offeror to accomplish the RFP requirements as well as “manpower” and workload estimates in support of the requirement established by the RFP.

Specifically, the RFP provided as follows:

¹ According to NAVSEA, during each midlife availability, in addition to required maintenance and repairs, ship upgrades will be accomplished in several areas, including “Hull, Mechanical & Electrical [] Systems; Command, Control, Communications, Computers, Combat Systems and Intelligence; Force Protection; Technology Insertion; Mission Support; and Survivability.” Agency Report (AR) at 3.

1. Describe the total facility resources available to the organization. Clearly indicate which facility resources, production and administrative, are committed to the work effort, which facility resources are committed to or proposed for other work efforts, and any residual facility resources available. The Offeror must clearly demonstrate that it has access to facilities required to execute this contract. The Offeror must demonstrate how it will obtain required production and administrative facilities, as well as permits and certifications necessary to operate these facilities and perform the work by contract award for the period of performance of this contract.
2. Describe the plan for phasing and allocation of facility resources (piers, cranes, shops, lay down areas, parking etc).
3. Describe and provide consolidated manpower charts to support the work projected from this MSMO solicitation.
4. Provide current and projected workload for all team members and/or significant subcontractor(s).
5. Using consolidated manpower charts displaying total shipyard and subcontractor workload, provide a plan to accommodate any peaks or valleys in workload.

RFP at 116-17.

Under the past performance factor, the RFP provided that NAVSEA would review “Contractor Performance Assessment Reporting System ratings (CPARS) and other existing past performance information on relevant contracts . . .” and that “[t]rends showing improving or deteriorating performance will also be considered.” RFP at 136-37. With regard to the past performance cost subfactor, the RFP stated that the Navy would evaluate “the expected risk that an Offeror will effectively forecast, manage and control cost based upon an Offeror’s past performance of previously awarded, relevant contracts, and the effectiveness of any implemented or proposed corrective actions.” RFP at 137. The RFP further indicated that in evaluating past performance, greater consideration would be given to contracts requiring “the same or similar type and complexity of work required by the solicitation” and expressly stated that past performance with “CNO [Chief of Naval Operations] scheduled availabilities and continuous maintenance contracts for Amphibious Warfare Class Ships” was considered to be “most relevant.” RFP at 136.

With respect to the evaluation of cost, because the actual defined work for each availability is variable and will not be developed until after award, the RFP instructed offerors to submit proposed estimated cost data based upon a “notional

work package.” The notional work package included “a sampling of specific work items expected to be performed under the contract.” AR at 4. In addition, offerors were required to submit proposed estimated cost data based upon a non-specific work item, referred to as “999-99-999,” consisting of 635,916 labor hours for “other work.” RFP at 127. NAVSEA included this work item to capture “the difference between the number of [labor hours] included in a typical availability and the Government estimate of [labor hours] for all other work items in the notional work package.” RFP at 124. Regarding this item, the RFP warned offerors to ensure that “their cost proposals are in accordance with proposed technical approaches, including any current or proposed work sharing agreements. For example, if company ‘X’ has an agreement that [it] will subcontract 25% of the production effort to company ‘Y’, the proposal shall demonstrate that proposed costs accurately reflect this percentage.” RFP at 124-25.

The RFP indicated that NAVSEA would review each offeror’s cost proposal in order to assess and evaluate the realism of the offeror’s estimated costs, considering “proposed labor hours, labor rates, material costs, burden rates and other costs . . . including Government estimates for: (1) direct labor hours; (2) material costs; (3) direct labor costs; (4) overhead and G&A [general and administrative] costs; and (5) any other costs which are likely to be incurred by the Offeror in performance of the requirements of the RFP.” RFP at 137. The RFP provided that, on the basis of its evaluation, NAVSEA’s cost analysis panel (CAP) “will develop a ‘projected cost to the Government’ which represents, in the Government’s judgment, the overall cost . . . which will result from the Offeror’s actual performance of the contract requirements” Id. at 138.

Offerors were also warned not to propose unrealistically low estimated costs. Specifically, the RFP stated as follows:

Experience in Navy programs indicates a contract awarded to a contractor submitting an unrealistically low cost/price proposal (whether resulting from a decision on the part of the contractor to submit a price below anticipated costs . . . or other circumstances) may cause problems for the Navy as well as the contractor during contract performance. . . . Accordingly, Offerors are cautioned that SHOULD THE GOVERNMENT, IN THE EXERCISE OF ITS JUDGMENT, DETERMINE THAT A COST PROPOSAL SUBMITTED IN RESPONSE TO THIS SOLICITATION IS UNREALISTICALLY LOW, THE GOVERNMENT MAY REJECT THE PROPOSAL, REGARDLESS OF ITS TECHNICAL MERIT AND/OR EVALUATED COST TO THE GOVERNMENT.

Id.

NAVSEA received proposals from four offerors, including Metro and MCT JV,² which were evaluated by the agency's technical evaluation review panel (TERP) and CAP. Metro's and MCT JV's initial proposals were evaluated as follows:

	Metro	MCT JV
Management Capability	[Deleted]	[Deleted]
Resource Capabilities	[Deleted]	[Deleted]
Past Performance	[Deleted]	[Deleted]
Proposed Cost	[Deleted]	[Deleted]
Projected Cost	[Deleted]	[Deleted]

AR at 6-7.

In rating MCT JV's proposal [Deleted] under the resource capabilities factor, the TERP identified three major weaknesses. One of the major weaknesses concerned the Colonna's dry-dock, which was proposed by MCT JV. According to the TERP, the Colonna's "dry-dock [did] not appear to meet the minimum requirements for dry-docking an LSD class ship." AR, Tab 4, TERP Report, Mar. 22, 2007, encl. 4 at 6. In this regard, the TERP was concerned that the Colonna's dry-dock was not certified to a high enough capacity to lift LSD Class ships. A second major weakness concerned the fact that MCT JV's proposal stated that [Deleted] percent of the production work would be performed by MHI, but did not explain who would be performing the remaining [Deleted] percent. Id. at 2.

Discussions were then conducted with the offerors. During discussions NAVSEA identified its concerns regarding the Colonna's dry-dock and asked MCT JV to explain how it intended to meet the dry-docking requirements. In addition, NAVSEA asked MCT JV to "provide a breakdown for who will be performing the [Deleted] percent of the production work that remains with MHI performing [Deleted] percent." AR, Tab 7, MCT JV Technical Discussion, at 1.

NAVSEA also raised several issues during discussions regarding MCT JV's cost proposal. Among other things, NAVSEA questioned MCT JV's distribution of work among the members of the joint venture. In this regard, NAVSEA indicated that it calculated a distribution of labor hours among the three members of MCT JV as follows: MHI [Deleted], Colonna's [Deleted], and Tecnico [Deleted]. NAVSEA then asked MCT JV to explain why it did not allocate work in accordance with a "resource agreement" which was part of a separate proposal submitted under the solicitation

² MCT JV is a joint venture comprised of three firms: Marine Hydraulics International, Inc. (MHI), Colonna's Shipyard, Inc., and Tecnico Corp.

by MHI as a prime contractor, with Colonna's and Tecnico identified as subcontractors. According to NAVSEA, under that resource agreement, MHI proposed the following work assignments among its team members:

Targeted Work Assigned: MHI [Deleted], Colonna's [Deleted], Tecnico [Deleted]

Minimum Work Assigned: MHI [Deleted], Colonna's [Deleted], Tecnico [Deleted]

AR, Tab 7, MCT JV Cost Discussions, at 4-5.

The record reflects that MCT JV provided a copy of its joint venture agreement with its proposal. This agreement established that ownership in the joint venture would be apportioned with MHI having a majority stake of [Deleted] percent, Colonna's owning [Deleted] percent, and Tecnico owning [Deleted] percent. Regarding the allocation of work, the joint venture agreement provided as follows:

[Deleted]

AR, Tab 39, MCT JV Cost Proposal, attach. E.1-1, at 4.

MCT JV submitted a revised proposal responding to the issues raised by NAVSEA during discussions. As part of its response, MCT JV addressed the CAP's question regarding its failure to allocate labor hours according to the "resource agreement." In this regard, MCT JV explained that the resource agreement did not apply to the joint venture; rather, it was part of MHI's separately submitted proposal as a prime contractor. In contrast to the resource agreement, MCT JV explained that the joint venture agreement does not require the assignment of a specific percentage of work to each partner; instead, it sets goals, requires that the dry-dock related work be assigned to Colonna's, and defines the allocation of profits based partially on work percentage assigned and partially on ownership percentage in the joint venture. The CAP agreed with MCT JV's answer, noting that the resource agreement did not apply to the joint venture. AR, Tab 17, CAP Evaluation of Cost Proposal Discussions with MCT JV at 22.

Regarding MCT JV's responses to the technical discussion questions, the TERP determined that MCT JV adequately addressed its question regarding the work allocation percentage in its technical proposal, where MCT JV identified an allocation of [Deleted] percent for MHI, [Deleted] percent for Colonna's, and [Deleted] percent for Tecnico, with the remaining workload ([Deleted] percent) performed primarily by "specialty subcontractors." AR, Tab 15, Final TERP Report for MCT JV, at 3. The TERP's concerns regarding the adequacy of the Colonna's dry-dock, however, remained. While MCT JV stated that its proposed dry-dock "has more than enough lift capacity and reserve buoyancy to lift an LSD 41/LSD 49 Class ship" and indicated that LSD class ships "can be safely docked in the Colonna's dock

with a margin of safety of 123% [Deleted],” NAVSEA found the premise underlying MCT JV’s conclusion to be erroneous and raised this issue again with MCT JV. AR, Tab 8, MCT JV Response to Discussions at 13. Specifically, in its second round of discussions with MCT JV, NAVSEA stated:

Although acknowledging the fact that the MIL-STD-1625C(SH) Certificate for Colonna’s dry dock identifies a [Deleted] LT/ft. limit, MCT JV contends that this is the “buoyancy rating” that applies to a ship taking up the full length of the dock. Since the length of LSD Class ships is less than the full length of the Colonna’s dock, MHI believes “the maximum structural loading of [Deleted] LT/ft. should be the basis for acceptability.”

MCT JV’s analysis is not correct. The certified rating of [Deleted] LT/ft. is based on buoyancy, but it is based on available buoyancy over the length of the dock’s keel block length that supports the ship. The total lift capacity of [Deleted] Long Tons divided by the dock’s keel block length of 499 feet = [Deleted] LT/ft. The [Deleted] Long Tons lift capacity is based on how much the dock can lift at a freeboard required by MIL-STD-1625C(SH). Accordingly, the Colonna’s dry dock does not meet the solicitation’s requirements.

AR, Tab 9, MCT JV’s 2nd Technical Discussions, at 2.

In responding to this second round of technical discussions, MCT JV was able to demonstrate that the Colonna’s dry-dock satisfied the required lift capacity. In this regard, the TERP noted that additional information provided by Colonna’s, “including a different loading condition . . . results in a linear load on the dock that is just under the NAVSEA certified capacity of the dock.” AR, Tab 15, Final TERP Report for MCT JV, at 6. Colonna’s also indicated that it would seek to have the limit of its dry-dock raised in the future, thereby providing “more of a cushion in case future ships come in heavier or with a different loading condition.” Id. As a consequence, the TERP revised MCT JV’s rating under the resource capabilities technical factor from unsatisfactory to satisfactory.

While the TERP found the Colonna’s dry-dock to be acceptable, it noted that the dry-dock presented a “moderate” degree of risk. This risk was based on the lack of flexibility associated with the TERP’s conclusion that the dock provided a low “load lifting margin [of] [Deleted] percent.” Id. at 5.

As it relates to the protest, in its evaluation under the past performance factor, the TERP considered CPARS reports regarding performance by the offerors and their major subcontractors. With regard to Metro, the TERP considered various CPARS reports, finding Metro’s cost-reimbursable contracts involving dry-docking work for amphibious warfare class ships to be highly relevant. AR, Tab 15, TERP Report for

Metro, Nov. 13, 2007, encl. 3 at 6. As a general matter, the CPARS reports provided detailed discussions of Metro's performance and under the technical subfactor, Metro was rated in the reports overall as either "good" or "outstanding." AR, Tab 22, Metro's CPARS. Considering these reports, NAVSEA noted several strengths and weaknesses with Metro's past performance under the technical subfactor. Specific weaknesses identified by the TERP included problems during Metro's performance of a contract in connection with the USS Shreveport in fiscal year (FY) 2005. The CPARS report indicated that Metro had "improperly built keel blocks" and improperly moved three keel blocks after a block check by the Navy. Notwithstanding these incidents, the CPARS report in connection with this contract rated Metro's overall technical performance as "good." Id. On one of the contracts identified as of "high" relevance (USS Nashville FY 2004), the CPARS report reflected an overall technical score for Metro of "outstanding." Id. In addition, regarding the cost subfactor, the CPARS reports reflected ratings for Metro of "good" and "outstanding." Id.

Prior to the submission of final proposals, NAVSEA amended the RFP to require offerors to cap their indirect rates for at least the first 3 years of contract performance at the rates in their cost proposals. RFP amend. 8. This change had significant consequences in NAVSEA's cost evaluation. In its final cost proposal, Metro capped its indirect rates [Deleted]. Specifically, with regard to its overhead rate, Metro proposed a capped rate of [Deleted]. For [Deleted], Metro proposed uncapped rates of [Deleted]. For its G&A rate, Metro proposed a capped rate of [Deleted]. The CAP found Metro's rates to be low since they were "significantly lower than [Metro's] current provisional billing rates of [Deleted] overhead and [Deleted] G&A"; however, because the rates were capped, the CAP limited its adjustments to those years where the rates were not capped. AR, Tab 16 Final CAP Report at 13. In adjusting Metro's uncapped overhead rates, the CAP utilized Metro's higher FY 2008 forward pricing rate agreement (FPRA) rates.

In its report the CAP noted that Metro "may experience greater indirect cost[] rates than projected that could result in an operating loss. This is a risk that the Government may have to deal with after contract award if Metro is the successful offeror." Id.

NAVSEA took the additional step of requesting an audit on Metro's financial condition and capability from the Defense Contract Audit Agency (DCAA). DCAA's audit opinion indicated as follows:

[Deleted]

AR, Tab 16, DCAA Audit Report of Metro's Financial Capability, at 3-4.

In its audit report, DCAA also noted various efforts identified by Metro to reduce its costs and indirect rates, to include, among other things: [Deleted]. DCAA indicated

that it was unable to determine what, if any, impact these changes would have on Metro's financial condition. Id. at 6.

The final CAP report also addressed issues concerning MCT JV's final proposed allocation of work among the members of the joint venture. Regarding MCT JV's allocation of work among its partners for the notional work packages and item 999-99-999, NAVSEA noted that, in its final proposal, MCT JV allocated total labor hours as follows: [Deleted] percent to MHI, [Deleted] percent to Colonna's, and [Deleted] percent to Tecnico, with [Deleted] percent to other subcontractors. NAVSEA revised MCT JV's cost in a "manner to produce a result more closely aligned with the [joint venture] agreement, also taking into consideration the response to technical discussions regarding work percentages provided by MCT JV." AR, Tab 16, Final CAP Report, at 24. In reallocating MCT JV's labor hours, NAVSEA specifically noted the fact that during discussions, MCT JV had indicated that MHI would provide [Deleted] percent of the direct execution of the labor, Colonna's would provide [Deleted] percent, and Tecnico would provide [Deleted] percent, with the remaining [Deleted] percent performed by "specialty subcontractors." In addition, NAVSEA considered that under the terms of the joint venture agreement, work would be distributed to the owners pro-rata based on their ownership interests (MHI [Deleted], Colonna's [Deleted], and Tecnico [Deleted]). Based on its analysis, NAVSEA allocated [Deleted] percent of the total projected labor hours to MHI, [Deleted] percent to Colonna's, [Deleted] percent to Tecnico, and [Deleted] percent to other subcontractors.

This reallocation differed drastically from MCT JV's allocation for item 999-99-999, where MCT JV proposed [Deleted] hours (approximately [Deleted] percent) of the 635,916 hours for the members of the joint venture at their respective labor rates,³ with the remaining [Deleted] hours (approximately [Deleted] percent) allocated to subcontractors with a significantly lower hourly labor rate of [Deleted]. AR, Tab 40, MCT JV Final Cost Proposal, encl. E-1.

In evaluating offerors' final proposal revisions, NAVSEA assigned Metro and MCT JV the following technical scores and projected costs:

³ For FY 2007, MHI's proposed composite production labor rate was [Deleted], Colonna's rate, [Deleted], and Tecnico's composite labor rate was [Deleted]. AR, Tab 40, MCT JV's Final Cost Proposal Revision, encl. E-1.

	Metro	MCT JV
Management Capability	Very Good	[Deleted]
Resource Capability	Outstanding	[Deleted]
Past Performance	Outstanding	[Deleted]
Proposed Cost	\$288,159,874	[Deleted]
Projected Cost	\$298,056,509	[Deleted]

AR at 8.

As part of its best value decision process, NAVSEA established a best value advisory counsel (BVAC), which analyzed and compared the evaluations of the various proposals. In its report, the BVAC concluded that, as compared with the proposal submitted by MCT JV, Metro's proposal was stronger "by far" in terms of technical merit since MCT JV "lack[ed] many of the strengths found in the Metro proposal." AR, Tab 26, BVAC Report, at 9. The BVAC expressly found that Metro's proposal reflected "low risk" based on various identified strengths, without any weaknesses. Id. The BVAC further highlighted Metro's "extensive experience working on amphibious warfare class ships, in performing availabilities of the size and scope contemplated under this contract as a prime contractor, and in performing under cost-reimbursable MSMO type contracts" as compared with MCT JV's relative lack of experience. Id. In addition, the BVAC indicated that MCT JV's proposed use of the Colonna's dry-dock increased the risk of unsuccessful completion and mitigated any potential evaluated cost savings. Specifically, the BVAC indicated that LSD Class ships [Deleted], which "can potentially cause some disruption of schedule, increased cost or degradation of performance." Id. at 7.

Based on this assessment, the BVAC recommended selection of Metro's proposal as the best value. In addition, the BVAC noted that the evaluated costs for MCT JV were based in part upon NAVSEA's reallocation of hours between the joint venture partners. According to the BVAC, even assuming the allocation proposed by MCT JV, which would result in a lower projected cost of [Deleted] for MCT JV, Metro's proposal would remain the best value. The source selection authority (SSA) agreed with the findings of the BVAC and selected Metro for award. Upon learning of the agency's decision, and after obtaining a debriefing, MCT JV filed its protest with our Office.

Analysis

In its protest, MCT JV argues that NAVSEA's cost evaluation was flawed because NAVSEA: (1) failed to consider, as required by the solicitation, the implications of Metro capping its indirect rates at unrealistically low levels; and (2) unreasonably reallocated MCT JV's proposed allocation of 635,916 labor hours under work item

999-99-999.⁴ Regarding NAVSEA's technical evaluation, the protester argues that, under the resource capabilities factor, the agency improperly determined that the Colonna's dry-dock presented moderate risk. Under the past performance factor, MCT JV asserts that NAVSEA's evaluation of Metro was flawed because it failed to consider Metro's history of dry-docking problems, which resulted in the decertification of Metro's dry-dock, as well as Metro's record of "substantial cost overruns." Protester's Comments, Mar. 31, 2008, at 17. The protester also argues that NAVSEA's discussions with MCT JV were not meaningful regarding its proposed allocation of labor hours and its concerns regarding Colonna's dry-dock. In light of these alleged errors, the protester also challenges the agency's best-value decision.

Cost Evaluation

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 9; PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 5; see Federal Acquisition Regulation (FAR) § 16.301. As a result, a cost realism analysis is required to determine the extent to which an offeror's proposed costs represent the offeror's likely costs in performing the contract under the offeror's technical approach, assuming reasonable economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. A cost realism analysis involves independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR § 15.404-1(d)(1); Advanced Commc'ns. Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 at 5. Based on the

⁴ The protester raised several other issues concerning the agency's cost evaluation, which were subsequently conceded by the protester or abandoned. With respect to other issues, the agency agreed that it erred in estimating certain costs, but argued that the errors could not have been prejudicial given the cost disparity between the two proposals. For example, MCT JV challenged the agency's upward adjustment to the G&A rate of the joint venture, arguing that it resulted in double-counting of G&A costs. The agency conceded that its methodology double-counted G&A, but argued, based upon a post-hoc revised analysis, that the cost impact was less significant than that argued by the protester and was not prejudicial. Given that we are sustaining the protest and recommending that the agency make a new source selection decision, the agency should address its admitted errors in evaluating the offerors' cost proposals as part of the corrective action it takes in response to our decision.

results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR § 15.404-1(d)(2)(ii).

The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency. We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26. An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 10-11.

The protester argues that NAVSEA unreasonably accepted Metro's unrealistically low capped indirect rates and failed to consider the risk presented by these low capped rates in determining that Metro's proposal represented the best value to the government. According to the protester, this was contrary to the terms of the solicitation, which expressly stated that the agency would perform a cost realism evaluation and admonished offerors not to submit unrealistically low costs. In support of this allegation, the protester highlights the fact that Metro proposed indirect rates (overhead and G&A) at levels below its forward pricing rates, as well as the then-current information the agency had regarding Metro's indirect rates. Because Metro capped its indirect rates at such unrealistically low levels, the protester alleges that Metro will be operating at a loss under the contract and that the agency failed to properly consider this risk in its selection of Metro for award.

The agency essentially argues that because Metro capped its indirect rates, upward adjustment to Metro's rates was not warranted; any decision about Metro's ability to perform at the rates capped below actual costs is solely a matter concerning Metro's responsibility; and it in fact considered Metro's ability to perform at the capped rates as part of its affirmative responsibility determination.

As a general matter, the contractor bears the risk of cost overruns for a particular category or type of work in a cost-reimbursement contract when the contractor agrees to a cap or ceiling on its reimbursement for that category or type of work. Thus, when offerors propose such caps, and no other issue calls into question the effectiveness of the cap, upward adjustments to capped costs are improper. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202 at 7. Here, there is nothing in the record to suggest that the rate caps proposed by Metro were in any way illusory; thus, we agree with the agency's contention that it was not required to upwardly

adjust Metro's capped indirect rates, notwithstanding the fact that the agency itself found Metro's capped rates to be "significantly" lower than its then-current rates.⁵

Nevertheless, the agency could not simply ignore the risk presented by these capped rates in concluding that Metro's proposal was the best value. As noted previously, the solicitation expressly admonished offerors not to propose unrealistically low costs because of NAVSEA's concern that a proposal with unrealistically low costs due to an offeror's decision to submit a proposal below its anticipated costs "may cause problems for the Navy as well as the contractor during contract performance." RFP at 138. Recognizing that the capped indirect rates proposed by Metro shifted the risk of cost overruns for those rates entirely to Metro, the imposition of the cap in fact exacerbated the issues identified by DCAA regarding Metro's financial condition [Deleted], and thereby further hampering its ability to perform under its government contracts--the very concern articulated in the RFP. While NAVSEA was clearly aware of the concerns regarding Metro's financial situation, and the fact that the rate caps would potentially place Metro [Deleted], thereby potentially affecting its performance under the contract, the agency failed to consider the risks posed by Metro's low rates.

NAVSEA argues that the issue of Metro's ability to perform at its capped rates was solely a matter concerning Metro's responsibility, a matter which the protester did not challenge, and was expressly considered as part of that determination. While we agree that, as a general matter, a decision about an awardee's ability to perform a contract at rates capped below actual costs is a matter of an offeror's responsibility, see, e.g., Vitro Corp., *supra*, at 7; Halifax Tech. Serv., Inc., B-246236.6 *et al.*, Jan. 24, 1994, 94-1 CPD ¶ 30 at 9, where, as here, the solicitation expressly instructs offerors not to submit unrealistically low costs or prices, the risk stemming from an offeror's decision to propose unrealistically low capped rates is a matter for the agency's consideration in the context of its evaluation of proposals and source selection decision process. The agency's failure to consider Metro's capping of its rates in that context was inconsistent with the terms of the solicitation.⁶ We therefore sustain the protest in this regard.

⁵ In addition, to the extent the protester argues that the agency failed to properly evaluate Metro's indirect rates for the years that they were not capped, we find the protest to be without merit since the protester has not established that the agency acted unreasonably in adjusting Metro's indirect rates for those years to those established under Metro's FPRA. See Jonathan Corp., B-230971, Aug. 11, 1988, 88-2 CPD ¶ 133 at 9-10.

⁶ In response to this issue, NAVSEA also argues that the risk to the government of poor performance by Metro is low since each availability is an option and the Navy can simply decide not to exercise an option if it experiences problems with Metro's performance. Setting aside the fact that this contention reflects NAVSEA's post-hoc judgment, which is not reflected in the contemporaneous evaluation record, it is
(continued...)

Turning to NAVSEA's evaluation of the cost proposal submitted by MCT JV, while we find that the agency had reasonable concerns about MCT JV's allocation of labor hours in its cost proposal, we conclude that the agency's discussions regarding this matter were not meaningful. Specifically, the record reflects a wide disparity between MCT JV's proposed allocation of labor hours in its technical proposal and the allocation of labor hours in its cost proposal. As noted above, in its technical proposal MCT JV allocated [Deleted] percent of the labor hours to MHI, [Deleted] percent to Colonna's, [Deleted] percent to Tecnico, and the remaining [Deleted] percent to other specialty subcontractors. NAVSEA, however, determined that MCT JV's final cost proposal reflected an allocation of [Deleted] percent of the total labor hours to MHI, [Deleted] percent to Colonna's, [Deleted] percent to Tecnico, and [Deleted] percent to other subcontractors. The [Deleted] percent allocation to other subcontractors had the effect of significantly reducing MCT JV's estimated cost since MCT JV proposed a significantly lower labor rate for those subcontractors.

In its protest, MCT JV specifically complains that NAVSEA's reallocation of its labor hours under item 999-99-999--where the disparity between MCT-JV's allocation of labor hours between its technical proposal and cost proposal is even greater--was unreasonable. As noted above, under item 999-99-999, MCT JV allocated only [Deleted] percent of the work to its partners and [Deleted] percent to "other subcontractors." Because item 999-99-999 represented approximately [Deleted] percent of the total projected labor hours used to estimate MCT JV's total cost, by allocating [Deleted] percent of these labor hours to a category of other subcontractors with a significantly lower labor rate, MCT JV was able to significantly reduce its estimated cost.⁷ This extensive reliance on subcontractors for the purpose

(...continued)

fundamentally inconsistent with the RFP's evaluation scheme, which required NAVSEA to evaluate "all options," and NAVSEA's stated desire to avoid performance problems resulting from offerors submitting unrealistically low cost proposals. RFP at 138.

⁷ NAVSEA projected a total of [Deleted] labor hours for MCT JV based on the notional work items and item 999-99-999 (MCT JV proposed [Deleted] labor hours). AR, Tab 16, Final CAP Report for MCT JV, at 24. As noted above, item 999-99-999, by the terms of the RFP, comprised 635,916 of the total labor hours. Given that item 999-99-999 represented a relatively large percent of the total labor hours, MCT JV's disparate allocation for this item had the effect of skewing NAVSEA's calculation of MCT JV's allocation of the total-labor hour effort. If one were to exclude item 999-99-999, and consider only MCT JV's allocation of labor hours for the notional work items, MCT JV's allocation reflects a subcontractor allocation of approximately [Deleted] percent, which is more consistent with the [Deleted] percent allocation in its technical proposal.

of calculating its total estimated cost, however, was clearly at odds with MCT JV's technical proposal, which indicated that MCT JV would allocate a much smaller percentage [Deleted] of the work to specialty subcontractors.

NAVSEA was thus presented with a situation similar to the one it faced in Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80, where an offeror attempted to reduce its total estimated cost by allocating all of its labor hours for notional work items to its team member with the lowest labor rate, notwithstanding the fact that the entire team would be performing the actual work under the contract. In that case, we held that the Navy's cost realism evaluation was unreasonable because the Navy accepted the proposed allocation without further question and thus failed to consider the impact of the team members' higher rates in determining the offeror's probable cost of performance under the contract. In response to our decision in Metro, NAVSEA included item 999-99-999 to capture the total labor effort of a typical availability when combined with the specific notional work items identified in the RFP, and instructed offerors to ensure that their labor hour allocations for this item were consistent with their proposed technical approaches. AR at 23-24; RFP at 124-25.

While we commend NAVSEA's efforts to adjust MCT JV's allocation of labor hours to reflect a labor mix that was more consistent with its technical proposal and MCT JV's joint venture agreement, and therefore reflective of a more realistic total probable cost for MCT JV, given our conclusion, discussed below, that NAVSEA's discussions with MCT JV regarding its concerns in this regard were fundamentally flawed, any allegation regarding the propriety of NAVSEA's reallocation is academic at this juncture.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Smiths Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5 at 12; Symplcity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 8. Further, an agency may not mislead an offeror--through the framing of a discussion question or otherwise--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Here, the record reflects that with respect to the allocation of labor hours in MCT JV's cost proposal, NAVSEA asked MCT JV to explain why the allocation was inconsistent with its "resource agreement." As noted above, MCT JV responded that the resource agreement did not apply to its proposal; rather, it was an agreement among MHI, Colonna's, and Tecnico relating to a separate proposal submitted by MHI as the prime contractor. The record further reflects that the CAP accepted MCT JV's response, agreeing that the resource agreement did not apply to the joint

venture. Thus, by questioning MCT JV's allocation of labor hours in its cost proposal solely by reference to a resource agreement that by its terms did not apply to this proposal, NAVSEA never conveyed to MCT JV its actual concern--that the labor hour allocation in the cost proposal appeared to be inconsistent with its technical proposal and joint venture agreement.⁸ Accordingly, we find that the agency's discussions in this regard were misleading and therefore not meaningful.

Technical Evaluation

MCT JV also challenges NAVSEA's findings regarding the Colonna's dry-dock and argues that the agency failed to raise its dry-dock concerns in discussions. The protester also argues that the evaluation of Metro's past performance was flawed because the agency failed to consider Metro's history of problems with its dry-dock and contract cost overruns. We find the protester's contentions regarding these issues to be without merit.

In reviewing an agency's evaluation, we will not reevaluate technical proposals or substitute our judgment for reasonably based past performance ratings; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. United Paradyne Corp., B-297758, Mar. 10, 2006, 2006 CPD ¶ 47 at 4; L-3 Commc'ns. Westwood Corp., B-295126, Jan. 19, 2005, 2005 CPD ¶ 30 at 5. Here, MCT JV argues that the Navy's concerns regarding the load lifting margin of the Colonna's dry-dock are unfounded because NAVSEA failed to consider "the benefits of using a stern tower to reduce the load per foot and the risk of overloading." Protester's Comments, Mar. 31, 2008, at 9. MCT JV, however, never proposed using stern towers as part of its technical proposal to increase load lifting capacity and reduce the risk of overloading, notwithstanding the fact that the solicitation required offerors to "[d]escribe the total facility resources available to the organization." RFP at 116. As a consequence, there was no basis for NAVSEA to consider the use of stern towers as part of its evaluation.

MCT JV also faults NAVSEA for not raising its concerns regarding the risks and lack of flexibility associated with the Colonna's dry-dock in discussions. Having held several rounds of discussions to enable MCT JV to establish that the Colonna's dry-dock met minimum requirements for acceptability, the agency was not required to continue to engage in additional rounds of discussions to address its concerns

⁸ NAVSEA argued that the resource agreement was in fact relevant to and considered as part of its reallocation analysis. This argument, however, is inconsistent with the contemporaneous record, which shows that the CAP concluded that the resource agreement did not apply to the joint venture and that the reallocation analysis only discusses MCT JV's technical proposal and the joint venture agreement. Moreover, it is simply unreasonable to conclude that the agreement was relevant, given that it was submitted as part of a separate proposal and did not apply to the joint venture.

stemming from the [Deleted] level of acceptability of the Colonna's dry-dock achieved as a consequence of NAVSEA's prior rounds of discussions. Metson Marine Servs., Inc., B-299705, July 20, 2007, 2007 CPD ¶ 159 at 5; Metro Mach. Corp., *supra*, 2005 CPD ¶ 112 at 19.

Regarding NAVSEA's evaluation of Metro's past performance, MCT JV argues that NAVSEA failed to consider information concerning Metro's dry-dock problems, which was close at hand. In this regard, the protester presented information concerning the suspension of Metro's dry-dock certification for a short period in 2005 and evidence that an advisor to the TERP was aware of Metro's suspension and the underlying circumstances. The protester alleges that the agency failed to consider this "close-at-hand" information since the evaluation record is devoid of any mention of Metro's suspension.

The protester's argument in this regard is an elevation of form over substance. While the evaluation record does not specifically mention Metro's suspension or the specific dry-docking issues identified by the protester, it does reflect that by considering Metro's CPARS reports, NAVSEA specifically considered the underlying facts that led to the suspension. Based on the information in these reports NAVSEA noted as a past performance weakness for Metro the specific incidents that led to the suspension. NAVSEA also considered the fact that the overall CPARS rating for Metro in connection with this report was in fact positive, reflecting an overall technical rating of "good." AR, Tab 22, CPARS Reports for Metro. We conclude that, having considered Metro's performance, in its entirety, as reflected through the completed final CPARS reports regarding Metro's performance, the agency's evaluation of Metro's past performance was not unreasonable.

MCT JV raises a similar argument concerning Metro's alleged history of cost overruns on its government contracts, noting that [Deleted]. The protester argues that the agency failed to properly consider this information in its evaluation of Metro's proposal under the past performance subfactor for cost. While the applicable DCAA report did note that Metro was [Deleted] for three contracts, the report did not in fact establish that Metro would bill the government for those instances where it had exceeded applicable funding limits, nor did the reports discuss any of the underlying facts surrounding these limited overruns.⁹ Given the extensive CPARS information considered by NAVSEA--in the five most relevant CPARS reports considered by NAVSEA, Metro was rated as either "good" or "outstanding" for cost--we have no basis to conclude that the agency's evaluation of Metro's proposal as "good" under the cost subfactor was unreasonable.

⁹ DCAA indicated that on one contract Metro had [Deleted]. AR, Tab 16, DCAA Audit Report of Metro, Oct. 15, 2007, at 6.

Recommendation

We sustain the protest on the basis that the agency's evaluation of Metro's proposal was improper because it failed in its source selection decision to consider the risk of Metro's low capped indirect rates on its ability to perform under the contract. In addition, we sustain the protest because the agency failed to conduct meaningful discussions with the protester regarding the agency's concerns about the protester's allocation of labor hours in its cost proposal. We recommend that the Navy hold discussions in order to more accurately gauge the impact of Metro's capped indirect rates on its ability to perform the contract and to address its concerns regarding the protester's allocation of labor hours in its cost proposal, and reevaluate proposals in light of this information. The Navy should also make a new source selection decision. If, after the new evaluation, the agency determines that another firm's proposal represents the best value to the government, the agency should terminate Metro's contract and make a new award.¹⁰ We further recommend that the agency reimburse the protester the reasonable costs of pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred on this protest, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2008).

The protest is sustained.

Gary L. Kepplinger
General Counsel

¹⁰ During the course of the protest, the Navy notified our Office and the protester that it had decided to proceed with performance of the contract awarded to Metro on the basis that continued performance was justified by "urgent and compelling circumstances" which significantly affect the interest of the United States. Letter from NAVSEA to GAO, Feb. 27, 2008. Given that the contract requires performance with respect to numerous scheduled availabilities over a 7-year period, we believe that our recommendation can be implemented and meaningful relief attained notwithstanding the Navy's decision to allow Metro to proceed with performance.