In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 04-835C

(Originally Filed Under Seal April 21, 2005)
(Reissued May 10, 2005)

BID PROTEST

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AUTOFRIGO EUROPE, S.R.L.,	*
Plaintiff,	*
v.	*
THE UNITED STATES,	*
Defendant,	*
and	*
EBREX FOOD SERVICES, S.A.R.L.,	*
Intervenor.	*

* *

Thomas Owen Mason, McLean, VA, attorney of record for plaintiff and ***Robert E. Korroch, Francis E. Purcell, Jr.,*** and ***Rachel L. Semanchik***, of counsel.

Sameer Pandurang Yerawadekar, Department of Justice, Washington, D.C., with whom was ***Assistant Attorney General Peter D. Keisler***, for defendant. ***David M. Cohen***, Director, and ***Franklin E. White, Jr.***, Assistant Director.

Kathleen Hallam, Defense Logistic Agency, of counsel.

John Allen Burkholder, Los Angels, CA, attorney for intervenor and ***Kevin J. Lombardo***, of counsel.

OPINION & ORDER

***Futey*, Judge.**

This post-award bid protest case is before the court on plaintiff's motion for judgment on the administrative record and defendant's cross-motion. Plaintiff

maintains that the Defense Supply Center Philadelphia's (DSCP) technical evaluation was flawed because it did not consider EBREX's, the incumbent contractor and awardee, alleged poor performance and poor fill rate under the predecessor contract. Plaintiff also avers that DSCP failed to credit it with the past performance and experience of its teammate MDV/Nash Finch. Further, plaintiff contends that the agency failed to conduct an adequate price or cost realism analysis because it did not compare EBREX's proposed prices to EBREX's actual prices under the prior contract. Plaintiff also asserts that the agency did not fulfill its obligation of undertaking meaningful discussions. Plaintiff, therefore, concludes that it was prejudiced by DSCP's alleged errors because if the proposals had been evaluated properly there was a substantial chance it would have been awarded the contract.

Defendant, on the other hand, avers that there is no evidence of a systematic fill rate problem in the administrative record. Defendant also contends that it had mechanisms in place to monitor EBREX's fill rates during contract performance, none of which signaled a problem. Further, defendant maintains that plaintiff was properly credited with the past performance and experience of MDV/Nash Finch. Defendant asserts that it was plaintiff's own lack of experience which led to a lower technical score. Defendant also contends that the agency conducted a sufficient price and costs realism analysis. In addition, defendant avers that the agency engaged plaintiff in meaningful discussions. EBREX was granted permission to intervene and advances arguments essentially analogous to those proffered by defendant.

Factual Background

On May 10, 2002, the Defense Logistic Agency, acting through DSCP, issued Solicitation No. SP0300-02-R-4003 seeking to procure food and non-food items for military operations in Europe and the Middle East. The solicitation contemplated three zones: (1) Zone I - Northern Europe; (2) Zone II - Southern Europe; and (3) Zone III - the Middle East (Kuwait/Qatar and Saudi Arabia). Four prime vendor contracts were to be awarded, with one contract apiece for Zone I and Zone II, and two contracts within Zone III. While the solicitation stated that an offeror could only be awarded a contract for one zone, and could not be awarded both contracts under Zone III, it nevertheless permitted an offeror to bid on all three zones. The contract, as awarded, would consist of a single base year, with up to four option years, and amounted to a total value of $392,458,400.

The solicitation provided that the contract would be awarded to the offeror whose proposal "present[ed] the best value to the [g]overnment,"[1] based on evaluation factors and subfactors, and DSCP was permitted to award the contract to a bidder other than the low priced offeror. The solicitation identified three evaluative categories: (1) Technical; (2) Cost or Price; and (3) Socioeconomic. Within the Technical category, six factors, listed in descending order of importance, were enumerated: (1) Experience/Past Performance; (2) Product Availability; (3)

[1] Administrative Record (AR) at 00015.

Distribution System/Capability; (4) Quality Assurance; (5) Contingencies; (6) Back-Up Plan. Within the Socioeconomic category, three factors, likewise listed in descending order of importance, were set forth: (1) Socioeconomic Considerations; (2) Javits-Wagner-O'Day Act Entity Support; (3) DLA Mentoring Business Agreements. The Technical category, in its entirety, was more important than Cost or Price, which, in turn, was more important than the Socioeconomic category.[2]

Under factors 1 and 2 of the Technical category, offerors were required to submit fill rate information. Fill rate is a percentage calculation of the number of cases accepted by the customer divided by the number of cases ordered. The solicitation called for a minimum proposed fill rate of 97% before substitutions, which would become the fill rate benchmark during contract performance.[3] An offeror was required to support its proposed fill rate with "detailed information . . . that clearly demonstrates how the rate will be met and maintained."[4] To comply with factor 1, an offeror was required to supply "evidence of experience in providing full line food and non-food service for customers with similar food dollar/volume requirements . . . and must show evidence of experience with export shipping and OCONUS [Outside the Continental United States] warehousing and distribution."[5]

The solicitation further detailed the evaluation:

> The Government will perform an integrated assessment of the offeror's corporate experience and past performance . . . . The Government will evaluate the offeror's experience in fulfilling requirements of similar dollars and volume for other customers in a Prime Vendor/regular dealer capacity, to include Government contracts, if any. This part of the evaluation will be based on the offeror's proposal, as well as any in-house Government records, if applicable.
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> The Government will evaluate the offeror's record of past performance both as a regular dealer/prime vendor on commercial and government contracts, if any, to determine whether the firm has a successful history of conforming to contractual requirements/business agreements and demonstrated a commitment to customer satisfaction. Specifically, the Government will assess whether the offeror has consistently provided timely delivery of quality products with consistently high fill rates.

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[2] ***Id.*** at 00005; see also ***id.*** at 00152.

[3] ***Id.*** at 00068.

[4] ***Id.***

[5] ***Id.*** at 00124.

. . .

> When evaluating Past Performance, the offeror's written proposal (Form), Government in-house records and information provided by the points of contact or references designated by the offeror will be taken into account. This agency's personal experience with the offeror (if any) will be considered more significant than information provided by outside references.[6]

Factor 2 also dictated that an offeror submit "supporting information that demonstrate[s] [its] ability to meet that level of service."[7] Factor 2 provided that the "[s]upporting information must include estimates of the amount of inventory the offeror intends to maintain in-house and in-transit at any given time."[8] In addition, DSCP expressed an intent to examine whether the proposals "clearly demonstrate how the stated goals will be met and maintained. Proposed fill rates that are supported by realistic and verifiable data will be viewed more favorably than those that are unclear or lacking information."[9]

The solicitation also went into great detail about the manner in which cost or pricing would be evaluated. The solicitation indicated that both a price and cost realism analysis would be conducted. The solicitation required offerors to submit pricing for a list of 86 core items, also known as market basket items. DSCP would evaluate both aggregate pricing and distribution prices. Aggregate pricing was more important than distribution price, but distribution price would gain importance as the difference between the offerors' aggregate pricing diminished. Aggregate pricing is the sum of unit prices, which is calculated by adding delivered prices to distribution prices.

Unit price consisted of the "total price (in U.S. currency) that is charged to DSCP per unit for a product delivered to the [g]overnment."[10] Delivered price was designated as "the actual invoice price (in U.S. currency) of the product paid to the manufacturer/supplier, for delivery of product to offeror's CONUS [Continental United States] distribution point."[11] The solicitation defined distribution price as "a firm fixed price, offered as a dollar amount, which represents all elements of unit

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[6] ***Id.*** at 00154-55.

[7] ***Id.*** at 00129.

[8] ***Id.***

[9] ***Id.*** at 00155.

[10] ***Id.*** at 00141.

[11] ***Id.*** at 00140.

price, *other than* the delivered price."[12] Further, it typically included "projected general and administrative expenses, overhead, profit, packaging costs, transportation cost from the Prime Vendor's OCONUS distribution facility(s) to the final delivery point or any other projected expenses associated with the distribution function."[13] While delivered price could permissibly fluctuate over the life of the contract, distribution price was supposed to remain constant.

Plaintiff and EBREX submitted offers for Zone II. Under the predecessor contract, Contract No. SPO300-03-D-2949 (Contract No. 2949), EBREX was the prime vendor for Southern Europe for the previous five years. Plaintiff and EBREX both proposed, consistent with the terms of the solicitation, to utilize teaming arrangements - - EBREX chose Lankford SYSCO as its domestic food supplier and plaintiff chose MDV/Nash Finch. Plaintiff and Lankford SYSCO were involved in some capacity in performing Contract No. 2949. Plaintiff was a subcontractor that handled warehouse functions in Italy and other southern Mediterranean locations whereas Lankford SYSCO was a domestic food supplier.

On May 15, 2003, DSCP awarded the contract for Zone II to EBREX after determining that its proposal represented the best value to the government. Several highlights of DSCP's evaluation, pertinent to the case at bar, are warranted. Both EBREX and plaintiff received overall scores of [***] with respect to Factor 1 - Experience/Past Performance. As to Factor 2, Product Availability, plaintiff received a score of [***] whereas EBREX received a score of "Excellent." As to price, plaintiff's delivered price was [***] than EBREX's, but its distribution price was [***]. On May 28, 2003, in response to plaintiff's request, DSCP conducted a debriefing pursuant to 48 C.F.R. § 15.603. Prior to filing suit in this court on May 13, 2004, plaintiff unsuccessfully filed both an agency protest and a protest with the United States General Accounting Office (GAO).

In this action, plaintiff initially filed a motion to supplement the administrative record, which was granted-in-part and denied-in-part. The court permitted plaintiff to supplement the administrative record with: (1) a February 1, 2001, letter from Mr. Ferguson, the contracting officer (CO), to EBREX; (2) an internal EBREX email dated July 22, 2002; and (3) a DSCP Office of Legal Counsel Powerpoint slide. Subsequently, EBREX supplemented the administrative record with its response to the February 1, 2001 letter.

On October 28, 2004, plaintiff filed its Motion For Judgment on the Administrative Record. Plaintiff asked the court, in pertinent part, for the following relief: (1) to cancel the contract and option award to EBREX; (2) order DSCP to re-solicit the subject contract and to re-evaluate the proposals in accordance with the terms of the solicitation. EBREX and defendant responded and cross-moved on

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[12] ***Id.*** (emphasis in original).

[13] ***Id.***

December 3 and December 8, 2004, respectively. Plaintiff filed its reply and opposition to both pleadings on January 10, 2004. EBREX and defendant replied on January 24 and February 24, 2005, respectively. Subsequently, plaintiff renewed its motion to supplement the administrative record. The briefing on that issue was completed on February 24, 2005.

Discussion

Motions for judgment on the administrative record are treated in accordance with the rules governing motions for summary judgment. **RCFC** 56.1; see ***Nickerson v. United States***, 35 Fed. Cl. 581, 588 (1996), *aff'd*, 113 F.3d 1255 (Fed. Cir. 1997). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. **RCFC** 56(c); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247 (1986); ***Jay v. Sec'y, DHHS***, 998 F.2d 979, 982 (Fed. Cir. 1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. ***Anderson***, 477 U.S. at 248.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. ***Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.***, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Alternatively, if the moving party can show there is an absence of evidence to support the non-moving party's case, then the burden shifts to the non-moving party to proffer such evidence. ***Celotex***, 477 U.S. at 325. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, ***Litton Indus. Prods., Inc. v. Solid State Sys. Corp.***, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all favorable inferences and presumptions run. ***H.F. Allen Orchards v. United States***, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

The fact that both parties have moved for summary judgment does not relieve the court of its responsibility to determine the appropriateness of summary disposition. ***Prineville Sawmill Co., Inc. v. United States***, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387, 1390 (Fed. Cir. 1987)). A cross-motion is a party's claim that it alone is entitled to summary judgment. ***A Olympic Forwarder, Inc. v. United States***, 33 Fed. Cl. 514, 518 (1995). It, therefore, does not follow that if one motion is rejected, the other is necessarily supported. ***Id.*** Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. ***Id.*** (citing ***Corman v. United States***, 26 Cl. Ct. 1011, 1014 (1992)).

Congress amended the Tucker Act in 1996 by granting this court jurisdiction to hear post-award bid protest actions. 28 U.S.C. § 1491(b)(4). The court reviews the challenged agency decisions according to the standards set out in the

Administrative Procedures Act (APA), 5 U.S.C. § 706. ***Impresa Construzioni Geom. Domenico Garufi v. United States***, 238 F.3d 1324, 1332 (Fed. Cir. 2001) (citations omitted); ***Northrop Grumman Corp. v. United States***, 50 Fed. Cl. 443, 457 (2001). In particular, the court must determine whether the agency's actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). A bid award may be set aside, therefore, "if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." ***Impresa***, 238 F.3d at 1332 (citations omitted); ***Filtration Dev. Co., LLC v. United States***, 60 Fed. Cl. 371, 376 (2004).

In determining whether the agency has acted arbitrarily and capriciously toward plaintiff, the court must consider four factors. ***Keco Indus., Inc. v. United States***, 203 Ct. Cl. 566, 574 (1974). Specifically, the court must determine whether: (1) there was subjective bad faith on the part of the procuring officials; (2) there was a reasonable basis for the procurement decision; (3) the procuring officials abused their discretion; and (4) pertinent statutes and regulations were violated. ***Id.***; see also ***Aero Corp., S.A. v. United States***, 38 Fed. Cl. 739, 749 (1997). There is, however, "no requirement or implication . . . that each of the factors must be present in order to establish arbitrary and capricious action by the government." ***Hawpe Const., Inc. v. United States***, 46 Fed. Cl. 571, 578 (2000) (quoting ***Prineville***, 859 F.2d at 911).

When reviewing agency action, the APA requires a "thorough, probing, in-depth review" to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." ***Citizens to Preserve Overton Park, Inc. v. Volpe***, 401 U.S. 402, 415-16 (1971). In examining an agency's procurement action, the agency is given wide discretion in the application of procurement regulations. ***Bellevue Bus Serv., Inc. v. United States***, 15 Cl. Ct. 131, 133 (1988); ***CACI Field Servs., Inc. v. United States***, 13 Cl. Ct. 718, 725 (1987), *aff'd*, 854 F.2d 464 (Fed. Cir. 1988). In this regard, the court cannot substitute its judgment for that of the agency, even if reasonable minds could reach differing conclusions. ***CRC Marine Servs., Inc. v. United States***, 41 Fed. Cl. 66, 83 (1998). "This deference is particularly great when a negotiated procurement is involved and is greater still when the procurement is a 'best value' procurement." ***Computer Sciences Corp. v. United States***, 51 Fed. Cl. 297, 306 (2002) (quoting ***Bean Stuyvesant, LLC v. United States***, 48 Fed. Cl. 303, 320 (2000)). Indeed, "[t]he court should not substitute its judgment on such matters for that of the agency, but should intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." ***Baird Corp. v. United States***, 1 Cl. Ct. 662, 664 (1983). As long as a rational basis is articulated, and relevant factors are considered, the agency's actions must be upheld. ***Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.***, 419 U.S. 281, 285-86 (1974).

The "disappointed bidder bears a 'heavy burden' of showing that the award decision 'had no rational basis.'" ***Impresa***, 238 F.3d at 1333 (citing ***Saratoga Dev. Corp. v. United States***, 21 F.3d 445, 456 (D.C. Cir. 1994)). When a protestor is asserting a violation of regulation or procedure, "the disappointed bidder must show

a 'clear and prejudicial violation of applicable statutes or regulations.'" ***Id.*** (citing ***Kentron Hawaii, Ltd. v. Warner***, 480 F.2d 1166, 1169 (D.C. Cir. 1973); ***Latecoere Int'l, Inc. v. United States Dep't of Navy***, 19 F.3d 1342, 1356 (11th Cir. 1994)). Moreover, "to prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it." ***Data Gen. Corp. v. Johnson***, 78 F.3d 1556, 1562 (Fed. Cir. 1996). To establish prejudice, a protestor must demonstrate that but for the alleged error, there was a substantial chance it would have received the award. ***Statistica, Inc. v. Christopher***, 102 F.3d 1577, 1581 (Fed. Cir. 1996); ***Myers Investigative & Sec. Servs., Inc. v. United States***, 47 Fed. Cl. 605, 615 (2000).

I. Technical Evaluations

A. Fill Rate

Plaintiff maintains that DSCP failed to consider EBREX's poor fill rate and poor performance under the prior contract in its technical evaluation despite having that information in its possession. Plaintiff avers that fill rate problems were severe and longstanding. Plaintiff contends that DSCP could not verify contractor fill rates and, if it had closely examined EBREX's fill rate under the predecessor contract, the results would have revealed a fill rate well below what the solicitation required. Apart from the requirements set forth in the solicitation, plaintiff primarily relies on several pieces of evidence to substantiate its claim: (1) DSCP Office of Legal Counsel Powerpoint; (2) EBREX email pertaining to fill rates dated July 22, 2002; (3) DSCP letter to EBREX dated February 1, 2001; and (4) Mr. Erik Baggen's affidavit.

Defendant maintains that DSCP did consider EBREX's fill rate and performance under the prior contract. Defendant avers that mechanisms were in place to oversee contractor performance and that there were no visible signs that EBREX was not performing up to par under the prior contract. Defendant also contends that there are a variety of benign reasons why fill rate submissions would need to be adjusted and correspondences to that effect would not necessarily imply poor or inaccurate fill rates. Further, defendant asserts that the DSCP letter and the EBREX email do not establish the existence of an unaddressed, long-term fill rate problem, rather they only reference isolated incidents.

The court proceeds well-aware that an agency is accorded broad discretion when conducting its past performance evaluations. ***JWK Int'l Corp. v. United States***, 52 Fed. Cl. 650, 659 (2002), *aff'd*, 56 Fed. Appx. 474 (Fed. Cir. 2003) (table) (explaining that "various decisions hold that, in protests challenging an agency's evaluations of an offeror's technical proposal and past performance, review should be limited to determining whether the evaluation was reasonable, consistent with the stated evaluation criteria and complied with relevant statutory and regulatory requirements").

Plaintiff advances, in essence, a two-fold argument concerning the alleged past performance problem and fill rate issue. First, plaintiff attempts to demonstrate the existence of a fill rate problem through the three documents with which it supplemented the administrative record and through Mr. Baggen's affidavit. Second, plaintiff then assumes it has met its burden of demonstrating a fill rate problem and faults the government for not addressing the issue during proposal evaluations. The court, however, concludes that plaintiff has not established the first prong of its argument and, therefore, the government cannot be faulted for not addressing an alleged problem which did not exist. The court also concludes that DSCP's technical evaluation comported with the terms of the solicitation.

DSCP concluded that EBREX's "[f]ill rate ranges from 97.5% current contract to 100% smaller accounts."[14] DSCP had no reason to doubt the accuracy of these figures. The five customer references listed by EBREX were contacted and they provided favorable comments with respect to fill rates.[15] In addition to the information provided by EBREX in response to the solicitation, DSCP also relied on customer satisfaction surveys from 2002 which likewise indicated that EBREX's performance was "Very Good."[16] Further, the Contracting Officer Representative (COR) and account managers monitored fill rates during contract performance.[17] The COR maintained a presence at EBREX's main facility whereas the account managers were located overseas and in Philadelphia, Pennsylvania. DSCP also received additional feedback from customers. Moreover, DSCP considered EBREX's lack of "any restrictions on quantity," the strength of its domestic food supplier, Lankford SYSCO, and the manner in which EBREX intended to sustain the proposed fill rate.[18] Accordingly, DSCP conducted a proper technical evaluation and its reliance on the 97.5% and 100% fill rate figures was not unreasonable.

This conclusion is also independently substantiated by agency records cited in the CO's Report and in litigation before the GAO. The CO stated that "the Agency's fill rate reports for EBREX for FY02 (Oct 01-Sep 02) show 1,322,994 cases ordered of which 1,293,451 were available without substitution for a fill rate of 97.8%."[19] The GAO similarly concluded that "the agency's records for the period from January 2002 through May 2003 show that EBREX's overall average fill rate

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[14] ***Id.*** at 02777; see also ***id.*** at 02563.

[15] ***Id.*** at 03101.

[16] ***Id.***

[17] ***Id.*** at 03043; see also ***id.*** at 03102.

[18] ***Id.*** at 02778, 02930-31.

[19] ***Id.*** at 03101-02.

was 98.3 percent . . . ."[20] Against this backdrop, the evidence - - whether it came from customers ordering products under the contract, from domestically or internationally stationed government personnel responsible for monitoring the contract, from agency records, or from three EBREX employee affidavits - - overwhelmingly shows the absence of a sustained and severe fill rate problem.

The evidence relied upon by plaintiff does not assist its cause. Mr. Baggen's affidavit, purporting to establish fraudulent reporting, was expressly rebutted through affidavits submitted by three EBREX employees.[21] The February 2001 letter and EBREX email refer to isolated incidents involving only a handful of orders and do not transcend the entire contract period. While the court does not believe that there were no glitches or bumps in contract performance, these incidents must be examined against a contract whose term extended for five years and encompassed tens of thousands of orders, if not more. In addition, defendant proffered evidence establishing that discrepancies did exist, but fill rates were frequently adjusted during contract performance for reasons ranging from clerical errors to product returns to emergency orders. Lastly, the DSCP Office of Legal Counsel powerpoint slide does not in any way transform DSCP's reasonable evaluation into an unreasonable one. Accordingly, the court finds no merit to plaintiff's argument that DSCP improperly evaluated EBREX's fill rate and past performance under Contract No. 2949.[22]

B. MDV/Nash Finch

Plaintiff maintains that DSCP failed to credit it with the experience and past performance of its teammate, MDV/Nash Finch. Plaintiff disputes DSCP's statement, in handwritten notes, that MDV/Nash Finch's "experience is not entirely the same as [DSCP] will require . . . ."[23] Plaintiff also argues that the error was compounded when DSCP credited EBREX with its team's past experience, which included Lankford SYSCO and plaintiff, but reduced plaintiff's score on the basis of that same experience. Defendant and EBREX, on the other hand, assert there was no error in DSCP's evaluation.

The solicitation afforded offerors an opportunity to propose teaming arrangements in their proposals. Each offeror was to provide "evidence of experience in providing full line and non-food service for customers with similar food dollar/volume requirements as those of this solicitation, and must show

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[20] ***Id.*** at 03387; see also ***id.*** at 03262-63.

[21] ***Id.*** at 03313-21.

[22] As the court previously held, and repeats here, additional evidence on the issue is not necessary for meaningful judicial review. ***Autofrigo Europe, S.R.L. v. United States***, No. 04-835, slip op. at 6 (Fed. Cl. Sept. 10, 2004).

[23] AR at 01702.

evidence of experience with export shipping and OCONUS warehousing and distribution."[24] Further, "[t]his experience shall include the offeror's own corporate entity and any partners, subcontractors, and/or alternate sources who would be performing on the proposed contract. Offerors utilizing a consortium, joint venture or other teaming approach shall provide experience information for that consortium, joint venture or other teaming approach."[25] The solicitation clarified, however, the relative weight which would be given the offering entity as opposed to the team member:

> Offerors that are proposing a joint venture, partnership or a teaming approach should provide experience and past performance information for all members of the offering joint venture, partnership, or team. However, the most relevant experience and past performance data, and that which will receive the most credit, is the information directly related to the offering entity.[26]

After examining the Source Selection Decision, the court concludes that DSCP's evaluation properly credited plaintiff with its own experience as well as with that of its teammate, MDV/Nash Finch.

The Source Selection Decision explains that plaintiff's "rating of [***] was heavily influenced by the experience/past performance of [its] sub-contractor, MDV/Nash Finch."[27] In light of the very next sentence, which provides that "[EBREX's] rating of 'Good' was based on [its] own experience/past performance," there is no doubt that plaintiff received the benefit of its teaming arrangement, and MDV/Nash Finch's past performance and experience were considered. Further, consistent with the terms of the solicitation, the evaluation focused more heavily on plaintiff's own experience: "[Plaintiff] has not performed all tasks associated with full line distribution; i.e., purchasing, tracking delivery orders, etc., nor [does it] have direct experience with exporting."[28] Noticeably, nowhere does plaintiff convincingly argue that this conclusion is incorrect. For that matter, it would be difficult to do so given that it is entirely conceivable, and indeed rational to conclude, that plaintiff, as a subcontractor under EBREX's previous contract, would not have

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[24] ***Id.*** at 00124.

[25] ***Id.***

[26] ***Id.***

[27] ***Id.*** at 02930.

[28] ***Id.***

been responsible for all aspects of the operation.[29] Therefore, DSCP's evaluation of plaintiff's teaming arrangement was conducted in accordance with solicitation requirements.

II. Price and Cost Realism Analysis

Plaintiff maintains that DSCP failed to conduct a proper price or cost realism analysis. Plaintiff asserts that EBREX's actual prices on the previous contract were significantly higher than the prices proposed. Plaintiff avers that had the agency compared the proposed prices to the actual prices tendered under the previous contract, it would have concluded that the prices EBREX was proposing were unrealistic. Defendant, on the other hand, contends that DSCP conducted both a proper price analysis and cost realism analysis. Defendant asserts that the Federal Acquistion Regulations (FAR) does not mandate a particular evaluative technique. Defendant avers that its obligations under the FAR were met through a comparison of the offerors' proposed prices and through an evaluation of core market basket items.

48 C.F.R. § 15.404-1(b)(1) states that price analysis "is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit." The FAR does not dictate that a particular technique or procedure be used to accomplish this end. Rather, the FAR merely provides a non-exclusive list of acceptable techniques. 48 C.F.R. § 15.404-1(b)(2) (explaining which techniques the government "may" use). Amongst the techniques in the list, the FAR expresses a noted preference for either a "[c]omparison of proposed prices received in response to the solicitation," ***id.*** § 15.404-1(b)(2)(i), or a "[c]omparison of previously proposed prices and previous [g]overnment and commercial contract prices with current proposed prices for the same or similar items." ***Id.*** § 15.403-3(b)(2)(ii).

The CO bears the responsibility of determining price reasonableness. ***Id.*** § 15.404-1(a)(1). "When adequate price competition exists . . . generally no additional information is necessary to determine the reasonableness of price." ***Id.*** § 15.404-1(b). The FAR indicates that adequate price competition is established where:

> (i) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement and if - -
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> > (A) Award will be made to the offeror whose proposal represents the best value . . . where price is a substantial factor in source selection; and

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[29] See Plaintiff's Counter-Statement Of Facts To United States' Statement Of Facts ¶ 2.

(B) There is no finding that the price of the otherwise successful offeror is unreasonable.

Id. § 15.403-1(c)(1)(i)(A), (B).

A cost realism analysis differs from a price analysis in several respects. ***ViroMed Labs., Inc. v. United States***, 62 Fed. Cl. 206, 211 (2004). The analysis, as set forth in the FAR and reiterated in the solicitation in this case, consists of "independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed . . . [and] reflect a clear understanding of the requirements. . . ." 48 C.F.R. § 15.404-1(d)(1). The purpose of a price analysis is to ascertain whether the price is too high whereas a cost realism analysis focuses on whether a cost estimate is too low. ***First Enter. v. United States***, 61 Fed. Cl. 109, 123 (2004). For the most part, with the caveat of limited exceptions, a cost realism analysis is not required. ***Id.***

The agency in this instance, however, voluntarily assumed the burden of conducting a cost or price realism analysis. It is well-established that "[a]n agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation." 48 C.F.R. § 15.305(a). The solicitation made clear that "[t]he [g]overnment will evaluate all offerors' proposals to determine cost or price realism. Cost or price realism will demonstrate an offeror's understanding of the requirements of the solicitation and that the costs proposed are realistic for the performance requirements."[30] Nevertheless, as was the case with price analysis, the FAR does not mandate a particular evaluative technique.

This court has been cautious not to usurp the CO's discretion, or impose requirements not found in the FAR. Plaintiff carries the difficult burden of demonstrating that the CO's decision was irrational. ***Halter Marine, Inc. v. United States***, 56 Fed. Cl. 144, 172 (2003); ***United Payors & United Providers Health Servs., Inc. v. United States***, 55 Fed. Cl. 323, 329 (2003) (explaining that a choice will be upheld if it is "rational and based on reasoned judgment"). The CO possesses "wide discretion with regard to the evaluation of bids." ***Labat-Anderson, Inc. v. United States***, 42 Fed. Cl. 806, 846 (1999). "[T]he nature and extent of an agency's price realism analysis are matters within the agency's discretion." ***Labat-Anderson, Inc. v. United States***, 50 Fed. Cl. 99, 106 (2001) (citation omitted). This court has allowed a certain degree of flexibility and has not required that a cost realism analysis be performed with "impeccable rigor." ***Halter Marine***, 56 Fed. Cl. at 172 (quoting ***OMV Med., Inc. v. United States***, 219 F.3d 1337, 1344 (Fed. Cir. 2000)). Stated another way, the court examines whether the analysis evidences "irrational assumptions or critical miscalculations . . . ." ***JWK Int'l Corp. v. United States***, 49 Fed. Cl. 371, 393 (2001) (quoting ***OMV***, 219 F.3d at 1344).

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[30] AR at 00160.

As an initial matter, the court finds no error in DSCP's price analysis. Two competing entities, EBREX and plaintiff, submitted price offers.[31] 48 C.F.R. § 15.403-1(c)(1)(I). The FAR permitted DSCP to compare the two offerors' prices to show adequate price competition and, in turn, establish price reasonableness. ***Id.*** The contract would be awarded to the offeror whose proposal represented the best value to the government, and price was a significant factor in the procurement evaluation process. ***Id.*** § 15.403-1(c)(1)(i)(A). Further, there was no indication the price was unreasonable. With respect to delivered price, plaintiff's price was [***] than EBREX's price. On the other hand, with respect to distribution price, which was not subject to fluctuation in the same manner as delivered price, EBREX's price was [***] than plaintiff's price. Therefore, DSCP properly established price reasonableness through adequate price competition.

The court reaches the same conclusion with respect to DSCP's cost realism analysis. Both plaintiff and EBREX have experience in the industry and, therefore, were familiar with the government's requirements. Of the 86 products listed as evaluative market basket items, 24 of them were to be accompanied by manufacturer/supplier invoices or quotes.[32] The CO summed up the evaluation as follows:

> Each invoice was evaluated for appropriate manufacturer/supplier logo, effective date within the required 4 week period prior to the solicitation closing date (23 Jul 02 - 20 Aug 02), specific match with the delivered price contained in the offeror's cost or price proposal, and specific match to the item described in the Solicitation.[33]

In addition, as was discussed above, but elaborated upon in more detail here, DSCP scrutinized the offerors' delivered prices. DSCP analyzed whether an item's delivered price differed significantly against the other offeror's price and examined whether it differed significantly against the same or similar item in the catalog price. Where a significant disparity was visible, the issue was covered during negotiations and offerors once again were required to submit manufacturer/supplier invoices or quotes. These evaluative steps were taken to ascertain the offerors' ability to supply the item at the quoted price, i.e., whether the price was realistic. Further, the feasibility of providing items at a given price was corroborated by the [***] difference [***] between plaintiff's and EBREX's final delivered price proposals.[34]

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[31] ***Id.*** at 02932.

[32] ***Id.*** at 03093.

[33] ***Id.*** at 03093-94; see also ***id.*** at 01522.

[34] ***Id.***

It is important at this juncture to reiterate that "the nature and extent of an agency's price realism analysis are matters within the agency's discretion." ***Labat-Anderson***, 50 Fed. Cl. at 106. DSCP, in conducting a cost realism analysis of two sophisticated offerors, authenticated a subgroup of market basket prices, and also required substantiation in instances where a discrepancy existed either between the two offerors' proposals or the catalog price. While a price difference may indeed have existed between EBREX's proposed delivered prices and actual delivered prices under the previous contract, DSCP confirmed EBREX's ability to supply the items at the reduced price level. Accordingly, the court concludes that DSCP complied with the requirements of the FAR and the solicitation in conducting its price analysis and cost realism analysis.

III. Meaningful Discussions

Plaintiff maintains that DSCP failed to conduct equal and meaningful discussions. Plaintiff points to five categories where it alleges the government failed to direct its attention to significant weaknesses or deficiencies: (1) Subfactor 2C: Proposed Fill Rate; (2) Subfactor 3D: Electronic Data Interchange (EDI) Capability; (3) Subfactor 4H: Rebates and Discounts; (4) Subfactor 6A3: Back-Up Plan Fill Rate; and (5) Distribution Fees. Defendant contends that the government exceeded its burden during its discussions with plaintiff. Defendant also asserts that the discussions did not favor one offeror over the other.

When an agency enters into negotiations with an offeror after it has established the competitive range, those negotiations are referred to as discussions. 48 C.F.R. § 15.306(d). The CO is required to "indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." 48 C.F.R. § 15.306(d)(3); see also ***Consolidated Eng'g Servs., Inc. v. United States***, 2005 WL 850882, at *12 (Fed. Cl. Mar. 30, 2005). The FAR defines a "deficiency" as "a material failure of a proposal to meet a [g]overnment requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level." 48 C.F.R. § 15.001. On the other hand, the FAR defines "significant weakness" as a "flaw that appreciably increases the risk of unsuccessful contract performance." ***Id.***

The CO, however, is not necessarily constrained to the three enumerated areas. The FAR encourages, but does not require, the CO "to discuss other aspects of the offeror's proposal that could, in the opinion of the [CO], be altered or explained to enhance materially the proposal's potential for award." ***Id.*** § 15.306(d)(3). To the extent an offeror believes this provision mandates that the CO discuss every aspect of the proposal which could be improved, that is a mistake. The FAR expressly provides that the CO "is not required to discuss every area where the proposal could be improved" and indicates that "[t]he scope and extent of discussions are a matter of [CO] judgment." ***Id.***; see also ***DGS Contract Serv., Inc. v. United States***, 43 Fed. Cl. 227, 241 (1999). For discussions to be characterized as meaningful, they should

encompass defects in the proposal which fail to meet solicitation requirements. ***JWK***, 49 Fed. Cl. at 394.

"[W]hile agencies generally are required to conduct meaningful discussions by leading the offerors into the areas of their proposals requiring amplification, this does not mean that an agency must 'spoon-feed' an offeror as to each and every item that must be revised, added, or otherwise addressed to improve a proposal." ***WorldTravelService v. United States***, 49 Fed. Cl. 431, 439-40 (2001) (quoting ***LaBarge Elecs.***, Comp. Gen. B-266210, 96-1 CPD ¶ 58, 1996 WL 53930 (1996)). As long as the agency "generally lead[s] offerors into the areas of their proposals requiring amplification or correction," the agency's burden has been relinquished. ***Banknote Corp. of America, Inc. v. United States***, 56 Fed. Cl. 377, 384 (2003) (quoting ***WorldTravelService***, 49 Fed. Cl. at 439). All discussions with offerors are not identical and "are tailored to each offeror's proposal." 48 C.F.R. § 15.306(d)(1). Nevertheless, the CO must be cautious not to engage in "one-sided" discussions which "[f]avor[] one offeror over another." ***Id.*** § 15.306(e)(1). The overarching purpose of engaging in discussions "is to maximize the [g]overnment's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." ***Id.*** § 15.306(d)(2).

After careful review of the administrative record, the court concludes, to the same extent as the GAO, that DSCP's discussions with plaintiff were meaningful and that DSCP treated both offerors equally. At the outset, the thrust of plaintiff's argument is not so much directed toward meaningful discussions as it is toward DSCP's conclusions. Nevertheless, DSCP sent plaintiff a letter, dated February 28, 2003, asking it to address aspects of its proposal which needed additional explanation.[35] The letter set forth the agency's concerns regarding the [***] system,[36] the rebate/discount program, and EDI capability. Plaintiff responded by elaborating upon and clarifying the referenced aspects of the proposal. The court is neither persuaded that DSCP failed to comprehend the substance of plaintiff's response nor that DSCP should have undertaken further inquiries. In addition, plaintiff's argument with respect to distribution fees is unfounded. On two separate occasions, February 28, 2003, and April 7, 2003, DSCP brought to plaintiff's attention that individual distribution prices appeared either "high" or "especially high," and requested that plaintiff reduce said prices. Lastly, given the court's holdings in this case and on the basis of the evidence in the administrative record, the court does not agree that the

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[35] ***Id.*** at 01522-39.

[36] Given that plaintiff proposed the same approach for achieving its Proposed Fill Rate as well as its Back-Up Plan Fill Rate, and that DSCP was only required to lead plaintiff into the area requiring amplification, the discussions were meaningful as to both Subfactors 2C and 6A3 because plaintiff was placed on notice, and afforded an opportunity to explain, its [***] system. ***Banknote Corp.***, 56 Fed. Cl. at 384 (quoting ***WorldTravelService***, 49 Fed. Cl. at 439).

offerors were treated unequally during discussions. Accordingly, the court concludes that DSCP's discussions conformed with FAR and case law requirements.

Conclusion

For the above-stated reasons, plaintiff's Motion For Judgment On The Administrative Record is hereby DENIED. Defendant's cross-motion for judgment on the administrative record is hereby GRANTED. Plaintiff's Renewed Motion For Leave To Take Additional Discovery And Depositions is hereby DENIED. The Clerk is directed to enter judgment in accordance with this opinion. No costs.[37]

IT IS SO ORDERED.

BOHDAN A. FUTEY
Judge

[37] This opinion is being issued redacted. Plaintiff submitted redactions in accordance with the court's order of April 21, 2005.