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Comptroller General  
of the United States

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## Decision

**Matter of:** Lockheed Martin Simulation, Training & Support

**File:** B-292836.8; B-292836.9; B-292836.10

**Date:** November 24, 2004

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### DIGEST

1. Protest that agency improperly engaged in post-final proposal revision (post-FPR) discussions only with awardee is sustained where record shows that post-FPR exchange resulted in material changes to awardee's proposal.
2. Protest that agency failed to engage in meaningful discussions with protester is sustained where record shows that agency failed to discuss weaknesses first identified in a reevaluation of proposals that were based on earlier proposal language, and also was unreasonably vague in areas where agency did conduct discussions.

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### DECISION

Lockheed Martin Simulation, Training & Support, a business unit of Lockheed Martin Corporation (LMC), protests the award of a contract to Electronic Data Systems Information Services, LLC (EDS) under request for proposals (RFP) No. R-OPC-21970, issued by the Department of Housing and Urban Development (HUD) to acquire information technology (IT) services. LMC asserts that the agency committed various errors in conducting discussions, miscalculated proposals, and made an unreasonable source selection decision.

We sustain the protest.

## BACKGROUND

This is the third occasion where we have been called upon to review HUD's actions in connection with this acquisition. In August 2003, HUD awarded a contract to EDS under the subject RFP and LMC filed a protest relating to that award. We sustained the protest, finding that the agency miscalculated the proposals in numerous respects and appeared to have applied a double standard in its evaluation; as a consequence, the agency's source selection decision was not reasonable. We recommended that the agency reopen the acquisition, engage in discussions with the offerors, obtain and evaluate revised proposals (being sure to apply a consistent standard in its evaluation) and make a new source selection decision. Lockheed Martin Info. Sys., B-292836 et al., Dec. 18, 2003, 2003 CPD ¶ 230.

During the pendency of the initial protest, the agency determined that proceeding with performance of the EDS contract in the face of the protest was in the government's best interest. The agency therefore began transitioning its IT requirements from LMC, which had been the incumbent, to EDS. At the time of the agency's original decision to proceed with performance, LMC did not challenge the agency's actions. Subsequently, and at approximately the same time that the agency initiated its corrective action, LMC pursued injunctive relief at the United States Court of Federal Claims, seeking to prevent the further transition of IT activities from LMC to EDS. The Court did not rule on that dispute because the parties arrived at a negotiated settlement that suspended further transition activities until a new award decision could be made. Thus, following these actions, EDS was performing a portion of HUD's IT requirements, and LMC the remainder.

In response to our earlier decision, the agency amended the RFP in numerous significant respects and afforded the offerors an opportunity to submit revised proposals. Thereafter, both LMC and EDS filed pre-closing protests, each maintaining that the terms of the reopened competition provided the other offeror an unfair competitive advantage. Our Office conducted an alternative dispute resolution (ADR) session in an effort to settle the protests and allow the agency to proceed with its acquisition. The ADR session resulted in the agency's making several amendments to the RFP in response to the protest allegations, and EDS and LMC withdrawing their respective protests.

### The Solicitation

As explained in more detail in our first decision, HUD issued the RFP to acquire a wide range of IT services to support all of the agency's requirements for information processing, telecommunications and other related needs for a base (transition) period of up to 1 year, with nine 1-year options. The RFP contemplated a single award for the HUD Information Technology Solution (HITS) contract, which is a

follow-on contract for the HUD Integrated Information Processing Service (HIIPS) contract. (As noted, LMC was the incumbent for the HIIPS contract, but as a consequence of the agency's transition activities, EDS also currently performs a portion of the agency's requirements.) The solicitation contemplated the award of a hybrid contract including both fixed-price and cost-reimbursement contract line item numbers (CLINs).

The requirement--essentially all of HUD's information processing, telecommunications and related needs on a nationwide, agency-wide basis--was organized around 24 core functions reflecting the agency's various service needs. For example, the first core function, "hardware," includes the provision, management, storage, maintenance, upgrade, backup and operation of all computer hardware, including mainframe computers, servers, printers and peripheral devices. Another core function relates to the provision of all of the agency's desktop computing requirements, another to notebook computing requirements, and so on.

The RFP reflected a performance-based contracting approach, and thus did not include substantive specifications or a statement of work. Instead, the RFP set forth a statement of objectives, outlined in general terms the various core functions, and presented information relating to HUD's current computing environment.<sup>1</sup> Offerors were required to include in their proposals two primary items--performance work statements (PWS) (one for each CLIN), which were intended to embody the contract terms that would govern the rights and obligations of the parties; and one or more service level agreements (SLA), which were to include both minimum and higher standards of performance, as measured by various performance metrics (essentially, empirical standards against which a firm's performance would be measured). (Other information was required--such as a quality assurance surveillance plan and past performance information--but the PWSs and SLAs were the documents that would outline the central substantive elements of the firms' HITS solution, and govern the contractual rights and liabilities of the parties.)

The RFP advised firms that the agency intended to make award to the firm submitting the proposal found to offer the "best value" to the government, considering both cost/price and several non-cost/price considerations. The first and most important evaluation factor, capability, was further divided into the following subfactors (in descending order of importance): technical/management solution, performance metrics, transition approach, and small business strategy. The second evaluation factor was past performance. The RFP provided that the agency would assign adjectival ratings--exceptional, good, satisfactory, marginal or poor (or neutral for a lack of past performance)--for these factors and subfactors. These two factors

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<sup>1</sup> One of the changes made to the RFP as a consequence of the ADR procedure was the inclusion of a comprehensive inventory of all of HUD's IT hardware and software.

combined were significantly more important than the third factor, cost/price. Finally, the RFP advised that the agency would assign each of the non-cost/price considerations a risk rating of high, medium or low.

### The Proposals

As noted, the agency initially called for revised proposals in an effort to implement our earlier-recommended corrective action. HUD conducted detailed debriefings for the offerors (LMC's debriefing occurred at the time of the original award, in August 2003, while EDS was provided its debriefing as part of the agency's effort to implement our recommended corrective action), and also engaged in discussions with the firms. On March 31, 2004, prior to our conducting the ADR session to resolve the pre-closing protests, the agency received revised proposals. After the agency amended the solicitation in response to the ADR procedure, LMC and EDS were afforded the opportunity to submit limited revisions to their proposals. (HUD was unwilling to open discussions on a general basis at that time.) Final proposal revisions (FPR) were submitted on June 18.

On June 28, the agency sent communications to both firms. In its letter to LMC, the agency asked it to verify that certain non-local equipment moves were included in its fixed price, and to calculate the outcome (the payment of a financial incentive or disincentive) in the application of one of its SLAs using sample data. Agency Report (AR), exh. 109. In its letter to EDS, the agency raised two questions--it asked EDS to calculate the outcome of an SLA using sample data, and also asked the firm to clarify an aspect of its technology refresh solution (also referred to in the record as its technical refresh plan) as it related to the replacement of government-furnished equipment (GFE). AR, exh. 112. The firms provided responses to these questions on June 29 and 30.

The agency evaluated the proposals and assigned the following ratings (concluding that the proposals were "essentially equal" with respect to cost/price):

	<b>LMC</b>	<b>EDS</b>
<b>Overall Technical Rating/Risk</b>	Marginal/High	Good/Medium
<b>Capability Factor/Risk</b>	Satisfactory/High	Good/Medium
<b>Tech./Mgmt. Subfactor/Risk</b>	Satisfactory/Medium	Exceptional/Low
<b>Perf. Metrics Subfactor/Risk</b>	Marginal/High	Satisfactory/Medium
<b>Transition Subfactor/Risk</b>	Marginal/High	Good/Low
<b>Small Business Subfactor/Risk</b>	Exceptional/Low	Good/Low
<b>Past Perf. Factor/Risk</b>	Good/Low	Good/Low
<b>Evaluated Price</b>	\$745,364,142	\$743,731,579

AR, exh. 116, at iii, iv, 15. On the basis of these evaluation results, the agency made award to EDS. This protest followed.

LMC raises a number of assertions, including several relating to the conduct of discussions. We conclude that the discussions were flawed, and sustain LMC's protest on this basis.

#### EDS POST-FPR EXCHANGE

##### Technical Refresh Plan

Both offerors included as part of their proposals technical refresh plans, that is, a plan for periodically replacing computing and telecommunications assets with new assets. (For example, an offeror might propose to replace desktop computers every 30 months, and servers every 50 months.) HUD had on hand a vast array and quantity of computing and telecommunications equipment of varying age and functionality, which it made available to the offerors as GFE to be used under their respective HITS solutions. GFE is to be utilized during the initial stages of the contract, and then be replaced with contractor-owned assets in the subsequent years of the contract. EDS's technical refresh plan, as presented in its FPR, provided:

The contractor solution shall provide provisioning, management, storage, maintenance, backup, and operation of all computer hardware (including printers and peripherals) to meet or exceed HITS objectives. Throughout the delivery of core function services, the contractor shall provide for the procurement, delivery, installation, and maintenance of new equipment in accordance with the technology refresh plan defined in Exhibit 3.1-5.

As illustrated in Exhibit 3.1-5, equipment replacement is scheduled when systems reach the operational reorder age, and refresh is planned for completion before the equipment reaches its maximum operating age.

AR, exh. 111, at C-43. EDS's proposal exhibit 3.1-5, referred to in the above-quoted text, is a table with a comprehensive list of the various categories of hardware to be used under the contract, with a "reorder age" and "maximum operating age" (MOA) for each category of equipment expressed in months (for example, the table lists desktop computers and shows a reorder age of [deleted]). Id. The exhibit also includes several footnotes relating to some of the details of EDS's technical refresh plan. As is relevant here, footnote 6 provides "[r]eorder age is defined from the date of installation into HITS environment." Id.

The agency evaluators apparently were unsure how GFE was being treated under the EDS technical refresh plan. Accordingly, on June 28, the agency posed the following question to EDS:

Reference Exhibit 3.1-5, Page C-43, Maximum Operating Age. Please clarify whether the "maximum operating age" of GFE will be measured from the date of contract award or date of installation into the 'as-is' operating environment.

AR, exh. 112. EDS's June 30 response provided as follows:

The "Maximum Operating Age" used in Exhibit 3.1-5 refers to the EDS estimate for the useful operating life by the category of equipment, and is to be counted from the date of installation by EDS into the HITS solution. The categories of equipment in Exhibit 3.1-5 that have projections for "Reorder Age" (which is the point at which EDS will begin the ordering process to replace a unit) and "Maximum Operating Age" [deleted]. The footnotes #1-#5 in the exhibit discuss the migration path for some of the categories of existing GFE . . . .

The process to assess the age and replace the existing HUD owned GFE in place at the time of HITS transition will be accomplished in several steps as detailed below:

AR, exh. 112. The response went on to note EDS's offer to provide [deleted] during the transition phase of the contract, and EDS's commitment to achieving the goal of having [deleted], thereby removing some legacy GFE computers from use. The response then described an "[deleted]." Id.

LMC asserts that EDS's June 30 response made three material changes to EDS's proposal: (1) it declared for the first time that [deleted]. LMC concludes that the

agency's communication with EDS constituted discussions, and that LMC therefore was entitled to the same opportunity to revise its proposal.

The agency asserts that EDS's response made no material change to its proposal. According to HUD, the discussion question posed was designed merely to clarify EDS's intent with respect to the reorder age concept already included in the firm's proposal, because the evaluators could not understand how already-installed GFE would be "installed" into the HITS environment. HUD maintains that the plain language of the proposal already made it clear that the MOA concept applied to all equipment and dictated that GFE would be replaced by the time it reached the MOA. HUD supports its position with an affidavit in which the program manager for the HITS procurement states:

"Maximum operating age" generally means the maximum amount of time that the device should be in operation. 'Reorder age' generally means the age of the device when the reorder process begins. We viewed the EDS proposal as providing a clear maximum operating age, but it was unclear what the reorder age was for [GFE] because footnote 6 to the table in the EDS proposal (Exhibit 3.1-5) discussed the date the equipment is installed in HITS. We understood that the reorder age could go up to the maximum operating age, but we wanted EDS to confirm this understanding. We also knew that performance would be measured by the SLAs. We considered the EDS approach as acceptable because we knew the maximum operating age and the SLA would ensure good performance.

Agency Legal Memorandum, Sept. 30, 2004, attach. 2, at ¶ 13.

EDS offers a wholly different explanation regarding its June 30 response. According to EDS, its proposal never made the [deleted], and the explanation it provided in the June 30 response therefore did not change its proposal in any way; it was perfectly consistent with its proposal. EDS states that the technical refresh schedule outlined in exhibit 3.1-5 was always applicable [deleted], and cites as support the statement in its proposal that: "[t]hroughout the delivery of core function services, the contractor shall provide for the procurement, delivery, installation, and maintenance of new equipment in accordance with the technology refresh plan defined in Exhibit 3.1-5." AR, exh. 111, at C-43. EDS asserts that this language made clear that the technology refresh plan outlined in exhibit 3.1-5 was only [deleted]. EDS explains further that its proposal always contemplated the replacement of [deleted] outlined in clause H.4 of its proposal, and that its June 30 discussion response merely directed the agency's attention to that provision of its proposal without elaborating on it. EDS asserts that the reference to [deleted] was merely the result of calculating the MOA of selected GFE based on its original date of installation.

As a general rule, discussions occur where the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror an opportunity to revise or modify its proposal in some material respect. Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. Where an agency engages in discussions, it must afford all offerors in the competitive range an opportunity to engage in meaningful discussions. Federal Acquisition Regulation (FAR) §15.306(d)(1). Where an agency reopens discussions with one offeror after the receipt of FPRs, it must afford all offerors in the competitive range an opportunity for reopened discussions. International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6.

We agree with LMC that the agency's exchange with EDS resulted in material changes to EDS's proposal regarding the technical refresh plan. In its June 18 proposal, EDS offered to procure, deliver and install new equipment. AR, exh. 111, at C-43. While this provision describes the equipment that will be deployed during technical refreshes (new equipment), it is [deleted]. Thus, contrary to EDS's assertion, we find no support for the position that this language in the technical refresh plan [deleted]. The next provision in the proposal specifically addresses equipment replacement, providing: "As illustrated in Exhibit 3.1-5, equipment replacement is scheduled when systems reach the operational reorder age, and refresh is planned for completion before the equipment reaches its maximum operating age." AR, exh. 111, at C-43. As with the prior provision, this clause [deleted] in describing what is being replaced. Since nothing in the remainder of the proposal suggests that EDS's technical refresh plan [deleted], we conclude that EDS's refresh plan, as proposed, [deleted]. This apparently also was the agency's understanding, as revealed by the manner in which it phrased its discussion question to EDS: "Please clarify whether the 'maximum operating age' of GFE will be measured from the date of contract award or date of installation into the 'as-is' operating environment." AR, exh. 112.

Contrary to the agency's asserted understanding, we agree with LMC that the June 30 response changed the proposal by providing, essentially, that the concepts of [deleted]. AR, exh. 112. As a result, EDS no longer would be obligated to [deleted]. The fact that HUD did not understand that EDS's June 30 response had this effect does not support a finding that the change did not occur. Given that there was a large amount of GFE, we conclude that this change in the treatment of GFE constituted a material change in EDS's proposal.<sup>2</sup>

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<sup>2</sup> It is not clear what effect this change would have had on the evaluation of EDS's proposal had the agency taken it into account. However, it is clear that the agency's  
(continued...)



## GFE Refresh Through the [deleted] Process

EDS's June 30 response changed its proposal, not only by [deleted] technical refresh plan for the first time, but also by [deleted] process outlined in the proposal, and adding several new features to the process. Under EDS's June 18 proposal, the [deleted] process was described solely as a mechanism to establish a [deleted]. The RFP included various listings of GFE on hand that would be available for use under the HITS contract.<sup>3</sup> EDS's proposal stated that:

The contractor proposes a post award [deleted].

AR, exh. 111, at H-2-H-2a. (The clause also stated that the [deleted].) The final portion of the clause set forth the [deleted]. Id. The clause concluded with the declaration that "[t]he results of this [deleted]." Id. Contrary to EDS's characterization of the [deleted] described in its proposal, it does not purport to be--indeed, it makes no mention of--a mechanism for establishing the [deleted].

The June 30 response changed the proposal to establish the [deleted]. Based on the June 30 response: (1) the results of the [deleted] report would be used by EDS to make an [deleted]. In establishing this method for [deleted] and also adding significant features not present in its proposal, EDS materially changed its proposal.<sup>4</sup>

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(...continued)

belief that EDS's technical refresh plan [deleted] carried some weight in the evaluation. As stated by HUD's HITS program director in her affidavit where she is discussing the GFE refresh question "[w]e considered the EDS approach as acceptable because we knew that the maximum operating age and the SLA would ensure good performance." Agency Legal Memorandum, Sept. 12, 2004, Attach. 2 at ¶ 13 (italics added).

<sup>3</sup> The various listings relied upon by EDS in its proposal are recited in its Government Property clause, and include: attachments 1 and 2 to the RFP provided by HUD in amendment Nos. 8 and 10; a HUD e-mail dated March 4, 2004 that provided further clarification, as well as a listing of existing government licenses and quantities for Oracle products available to the offerors; and an April 19 compact disc that included the latest inventory of HUD field assets. AR, exh. 111, at H-1.

<sup>4</sup> We point out that the [deleted] appears to contemplate a potential [deleted] that was nowhere accounted for in the agency's evaluation of proposals. As noted, the [deleted] is elsewhere described in the deliverables section of the firm's proposal. In describing the data items to be provided in the report, the proposal states: "[deleted]." AR, exh. 110, at C-13. This provision would appear to [deleted].

We conclude that the agency's June 30 communication with EDS constituted discussions, and that the agency was required to reopen discussions with LMC to provide it the same opportunity to revise its proposal.

#### DISCUSSIONS WITH LMC

LMC asserts that discussions with it were inadequate because the agency failed to bring to LMC's attention various evaluated weaknesses that LMC maintains prevented it from having a reasonable chance of receiving the award. In this regard, the record shows that the agency identified some 51 individual weaknesses, which resulted in LMC's proposal receiving an overall rating of marginal/high risk. AR, exh. 114, at 17-25.

In order for discussions to be meaningful, agencies must, at a minimum, point out to competing firms deficiencies, significant weaknesses, and adverse past performance information to which the firm has not previously had an opportunity to respond. FAR § 15.306(d)(3). The FAR also encourages contracting officers to discuss other aspects of a firm's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. *Id.* Discussions must be meaningful, equitable and not misleading; discussions cannot be meaningful unless a firm is led into those weaknesses, excesses or deficiencies that must be addressed in order for it to have a reasonable chance for award. *TDS, Inc., supra*, at 6-7.

LMC asserts that the agency identified 11 weaknesses in its proposal that were based on language from the earlier, pre-corrective action, version of its proposal. LMC maintains that the agency was required to discuss these 11 weaknesses with the firm pursuant to our decision in *DevTech Sys., Inc.*, B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 in which we held that, where an agency identifies new weaknesses in a proposal during a reevaluation of that proposal in an acquisition where discussions have previously occurred, it is required to discuss those new weaknesses with the offeror. The agency responds that, with respect to 6 of the 11 alleged weaknesses arising from proposal language that predated the current FPRs, the agency did not assign a weakness to the LMC proposal during its evaluation, and thus was not required to raise the matter in discussions. Agency Legal Memorandum, Sept. 30, 2004, at 118-33.

While the agency is correct that the six weaknesses to which LMC refers were not identified as weaknesses in the technical evaluation report on LMC's proposal, all six are specifically identified in the agency's final evaluation and tradeoff analysis report as weaknesses and as bases for distinguishing between the LMC and EDS proposals.

AR, exh. 116, at vii-x, xiv.<sup>5</sup> Given that they ultimately were listed in the best value analysis--they related to 6 of the agency's 10 identified best value items--and that they contributed in some manner to the proposal's receiving an overall marginal/high risk rating, we do not think the fact that they were captured in the best value determination, rather than the technical evaluation report, provided a basis for concluding that these issues were not significant weaknesses. Further, while it is not clear how significant they were, given that they played a large part in the best value determination--and therefore presumably were among the most important reasons for downgrading LMC's proposal--absent some clear showing by the agency that they were not significant, since they were based on information in LMC's original proposal, and the agency had not previously discussed the issues with LMC, it was obliged to do so. DevTech Sys., Inc., *supra*, at 4-5.

LMC also asserts that, in numerous instances where the agency claims to have had discussions, the discussion materials did not meaningfully lead LMC into those portions of its proposal requiring revision.

We agree that, in some instances, the agency did not adequately bring the identified weakness to LMC's attention. For example, one of the weaknesses identified in LMC's proposal was a lack of definitiveness in describing processes. This weakness was listed in the agency's final evaluation and tradeoff report, which in turn referenced the agency's technical evaluation report of the LMC proposal. AR, exh. 116, at 16. HUD takes the position that it addressed this issue in a communication dated December 13, 2002, when it advised LMC that it was responsible to make its proposal responsive, clear and accurate; that it had to respond to HUD and HITS goals; and that its responses had to be strategic, not just tactical, and had to demonstrate how LMC would achieve the strategic goal. Agency Legal Memorandum, Sept. 30, 2004, at 136; AR, exh. 23, at 15.

We find no merit to the agency's position. The referenced discussion materials were presented to LMC after it submitted its initial proposal in May 2002, long before it revised its proposal in January 2003, and again in March 2004. To suggest that this provided any useful information by March 2004 is unreasonable, since both the RFP and the proposals had changed so significantly by that time. Second, and more to

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<sup>5</sup> The six items at issue are: proposing to use a proprietary mainframe computer (AR, exh. 116, at vii, best value item No. 1); proposing to provide software at the N-2 level (AR, exh. 116, at viii, best value item No. 2); proposing a fixed ratio of desktop computers to notebooks (AR, exh. 116, at ix, best value item No. 4); not proposing a dedicated data center (AR, exh. 116, at x, best value item No. 5); not proposing a data center compliant with National Institute of Standards and Technology requirements (AR, exh. 116, at x, best value item No 5); and not proposing an SLA to measure performance during transition (AR, exh. 116, at xiv, best value item Nos. 8 and 10).

the point, these comments are so vague as to be meaningless within the context HUD's particular criticism of the LMC proposal.

#### RECOMMENDATION

In view of the foregoing, we sustain LMC's protest on grounds that the agency improperly engaged in post-FPR discussions with EDS, but not LMC, and otherwise failed to provide LMC with meaningful discussions. We recommend that the agency reopen the acquisition and afford both offerors meaningful discussions. At the conclusion of those discussions, the agency should solicit revised proposals and make a new source selection decision on the basis of the revised proposals.<sup>6</sup> We further recommend that, should HUD determine that LMC is in line for award, it should terminate EDS's contract for the convenience of the government and make award to LMC, if otherwise proper. Finally, we recommend that LMC be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2004). LMC's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa  
General Counsel

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<sup>6</sup> LMC's protest also challenged the reasonableness of the agency's evaluation and source selection decision. These issues are academic, since the agency will necessarily be performing an entirely new evaluation in the wake of receiving revised proposals.