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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Academy Facilities Management--Advisory Opinion

File: B-401094.3

Date: May 21, 2009

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Ann L. Giddings, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.

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

DIGEST

1. Contracting agency did not engage in misleading discussions where record shows that it accurately advised protester of specific instances where its line item prices were overstated in comparison to the government estimate.

2. Where solicitation contemplated award of fixed-price contract, price realism analysis was reasonable where, consistent with the solicitation methodology, agency compared proposed prices to government estimate, other proposed prices, and reviewed separate cost elements.

3. Protest allegation that awardee enjoyed an unfair competitive advantage by having employed a former government employee as a consultant as part of proposal preparation is denied where record contains no evidence that the government employee had access to sensitive business information regarding protester’s performance of the incumbent contract.

DECISION

Academy Facilities Management (AFM), of Gardena, California, protests the award of a contract to IAP World Services, Inc., of Cape Canaveral, Florida, under request for proposals (RFP) No. N40080-08-R-0512, issued by the Department of the Navy, Naval Facilities Engineering Command, for base operating support services for the United States Naval Academy (USNA). AFM argues that the agency’s evaluation of offerors’ technical proposals and IAP’s price proposal was unreasonable. AFM also

contends that the agency's discussions with the protester regarding its price proposal were improper, and that the Navy did not adequately mitigate the unfair competitive advantage that IAP allegedly derived from its employment of the former USNA public works officer.

AFM filed its protest with our Office on February 10, 2009. Thereafter, on May 13, AFM submitted a notice withdrawing its protest and simultaneously filed an action in the United States Court of Federal Claims that was substantially similar to its protest in our Office. We issued a confirmation of withdrawal notice on May 14. Subsequently, by order dated May 14, the court asked our Office to issue an advisory opinion addressing AFM's protest. See 4 C.F.R. § 21.11(b) (2009). Our opinion here is issued in response to the court's request, and is presented in the same general format that we normally employ to issue decisions responding to bid protests. As explained below, we find no merit to the protest.

The RFP, issued on April 18, 2008, contemplated the award of a combination fixed-price and indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year together with eight 1-year options for base operating support services.¹ In general terms the solicitation required the successful offeror to provide all personnel, materials, and other items necessary to perform the operation, maintenance, repair, alteration, demolition, minor construction, and other related functions for the physical facilities and utility systems of the USNA. Statement of Work (SOW) at 1. The RFP established three evaluation factors: technical; past performance; and price. The technical factor was in turn comprised of five equal subfactors: 1) relevant experience; 2) technical approach/methods; 3) management; 4) safety; and 5) small business subcontracting effort. The solicitation stated that the technical subfactors, when combined, were approximately equal in importance to past performance and price. Contract award was to be made to the responsible offeror whose proposal was determined to represent the "best value" to the government, all factors considered. RFP § M.

Five offerors, including IAP and incumbent AFM, submitted proposals by the June 9 closing date. An agency technical evaluation board (TEB) evaluated offerors'

¹ The solicitation set forth a fixed-price contract line item number (CLIN) and corresponding ID/IQ CLIN for each performance period. RFP § B. The Navy planned to primarily procure the required base operating support services by means of the fixed-price CLINs, with additional types, or quantities, of services ordered on an "as needed," ID/IQ basis. Both the fixed-price and ID/IQ CLINs were comprised of numerous exhibit line item numbers (ELIN). The Navy maintains, and AFM does not dispute, that while orders would be placed under individual ID/IQ ELINs, the fixed-price services would only be ordered at the CLIN level (*i.e.*, all ELINs within a fixed-price CLIN would be ordered simultaneously). The RFP nevertheless required offerors to provide pricing for both the fixed-price and ID/IQ ELINs.

proposals as to the nonprice factors and subfactors using an adjectival rating system that was set forth in the RFP: excellent; very good; good; satisfactory; marginal; unsatisfactory; and with regard to the past performance factor, neutral. Agency Report (AR), Tab 6, Initial TEB Report. A separate agency price evaluation panel (PEP) evaluated offerors' price proposals. *Id.*, Tab 7, Initial PEP Report. The contracting officer decided that discussions were necessary, and established a competitive range which included the IAP and AFM proposals. The agency conducted discussions, followed by the offerors' submission of final proposal revisions (FPR) by December 3. The Navy's final evaluation ratings of proposals were as follows:

Factor	IAP	AFM	Offeror C²
Technical			
Relevant Experience	Excellent	Excellent	Very Good
Technical Approach/Methods	Excellent	Excellent	Satisfactory
Management	Excellent	Very Good	Satisfactory
Safety	Excellent	Excellent	Satisfactory
Small Business Subcontracting	Very Good	Very Good	Very Good
Overall	Excellent	Excellent	Satisfactory
Past Performance	Excellent	Very Good	Marginal
Price	\$186,673,244	\$(DELETED)	\$(DELETED)

Id., Tab 20, Final TEB Report, at 3; Tab 14, Final PEP Report, at 5.

The agency evaluators also detailed the various strengths and weaknesses that they had found in support of the adjectival ratings assigned to offerors' proposals. The TEB identified a total of 33 strengths and 9 significant strengths in IAP's technical proposal, and a total of 20 strengths and 4 significant strengths in AFM's technical proposal.³ The TEB also performed a comparative analysis and concluded that IAP's proposal was technically superior to the other offerors'. *Id.*, Tab 13, Interim TEB Report, at 13-19, 23-29.

An agency source selection advisory board (SSAB) subsequently reviewed the evaluation ratings and findings of both the TEB and PEP. The SSAB generally

² Offeror C's proposal was the lowest-priced proposal received, and, as explained below, was considered in the agency's price/technical tradeoff.

³ In many instances the TEB's determination of a strength in an offeror's proposal was comprised of several aspects. For example, the TEB's determination that IAP's proposed [DELETED] represented a strength was comprised of six separate findings. *Id.*, Tab 13, Interim TEB Report, at 15.

concluded with the technical and price assessments of offerors' proposals, but concluded that AFM's past performance merited an evaluation rating of "excellent" instead of "very good." Id., Tab 15, Interim SSAB Report, at 7, 19. Further, as part of its recommendation that IAP's proposal represented the best value to the agency, the SSAB detailed the technical advantages (i.e., the technical discriminators) that distinguished IAP's proposal from the other offerors'. Id., Tab 21, Final SSAB Report, at 9-10.

On December 22, after having reviewed the SSAB findings and recommendations (as well as the underlying technical and price evaluation reports), the Navy source selection authority (SSA) determined that IAP's proposal was technically superior to those of both AFM and Offeror C. The SSA also determined that IAP's technical and past performance advantages outweighed the \$[DELETED] price advantage associated with Offeror C's proposal, and that IAP's proposal represented the best value to the government. Id., Tab 22, Source Selection Decision, at 1-2. Having determined that IAP's proposal was both higher technically-rated and \$[DELETED] lower-priced than AFM's, the agency's best value determination did not involve a price/technical tradeoff between the IAP and AFM proposals. Id. By letter dated February 10, 2009, AFM filed this protest with our Office.

AFM's protest raises numerous challenges to the Navy's evaluation of offerors' proposals. First, the protester alleges that the agency's discussions with the firm regarding its price proposal were inadequate and misleading. Second, AFM contends that the agency's evaluation of offerors' technical proposals was improper. Third, AFM alleges that the agency's price evaluation of IAP's proposal was flawed in various ways. Lastly, the protester maintains that the agency did not adequately mitigate the unfair competitive advantage which IAP allegedly derived from its employment of the former USNA public works officer. We have reviewed all of AFM's allegations and find that they are without merit. We discuss AFM's most significant arguments below.

Discussions

AFM argues that the agency engaged in misleading discussions. Specifically, the protester maintains that the Navy erroneously advised it during discussions that its proposal was "understated" by comparison to the independent government estimate (IGE). In reliance on this notification, AFM argues, it increased its final proposed price by approximately \$[DELETED]. AFM asserts that it was prejudiced by the misleading discussions, insofar as its proposal was competitively worse off for complying with the Navy's discussions advice. Protest, Feb. 10, 2009, at 9-10.

The PEP's evaluation of offerors' initial submissions included an analysis of offerors' prices at both the CLIN and ELIN levels. As part of its evaluation the PEP identified those instances where AFM's ELIN prices appeared understated or overstated in

comparison to the IGE.⁴ AR, Tab 7, Initial PEP Report, at 23-27, encls. 2-4. The Navy then conducted discussions with AFM and informed the offeror of the identified price weaknesses. Specifically, the discussions began by stating, “Overall your total price ([fixed-price] plus ID/IQ) compares favorably with the Government estimate.” Id., Tab 10, Agency Discussions with AFM, attach. 2, at 1. The discussions then included the identification of instances where AFM’s individual prices appeared to be understated, in the following manner:

Within the Utilities [sub-CLIN] (0001AB), your proposed price[s] for ELINs (A010) Gas Operations, (A011) Waste Water Operations, (A013) Steam Operations, and (A015) Water Operations appear to be understated. Please review the pricing, adjust the pricing if deemed necessary, and provide a detailed rationale to support your proposed prices with an explanation of your pricing methodology.⁵

Id.

Overall, the agency’s discussions with AFM identified 18 ELINs where the offeror’s prices appeared to be understated, and 31 ELINs where its prices appeared to be overstated. Id. at 1-3. The record indicates that, in certain instances, AFM adjusted its prices in response to the discussions, yet in other instances where the discussions expressed a concern, AFM confirmed its initial prices.⁶ Id., Tab 12, AFM Discussion Responses, attach. 2, at 4-6.

When discussions are conducted, they must at a minimum identify deficiencies and significant weaknesses in each competitive-range offeror’s proposal. Federal

⁴ Although unstated, the record appears to indicate that a 20 percent variation from the IGE (either upward or downward) was the “yardstick” being employed by the Navy.

⁵ The Navy employed similar language when informing IAP of those instances where its ELIN prices appeared to be understated (or overstated) in comparison to the IGE. Id., Tab 9, Agency Discussions with IAP, attach. 2, at 2-4.

⁶ For example, in response to the discussion item quoted above, AFM informed the Navy that its understatement of the fixed-price utility operation ELINs was largely the result of having over-allocated costs to corresponding preventive maintenance ELINs, all of which were then adjusted by the offeror. Id., Tab 12, AFM Discussion Responses, attach. 2, at 5. The reallocation of costs between fixed-price ELINs could not affect an offeror’s total evaluated price and, as set forth above, all fixed-price ELINs were to be ordered simultaneously. The record reflects that AFM’s response to a vast majority of the discussion items regarding the offeror’s fixed prices (both understated and overstated) was merely to reallocate costs between ELINs, with no effect on its total price. Id., at 4-7.

Acquisition Regulation (FAR) § 15.306(d)(3); Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. Discussions 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; Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 8. While an agency is not required to “spoon-feed” an offeror during discussions as to each and every item that could be revised to improve its proposal, see ITT Fed. Sys. Int’l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 6, agencies must impart sufficient information to afford offerors a fair and reasonable opportunity to identify and correct deficiencies, excesses, or mistakes in their proposals. Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 7. Further, an agency may not mislead an offeror—through the framing of a discussion question or a response to a question—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., supra; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. In the context of discussions relating to cost or price, agencies may not coerce or mislead an offeror during discussions into raising its prices. Chenega Fed. Sys., LLC, B-299310.2, Sept. 28, 2007, 2007 CPD ¶ 196 at 3.

We see nothing misleading or coercive regarding the discussions about which AFM complains. The Navy’s initial price evaluation found that, in certain instances, AFM’s prices appeared understated in comparison to the IGE. The agency’s discussions with AFM accurately conveyed the identified weakness and simply provided the offeror with the opportunity to review—and if deemed necessary, revise—its prices. AFM’s decision to revise certain prices upward or downward reflects the exercise of the firm’s own business judgment, not improper conduct by the agency. See First Preston Housing Initiatives, LP, B-293105.2, Oct. 15, 2004, 2004 CPD ¶ 221 at 3; Professional Landscape Mgmt. Servs., Inc., B-286612, Dec. 22, 2000, 2000 CPD ¶ 212 at 5. AFM does not dispute the facial accuracy of the Navy’s discussions. Rather, the protester contends that the discussion items included an “unstated message” that the offeror needed to raise its prices in the identified areas in order to satisfy the agency. Given that the information provided by the Navy during discussions accurately reflected the agency’s concerns, there is no basis to conclude that the discussions were misleading or coercive. We also find AFM’s contention that there was a hidden meaning being conveyed in the agency’s discussions lacks any foundation in the record.

AFM also alleges that the Navy’s discussions were not meaningful or equal. The protester contends that no matter how great its ELIN price discrepancies were in comparison to the IGE, the agency informed AFM that its prices were “overstated.” By contrast, AFM argues, the Navy’s discussions with IAP identified six ELINs—with price discrepancies as small as 39.88 percent above the IGE—as “significantly overstated.” AFM contends that it was prejudiced by the disparate treatment: when told that its prices were “overstated,” AFM lowered its prices by an average of

33.94 percent. By comparison, on those occasions when IAP was informed that its prices were “significantly overstated,” the awardee lowered its prices by an average of 60.73 percent. If AFM had had the benefit of similar discussions identifying significantly overstated ELINs, the protester argues, it would have altered its final proposal with comparably larger price reductions. Comments, Mar. 23, 2009, at 24-26.

As detailed below, we find the agency’s discussions were appropriately tailored to each offeror’s price proposal, the discussions provided to AFM were meaningful, and that any differences in wording with regard to the discussion questions did not materially impact offerors’ pricing.

The record reflects that the Navy provided identical discussions to IAP and AFM regarding the offerors’ total prices (“Overall your total price . . . compares favorably with the Government estimate”) as well as fixed-price CLINs (“Overall the total [fixed-price] for your proposal appears to be understated when compared with the Government estimate”).⁷ AR, Tab 9, Agency Discussions with IAP, attach. 2, at 2; Tab 10, Agency Discussions with AFM, attach. 2, at 1. While there is no dispute that the Navy would order the fixed-price services only at the CLIN level, its discussions nonetheless extended to individual fixed-price ELINs as well. The Navy’s discussions with IAP identified a total of six fixed-price ELINs as “significantly overstated.” On each occasion when using such language, the agency also found IAP’s ELIN prices to be unbalanced. For example, the Navy’s discussions with IAP stated:

Within the Utilities [sub-CLIN] (0001AB), it appears that your proposed Operations and Preventive Maintenance prices are unbalanced. Specifically, it appears to the Government that your Operations prices for Chilled Water (ELIN A006), Steam (ELIN A013), Water (ELIN A015), and Gas Operations (ELIN A017), are significantly overstated compared to the Government Estimate. Conversely, the Preventive Maintenance prices for Chilled Water (ELIN A007), Wastewater (ELIN A012), Steam (ELIN A014), and Water (ELIN A016) appear to be significantly understated compared to the Government Estimate. Please review the pricing, adjust your pricing if deemed necessary, and provide a detailed rationale to support your proposed prices with an explanation of your pricing methodology.

Id., Tab 9, Agency Discussions with IAP, attach. 2, at 2 (emphasis added).

⁷ The Navy’s discussions also extended to offerors’ ID/IQ pricing (both at the CLIN and ELIN levels), and were tailored to each offeror’s particular proposal.

The record reflects that it was the Navy's belief that prices were unbalanced, rather than the size of the price discrepancy, that determined the choice of discussion wording employed. For example, while the agency identified IAP ELIN A015 (Water Utility Operation) as apparently unbalanced and "significantly overstated," the price discrepancy from the IGE was 39.88 percent. By contrast, all (ten) IAP ELINs that the Navy identified as "overstated," but not unbalanced, had price discrepancies greater than 39.88 percent (and as high as 1,343.73 percent) from the IGE. *Id.* at 2-3; Tab 7, Initial PEP Report, encls. 3-4. The record also shows that where the Navy informed IAP of ELINs that appeared to be "significantly overstated," the discussions simultaneously informed the offeror of other ELINs that appeared to be "significantly understated."⁸ In comparison, the PEP did not find any individual AFM ELINs to be unbalanced, *id.*, Tab 7, Initial PEP Report, at 23-25, and the agency's discussions did not identify any AFM ELINs as "significantly overstated" regardless of the price discrepancy from the IGE. *Id.*, Tab 10, Discussions with AFM, attach. 2, at 1-3. IAP's response to the agency discussions that identified prices as unbalanced was to reallocate its costs between fixed-price ELINs, all of which, as set forth above, were to be ordered simultaneously.⁹ *Id.*, Tab 11, IAP Discussion Responses, Price Proposal Discussion Questions and Answers, at 3-7.

Although procuring agencies may not conduct discussions in a manner that favors one offeror over another, *see* FAR § 15.306(e)(1); *The Boeing Co., B-311344 et al.*, June 18, 2008, 2008 CPD ¶ 114 at 49-50, discussions need not be identical. Rather, discussions are to be tailored to each offeror's particular proposal. FAR § 15.306(d)(1), (e)(1); *Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.5, B-295126.6*, Dec. 7, 2007, 2008 CPD ¶ 4 at 7; *PharmChem, Inc., B-291725.3 et al.*, July 22, 2003, 2003 CPD ¶ 148 at 6.

⁸ The agency's choice of discussion wording for those prices deemed unbalanced (e.g., "significantly overstated") is consistent with the language in FAR § 15.404-1(g)(1) describing unbalanced pricing.

⁹ While IAP may have reduced the six fixed-price ELINs identified as "significantly overstated" by an average of 60.73 percent (as the protester claims), the reallocation of costs among ELINs resulted in a total change to IAP's fixed-price CLIN (base year) of only 4.2 percent ($[\text{DELETED}] \text{ price change} / [\text{DELETED}] \text{ initial price} = .042$). AR, Tab 4, IAP Initial Proposal, Vol. I, Price Proposal, at B-2 (Price Summary); Tab 11, IAP Discussion Responses, Price Proposal Revisions, at B-1 (Price Summary). Similarly, although AFM may have reduced the ELINs identified as "overstated" by an average of 33.94 percent as claimed, the reallocation of costs among ELINs resulted in a total change to AFM's fixed-price CLIN (base year) of only 0.43 percent ($[\text{DELETED}] \text{ price change} / [\text{DELETED}] \text{ initial price} = .0043$). *Id.*, Tab 5, AFM Initial Proposal, Vol. I, Price Proposal, at B-2 (Price Summary); Tab 12, AFM Discussion Responses, attach. 5, Revised Price Proposal, at B-2.

In our view, AFM's argument is mistakenly premised upon an improper "apples-to-oranges" comparison. In performing its evaluation of IAP's price, the agency identified various ELINs as apparently unbalanced, and its subsequent discussions with IAP utilized the wording "significantly overstated" only in those instances deemed to be unbalanced (irrespective of the degree of price discrepancy from the IGE). By contrast, in performing its evaluation of AFM's price, the Navy did not find any ELINs to be unbalanced, and thus, its discussions with the offeror did not identify any ELINs as "significantly overstated" (again, irrespective of the degree of price discrepancy from the IGE).¹⁰ In sum, the difference in the Navy's discussions with IAP and AFM was not the result of unequal treatment by the agency, but instead resulted from the agency's recognition of different underlying facts. See Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 24. We also see no merit to the protester's argument that the discussions, as phrased, were not meaningful; AFM received discussions properly tailored to its proposal, with specific notice of the individual areas which the Navy believed were of concern. The Navy's decision to identify certain individual AFM ELINs as "overstated," as opposed to "significantly overstated," did not, we think, fail to impart sufficient information to afford the offeror a fair and reasonable opportunity to identify and correct deficiencies, excesses, or mistakes in its proposal. Cf. Creative Info. Tech., Inc., supra.

AFM points to the fact that the Navy's discussions with it identified three fixed-price ELINs as "significantly understated" without also finding AFM's prices to be unbalanced. The protester therefore argues that the agency's assertion that only when prices were found to be unbalanced were they also identified as "significantly overstated" is a post-hoc rationalization unsupported by the contemporaneous record. Comments, May 8, 2009, at 3-4, citing AR, Tab 10, Agency Discussions with AFM, attach. 2, at 1.

In our view, any difference in the discussion wording regarding various individual ELINs did not deprive AFM of reasonably understanding the true nature and magnitude of the agency's concern with its price proposal. Moreover, the protester concentrates on the minutiae (i.e., discussions regarding certain fixed-price ELINs) and ignores the fact that the Navy's discussions with offerors at the level at which the fixed-priced services would actually be ordered—the CLIN level—were meaningful and entirely equal; in fact, they were identical. In sum it is clear that: the Navy's discussions informed both AFM and IAP how their fixed-price CLINs compared to the IGE; that only changes made at the fixed-price CLIN level would alter the offerors' prices; and that AFM does not challenge the adequacy or equality of the

¹⁰ By the protester's logic—that the agency was required to identify as "significantly overstated" every ELIN more than 39.88 percent above the IGE—IAP also did not receive meaningful discussions, as it too had numerous ELINs that varied from the IGE by more than this amount that were identified only as "overstated."

Navy's discussions at the fixed-price CLIN level. The record shows that any difference in the agency's discussion wording at the ELIN level essentially altered only the amount of costs that the offerors reallocated among their fixed-price ELINs, causing no material impact on their overall prices.

AFM also argues that the Navy's discussions were not meaningful and equal in another respect. The protester contends that for a total of eight ELINs where its prices were more than 20 percent above the IGE, the Navy failed to provide any discussion question.¹¹ By comparison, AFM argues, there were only three instances where IAP's prices exceeded the IGE by more than 20 percent for which it did not receive discussions. AFM contends that it was prejudiced by the alleged lack of equal and meaningful discussions, pointing again to the fact that it reduced its prices by an average of 33.94 percent in those instances where the Navy informed it that its prices were considered to be overstated. Comments, Mar. 23, 2009, at 23-24, encl. 6, AFM Chart Comparing Initial to Final Prices for Overstated ELINs.

We conclude that AFM has not established it was prejudiced by the alleged impropriety. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). As the protester itself points out, even assuming that AFM had reduced its original prices for the eight ELINs in question by 33.94 percent (the figure which AFM states was its average price reduction when informed that its prices were overstated), the total additional reduction in AFM's final price would only have been \$974,389. Comments, May 8, 2009, at 4. Further, even assuming that AFM had reduced its final prices to \$0 for the ELINs in question, the total reduction in AFM's final price would only have been \$2,753,796.¹² By contrast, there was a \$[DELETED] difference between the IAP and AFM proposals. Accordingly, we see no basis to conclude that the offerors' competitive positions would have changed; IAP's proposal would remain both higher technically-rated and lower-priced than AFM's.

¹¹ The AFM ELINs in question--[DELETED]--ranged from 21.89 percent to 45.41 percent above the IGE, with prices ranging from \$[DELETED] to \$[DELETED]. AR, Tab 7, Initial PEP Report, encls. 3, 4.

¹² This figure was calculated as follows. AFM's final prices for the eight ELINs in question were: [DELETED], for a base year total of \$[DELETED]. Similar totals were determined for each option period: [DELETED], for a combined total of \$2,753,796. AR, Tab 12, AFM Discussion Responses, attach. 5, Revised Price Proposal, Attach. J (ELIN Pricing).

Evaluation of Technical Proposals

AFM protests the agency's evaluation of offerors' technical proposals. AFM first contends that the Navy employed unstated evaluation criteria in its evaluation of offerors' proposals, as evidenced by two instances where the TEB gave IAP credit under the relevant experience subfactor for matters unrelated to the stated work requirements (*i.e.*, the offeror's [DELETED]). Comments, Mar. 23, 2009, at 21-23. AFM also asserts that the agency's technical evaluation was unequal. Specifically, the protester argues that the Navy failed in eight instances to assign strengths to AFM's proposal for which it had awarded strengths to IAP for a virtually identical submission.¹³ We need not decide whether the agency's evaluation of technical proposals employed unstated criteria or was unequal because we find that AFM has not demonstrated it was prejudiced by any of the alleged errors.

Here, both instances of alleged use of unstated evaluation criteria involved components of one of the four total strengths/significant strengths identified by the TEB in its evaluation of IAP's proposal under the relevant experience factor. AR, Tab 13, Interim TEB Report, at 14. Given their minor part in the evaluation, subtracting the credit given to IAP in these component areas would not have altered its "excellent" relevant experience subfactor rating or its "excellent" overall technical factor rating.¹⁴ Similarly, there is no basis to conclude that the eight instances of alleged unequal treatment would have altered AFM's overall technical rating of "excellent." Moreover, as detailed above, the TEB identified a total of 42 strengths/significant strengths in IAP's proposal, and a total of 24 strengths/significant strengths in AFM's proposal, and it was the offerors' strengths (and not the assigned adjectival ratings) on which the Navy based its determination of IAP's technical superiority. AFM does not dispute that, as part of its source selection determination, the agency detailed the various IAP strengths that distinguished the

¹³ The eight instances of alleged disparate treatment to which AFM refers do not all represent separate IAP strengths. Rather, three of the instances--[DELETED]--were among six total features comprising the IAP [DELETED] strength; AFM does not challenge the remaining features of the IAP evaluated proposal strength. Further, the record indicates that AFM received a full strength for what was regarded as just one aspect of IAP's [DELETED] strength (*i.e.*, [DELETED]). In another of the alleged assertions of disparate treatment, the difference is essentially between a significant strength and strength: while IAP received a significant strength for "[DELETED]," AFM received a strength for proposing an "[DELETED]." AR, Tab 13, Interim TEB Report, at 17, 24.

¹⁴ For example, even assuming that IAP had received a relevant experience subfactor rating of "very good" rather than "excellent," it still would have had three "excellent" and two "very good" ratings among the five equal subfactors, thereby resulting in an overall technical rating of "excellent" (just as AFM received).

awardee's proposal from AFM's, and acknowledges that it has not challenged many of the IAP strengths which the Navy identified as technical discriminators. In fact, AFM's protest expressly recognizes that its allegations of unequal treatment would only narrow (but not eliminate) the number of identified discriminators between the offerors' proposals.¹⁵ Protest, Mar. 23, 2009, at 26. Given that there is no evidence in the record that the alleged errors would have altered the relative technical merit of the IAP and AFM proposals or affected the agency's source selection determination, we see no basis to conclude that AFM was prejudiced in any way by the alleged errors in the agency's evaluation of technical proposals.

Price Evaluation

AFM challenges the Navy's evaluation of IAP's price proposal on several grounds. These arguments are without merit.

Price Realism

AFM alleges that the Navy failed to perform a proper price realism evaluation of IAP's proposal, insofar as the agency's evaluation was based entirely on a comparison to a flawed IGE. As a result, AFM contends, the Navy was unaware that IAP's proposed price was so low as to reflect an inadequate understanding of the work requirements. Protest, Feb. 10, 2009, at 7; Comments, Mar. 23, 2009, at 7-12.

The RFP established that the agency's price evaluation would be conducted as follows:

Price will be considered in the overall integrated assessment in determining which proposal is in the best interest of the Government based on completeness, realism, and reasonableness using one or more of the following price analysis techniques:

1. Comparison of proposed prices received in response to the solicitation.
2. Comparison of pricing data with the technical proposal, *i.e.*, should cost analysis.
3. Comparison of proposed prices with the independent government estimate.
4. Price realism may be conducted to determine if the overall price proposed is realistic for the work to be performed and reflects an

¹⁵ Even if the AFM and IAP proposals were determined to be technically equal, IAP's proposal remains lower-priced, thereby making a price/technical tradeoff decision unnecessary.

understanding of the requirements submitted in the technical proposal. . . .

RFP § M.4.3.

The Navy PEP evaluated offerors' prices for both reasonableness and realism. As reflected in the final PEP report, the agency's analyses compared offerors' prices to the IGE (both at the CLIN and ELIN levels) and to each other as follows:

	Fixed-Price	ID/IQ	Total
IAP	\$(DELETED)	\$(DELETED)	\$186,673,244
AFM	\$(DELETED)	\$(DELETED)	\$(DELETED)
Offeror C	\$(DELETED)	\$(DELETED)	\$(DELETED)
IGE	\$(DELETED)	\$(DELETED)	\$(DELETED)

AR, Tab 14, Final PEP Report, at 5.

The agency evaluators also reviewed various cost elements (i.e., overhead rates, general and administrative (G&A) rates) and profit in the offerors' proposals. Id. at 3-6. After its comparison of offerors' prices to the IGE and each other, and the review of various cost elements and profit, the PEP concluded that IAP's proposal was "realistic in that the revised overall price is proportional to the volume of work being performed and that it appears to reflect a general understanding of the work to be performed."¹⁶ Id. at 6.

Where, as here, a fixed-price contract (or fixed-price task order contract) is to be awarded, the "realism" of offerors' proposed prices is not ordinarily considered, since a fixed-price contracting vehicle places the risk and responsibility for contract costs and ensuing profit or loss on the contractor. OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 9; Labat-Anderson, Inc., B-287081 et al., Apr. 16, 2001, 2001 CPD ¶ 79 at 8; see FAR § 15.404-1(d)(3). However, an agency may, in its discretion, provide for a price realism analysis in the solicitation of fixed-price proposals for purposes of assessing an offeror's understanding of the solicitation's requirements or for assessing the risk inherent in an offeror's proposal.¹⁷ See Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD

¹⁶ By contrast, the PEP concluded that while it had concerns regarding the lower overall price submitted by Offeror C (\$(DELETED)), Offeror C's price was not so low as to be considered unrealistic. Id. at 5-6.

¹⁷ While the results of a price realism analysis may be used in technical performance risk assessments, offered prices may not be adjusted as a result of a price realism analysis. FAR § 15.404-1(d)(3).

¶ 149 at 14. The nature and extent of an agency's price realism analysis are matters within the agency's discretion, unless the agency commits itself to a particular methodology in the solicitation. See Navarro Research & Eng'g, Inc., B-299981, B-299981.3, Sept. 28, 2007, 2007 CPD ¶ 195 at 3.

Under the solicitation here, the Navy committed itself to performing a price realism analysis using any "one or more" of the "price techniques" set forth in the RFP, which included a "comparison of proposed prices with the IGE." RFP § M.4.3. AFM challenges the agency's price realism assessment because it was based solely on comparison of offerors' proposals to the IGE, and the IGE was "a profoundly flawed tool."¹⁸ Comments, Mar. 23, 2009, at 8. As a result, AFM argues, the Navy was unaware that IAP's price was so low as to reflect an inadequate understanding of the SOW requirements. Protest, Feb. 10, 2009, at 7-9; Comments, Mar. 23, 2009, at 7-12.

We need not decide whether the IGE here was flawed because, contrary to AFM's assertions, the Navy's price realism evaluation did not rely exclusively on the IGE. The record reflects that in addition to comparing offerors' prices to the IGE, the agency's evaluation also included comparing offerors' prices to each other. As set forth above, the comparison of offerors' prices to each other was another of the identified price techniques that the RFP established could be used for price realism purposes. The record shows that the Navy also analyzed certain elements within offerors' price proposals--overhead, G&A, and profit rates--as part of its price realism determination. As the Navy's price realism determination was consistent with the methodology established in the solicitation, we see no basis to find it improper.

Unbalanced Pricing

AFM argues that the Navy failed to sufficiently resolve its concerns regarding IAP's unbalanced pricing. The protester contends that the Navy's initial evaluation identified significant concerns that the fixed-price and ID/IQ aspects of IAP's

¹⁸ AFM points to the fact that for the majority of the fixed-price ELINs, offerors' prices routinely varied from the IGE by more than 20 percent. AFM acknowledges, however, that its comparisons are based on offerors' initial prices, and that it makes no similar comparisons between offerors' final prices and the IGE. Moreover, while the protester does not dispute the fact that the fixed-price services would only be ordered at the CLIN level, the comparisons and examples of price discrepancies provided by AFM concern the fixed-price ELINs. We fail to see, and AFM has not suggested how, the claimed disparities between offerors' prices and the IGE regarding fixed-price ELINs would be relevant if the Navy will not be placing orders for the fixed-price ELINs individually. AFM alleges no similar price discrepancies at the fixed-price CLIN level; rather, the protester acknowledges the general accuracy of the IGE for the fixed-priced CLINs (i.e., both the IAP and AFM initial prices were within 10 percent of the IGE). Comments, Mar. 23, 2009, at 9-10.

proposals were unbalanced in relation to each other. According to AFM, the Navy had no basis to support its subsequent determination that IAP's final proposal, while "problematic," was not unbalanced between its fixed-price and ID/IQ components. We disagree.

The TEP, as part of its evaluation of initial proposals, found that IAP's ID/IQ pricing appeared to be understated, at 32 percent below the IGE. AR, Tab 7, Initial PEP Report, at 18. In subsequent discussions the Navy informed IAP as follows: "Your overall ID/IQ price and most of your ID/IQ unit prices appear significantly understated in comparison to the Government estimate and may cause your proposal to be considered unbalanced." Id., Tab 9, Agency Discussions with IAP, attach. 2, at 3. IAP both raised its ID/IQ pricing and lowered its fixed prices in its FPR. As part of its evaluation of IAP's FPR, the TEP found that:

- IAP had the second lowest price of the three offerors in the competitive range;
- IAP's total price was below the IGE;
- IAP had the second highest total fixed-price in comparison to the other offerors (although still below the IGE);
- IAP had the lowest total ID/IQ price in comparison to the other offerors.

Id., Tab 14, Final PEP Report, at 3-6. The PEP also concluded that, although IAP had the second highest total fixed price and lowest total ID/IQ price in comparison to the other offerors, IAP's fixed-price-ID/IQ pricing structure was not so problematic as to be considered unbalanced. Id. at 6.

Unbalanced pricing exists where the prices of one or more CLINs are significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10, 2007, 2007 CPD ¶ 197 at 5; Triple H Servs., B-298248, B-298248.2, Aug. 1, 2006, 2006 CPD ¶ 115 at 2; see FAR § 15.404-1(g)(1). The protester has made no such showing of unbalanced pricing; while AFM alleges that IAP's ID/IQ prices were understated (by comparison to both the IGE and those of the other offerors), AFM has not demonstrated, or alleged, that IAP's fixed prices were overstated. Low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. Diversified Capital, Inc., B-293105.4, B-293105.8, Nov. 12, 2004, 2004 CPD ¶ 242 at 2 n.1; Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 3. As there is no evidence of overstated prices, we see no basis to conclude that the IAP offer was unbalanced. See USATREX Int'l, Inc., B-275592, B-275592.2, Mar. 6, 1997, 98-1 CPD ¶ 99 at 6. In any event, the record shows that the Navy conducted a risk assessment and determined the risks to the government associated with IAP's pricing were acceptable.

Unfair Competitive Advantage

AFM protests that the agency did not adequately mitigate the unfair competitive advantage which IAP allegedly derived from its employment of the former USNA public works officer (PWO), Navy Captain M.D.¹⁹ Specifically, AFM claims that Captain M.D. (who retired in mid-2006) was the USNA PWO for the first half of AFM's incumbent contract and displayed an extraordinary level of involvement in all aspects of AFM's performance. AFM also alleges that as PWO, Captain M.D. had "detailed and frequent immersion in all facets of AFM's incumbent contract performance," including staffing, management, and technical approaches, as well as cost data and indirect rates.²⁰ Protest, Feb. 10, 2009, at 12. The protester argues that because Captain M.D. subsequently became a member of the IAP team that competed here, IAP obtained an unfair competitive advantage that was prejudicial to AFM.

Subsequent to the filing of the protest, both the Navy and IAP provided statements regarding Captain M.D.'s involvement in AFM's incumbent contract, summarized as follows.

- Captain M.D. was the USNA PWO from 2003 to June 2006. In this capacity he oversaw the maintenance and construction work for all facilities and utilities at the Naval Academy. Captain M.D.'s staff (of approximately 200 people) oversaw the work of several contractors, including AFM. IAP Comments, Mar. 23, 2009, exh. 12, Affidavit of Capt. M.D., at 1.
- Captain M.D. was not the contracting officer for AFM's contract. He rarely if ever reviewed contract documentation, did not keep any contract files in his office, and did not execute, initiate, or negotiate any of the modifications to the AFM contract that occurred while he was the PWO. Captain M.D. did not participate in the details of the contract modifications that occurred with AFM (including the rates, costs, or prices negotiated) while he was PWO. He did not draft, negotiate, prepare the government estimate, or sign the modifications.²¹ Also, Captain M.D. does not recall ever asking for or seeing any of the details from the contract modifications. Captain M.D. did not take any AFM contract documents with him when he left the Navy. *Id.* at 1-3; AR, Mar. 12, 2009, at 11.

¹⁹ Throughout this decision, we identify individuals by their initials rather than their full names.

²⁰ AFM does not also allege that Captain M.D. had access to any source selection information for this procurement.

²¹ The Navy reviewed the 51 AFM contract modifications that occurred while Captain M.D. was USNA PWO, and found that none were initiated, negotiated, or executed by Captain M.D. AR, Mar. 12, 2009, at 11.

- Captain M.D. did not review AFM's proprietary in-house staffing, management, or technical information. Although he had access to a top-level organization chart for AFM, that chart did not include detailed staffing information. Moreover, the site visit provided by the Navy to prospective offerors allowed any interested parties to view and assess how the work was then being performed by AFM under the incumbent contract, including the location of AFM's current maintenance teams and watch standers. Although Captain M.D. participated in monthly performance reviews with AFM, those involved top level reports on performance issues (e.g., the number of on-time service calls and work requests). IAP Comments, Mar. 23, 2009, exh. 12, Affidavit of Capt. M.D., at 1-2.
- On or about March 31, 2008 (approximately 21 months after having left his position as the USNA PWO), Captain M.D. became a consultant to IAP on its proposal for the USNA base operating support services contract. Captain M.D.'s advice primarily involving providing insight into the USNA's operations and needs. Id. at 4.

An offeror may not have an unfair competitive advantage over other competitors and, in order to protect the integrity of the procurement system, contracting agencies may go so far as to exclude an offeror from the competition because of the likelihood that it has obtained an unfair competitive advantage, so long as the determination is based on facts and not mere innuendo or suspicion. See Kellogg Brown & Root Servs., Inc., B-400787.2, B-400861, Feb. 23, 2009, 2009 CPD ¶ 54 at 8; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 8. The mere employment of a former government official who is familiar with the type of work required, but not privy to the contents of proposals or to other inside agency information, does not confer an unfair competitive advantage. Main Bldg. Maint., Inc., B-291950, B-291950.2, May 15, 2003, 2003 CPD ¶ 103 at 10; Proteccion Total/Magnum Sec., S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 4.

There is simply no evidence in the record here of an unfair competitive advantage as a result of Captain M.D.'s prior employment with the Navy and his subsequent employment by IAP. As set forth above, AFM claimed that Captain M.D. had detailed and frequent involvement in all facets of AFM's contract performance, including staffing, management, and technical approaches, as well as cost data and indirect rates. The protester—the incumbent contractor with actual knowledge of Captain M.D.'s role on its contract—however, has not identified or produced a single piece of evidence (e.g., emails, other contract records, affidavits) to support any of its many assertions. Rather, AFM faults the Navy for essentially “failing to prove a negative”—i.e., the agency's inability to demonstrate that Captain M.D. was not involved in the negotiation of contract modifications with AFM. In light of the declarations of both the agency and Captain M.D. himself regarding his role, and the lack of any contrary evidence on the part of AFM, there is no evidence to support the protester's challenge to the award to IAP based on Captain M.D.'s involvement in the procurement.

AFM also contends that IAP's employment of Captain M.D. resulted in significant transfusions of knowledge regarding AFM's incumbent performance. Specifically, the protester claims that under its incumbent contract, it established a dedicated "Bancroft Hall Shop" as part of its overall maintenance staffing plan. AFM alleges that this innovation was essentially proprietary information, and one which Captain M.D. must necessarily have learned about when he was PWO and then imparted to IAP, as it was the only other offeror to propose such a feature as part of its staffing plan. Comments, Mar. 23, 2009, at 14-17. In its report to our Office, the Navy declares that AFM's incumbent Bancroft Hall Shop staffing was readily observable from the site visit provided to all prospective offerors; further, attendees were told that the Bancroft Hall shop space would be made available by the Navy to house on-site contractor staff.²² AR, May 4, 2009, attach. 1, Affidavit of R.M., USNA Assistant PWO, at 1. In its response AFM does not dispute the agency's declaration, but instead argues that its protest ground is not dependent upon the Bancroft Hall Shop issue. Comments, May 8, 2009, at 6-7. Quite simply, given that the record shows that AFM's Bancroft Hall Shop staffing plan was readily observable from the public site visit, there is no reasonable basis for AFM's speculation that Captain M.D. in some way improperly imparted AFM proprietary information to IAP.

Lastly, AFM fails to show that the information possessed by Captain M.D. was anything but stale. There is no dispute that Captain M.D. left his position as the USNA PWO in June 2006, and that the RFP here was issued in April 2008. Whatever information Captain M.D. may have learned as PWO regarding AFM's performance of the incumbent contract was certainly not current when he became a consultant to IAP almost 2 years later.

In sum, our review of the record in this case identified no basis to question the agency's evaluation or source selection decision for the reasons advanced by the protester. Accordingly, if our Office were resolving the protest, we would deny the issues raised for the reasons discussed above.

Daniel I. Gordon
Acting General Counsel

²² A dedicated Bancroft Hall Shop staff was also not a new concept introduced by AFM, but rather, pre-existed its incumbent USNA contract by at least 27 years. AR, May 4, 2009, attach. 1, Affidavit of R.M., USNA Assistant PWO, at 1-2.