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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: Checchi and Company Consulting, Inc.

File: B-285777

Date: October 10, 2000

Robert Sonenthal, Esq., and Nina G. Nathani, Esq., Sonenthal and Overall, for the protester.
Roy Goldberg, Esq., Schnader Harrison Segal & Lewis, for DPK Consulting, the intervenor.
Diane A. Perone, Esq., Agency for International Development, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office cannot find that the agency reasonably evaluated the protester's oral presentation where the agency and protester disagree as to the content of the oral presentation, the contemporaneous record of the oral discussions and presentations--which consists only of the protester's presentation materials and the evaluators' scoresheets--does not support the evaluators' conclusions regarding the protester's approach, and the agency did not act in accordance with the terms of the solicitation where it disregarded the protester's previously submitted written proposal in evaluating the oral presentation.

2. Agency failed to conduct meaningful discussions where it did not reasonably apprise the protester during discussions of significant weaknesses that caused the protester's proposal to be eliminated from the competition.

DECISION

Checchi and Company Consulting, Inc. protests the award of a contract to DPK Consulting under request for proposals (RFP) No. 519-00-P-006, issued by the U.S. Agency for International Development (USAID), for technical assistance and training to the government of El Salvador. Checchi contends that the agency's evaluation and exclusion of its proposal from the competition and the evaluation of DPK's proposal and its selection for award were unreasonable and inconsistent with the terms of the solicitation, and that the agency failed to conduct meaningful discussions.

We sustain the protest.

The RFP was issued to obtain technical assistance to "support El Salvador's efforts to institutionalize the new Criminal Procedure Code and the Criminal Code . . . in order to establish timely, effective and fair legal processes based on the rule of law." RFP at 8. The solicitation explained that the contractor's efforts are "an integral component" of USAID's overall strategic objective for "More Inclusive and Effective Democratic Processes" in El Salvador. RFP at 14. The RFP set forth two "intermediate results" for achieving the overall objective,[1] and described six "illustrative activities" to be performed under the contract in an effort to achieve the intermediate results.[2] RFP at 15-20.

The solicitation provided for the award of a cost-plus-award-fee contract, for a base period of 2 years with one 1-year option, to the offeror whose proposal represented the best value to the government. RFP at 24, 75. The solicitation stated that the evaluation of proposals would be conducted in three different phases. RFP at 72.

For the phase I evaluation, offerors were to submit technical and business management proposals that would be evaluated under the following criteria:

Technical

1. Institutional Capability and Past Performance	(20 points)
2. Management Plan and Key Personnel	(30 points)
3. Technical Concept Paper	(50 points)

Business Management

1. Cost Reasonableness	(20%)
2. Policies and Procedures Reflect Cost Consciouness	(15%)
3. Award Fee Structure	(30%)
4. Past Performance in Contract Administration	(30%)
5. Proposal Content and Preparation	(5%)

RFP at 78-80. The solicitation explained that the technical evaluation criteria were significantly more important than the business management criteria, and that the

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[1] The intermediate results are "Increased use of the Justice System" and "Improved Court Case Preparation and Management." RFP at 15.

[2] The illustrative activities include, for example, "Greater understanding of the roles and responsiblities of the new Criminal Procedure Code and Criminal Code by all judicial operators," and "Successful establishment of rural legal centers to improve access to legal services in selected sites." RFP at 15, 18.

contracting officer would determine based upon the evaluation of the phase I proposals which firms would be requested to participate in phase II of the evaluation process. RFP at 76.

The RFP stated that phase II of the evaluation would consist of "Discussions and Oral Presentations" with those offerors "determined to have a reasonable chance for award." RFP at 74. The solicitation set forth a general framework for the "oral discussion/presentation" sessions and provided that "oral presentations" would be evaluated under two factors: technical approach (60 points) and management/adminstrative approach (40 points). Id. at 74, 79. The solicitation added that "business discussions" would "involve a negotiation of the items presented in the [previously submitted written] business management proposal[s]," and that "these discussions will take place on the same day as the oral presentations." RFP at 74.

The RFP informed offerors that in phase III "[a] final revised proposal will be requested from the Offeror(s) whose proposal(s) continue to have a reasonable chance for award." The solicitation specified that "[t]he written proposal will include (1) amendment(s), if any to the original proposal; and (2) first year workplan," as well as a revised business management proposal. Id. The RFP, however, did not list any evaluation factors or criteria for phase III.[3]

The agency received proposals from five offerors, including Checchi and DPK, by the RFP's April 28, 2000 closing date. Agency Report, Tab 3, Negotiation Memorandum, at 7. The offerors' technical and business management proposals were forwarded to the technical evaluation committee (TEC) and business committee, respectively. Id. at 5, 10. DPK's technical proposal received a score of 80.60 out of 100 points, and its business management proposal received 58 out of 100 points. Checchi's technical and business management proposals received scores of 64.20 and 59 points, respectively. Id. at 8-9.

The agency determined that DPK, Checchi, and a third offeror had a reasonable chance for award. Id. at 10. By letters dated May 17, USAID invited these three firms to participate in oral presentations and discussions. These letters "recommended that all proposed key personnel attend the presentation," and provided "a list of proposal strengths and weaknesses as reported by the [TEC]" to "assist [each offeror] in being fully prepared for the oral presentations." The letters also informed

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[3] The RFP was deficient in that it did not include any evaluation factors for phase III revised proposals. 41 U.S.C. § 253a(b)(1) (1994 & Supp. IV 1998); Federal Acquisition Regulation (FAR) § 15.304(d). Since we sustain Checchi's protest on other grounds, we recommend that the agency, as part of its corrective action, amend the solicitation so that it includes phase III evaluation factors.

the offerors that "[i]n the afternoon of the date of your oral presentation, the business management proposal will be discussed." Agency Report, Tabs 9 and 10, Letters from USAID to Checchi and DPK.

DPK, Checchi, and the third offeror each participated in the phase II discussions/oral presentations. According to the agency, during the portion of the phase II discussions/oral presentations which addressed the offeror's technical approach, "[q]uestions were made on an as needed basis." Agency Report, Tab 3, Negotiation Memorandum, at 11. After the discussions/oral presentations were completed, "the business/management issues were discussed with the various contractors." Id.

The record of the discussion/oral presentation sessions consists only of the individual scoresheets completed by the agency evaluators (which appear to have been completed either during or shortly after each offeror's discussion/oral presentation session) and the offerors' presentation materials; the agency did not otherwise record the discussions/oral presentations. Agency Report, Tab 18, DPK's Oral Presentation Materials; Tab 19, Evaluators Scoresheets for DPK's Oral Presentation; Tab 21, Checchi's Oral Presentation Materials; Tab 23, Evaluator Scoresheets for Checchi's Oral Presentation.

In accordance with the solicitation, which, as indicated, included evaluation factors for only the portion of the discussions/oral presentations regarding the offerors' technical and management/administrative approaches (and not business management), the evaluators assigned scores of 83 out of 100 points to DPK and 73 points to Checchi. Agency Report, Tab 3, Negotiation Memorandum, at 11. In so scoring the proposals, the evaluators considered only the phase II discussions/oral presentations and did not consider the phase I proposals. Agency Report at 26-27. The agency determined, based upon the evaluation results of the discussions/oral presentations, that "only DPK had a reasonable chance for award," and that it would request a final revised proposal from only DPK for consideration during phase III of the evaluation process.[4] Agency Report, Tab 3, Negotiation Memorandum, at 13.

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[4] It is unclear from the record whether the agency considered DPK's proposed costs at any time prior to selecting DPK for award or ever considered the proposed costs of offerors other than DPK. Cost or price to the government must be included in every RFP as a significant evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 41 U.S.C. § 253a(c)(1)(B) (1994); FAR § 15.304(c)(1); Kathpal Techs., Inc.; Computer & Hi-Tech Management, Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9; see Electronic Design, Inc., B-279662.2, et al. Aug. 31, 1998, 98-2 CPD ¶69 at 8. This requirement means that an agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government. Kathpal Techs., Inc.; Computer & Hi-Tech Management, Inc., supra. Because we sustain Checchi's protest, we recommend that

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In deciding to remove Checchi from the competition for phase III, the agency noted the following technical weaknesses in Checchi's oral presentation: (1) Checchi had a "[h]eavy focus on human rights which is not a main focus of the contract"; (2) Checchi "[e]mphasized activities with [the] Public Defender's Office when the need to put the accent is in the Attorney General Office and the Police"; (3) Checchi proposed an "[u]nbalanced combination of local partners, which is not adequate to perform the project results. Proposed institutions lack political balance to truly represent the justice sector objectively"; and (4) the "proposed local institution to carry out training activities, IDHUCA [Instituto de Derechos Humanos de la Universidad Centroamericana] specializes in human rights not in legal reform training."[5] Id. at 12-13.

Following the determination to include only DPK in the phase III evaluation, USAID found that an individual proposed for one of the "key personnel" positions identified in DPK's proposal--its Chief of Party (COP)--was objectionable because the individual was not a citizen of the United States. The record reflects that the contracting officer then reviewed DPK's proposal and the evaluators' scoring of DPK's discussions/oral presentation--which DPK's COP participated in as one of DPK's proposed "key personnel"--and determined that, even without any individual designated to fill the proposed "key personnel" COP position, "DPK remained as the only firm with a reasonable chance for award."[6] Id. at 13.

The agency informed Checchi by telephone that it had been excluded from the remainder of the competition and requested that DPK submit a revised final proposal. Id. at 14. The agency subsequently awarded the contract to DPK at its proposed total cost of $3,986,083, with the individual to fill DPK's COP position designated as "to be determined" given that DPK had not found a substitute for the

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the agency, as part of its corrective action, ensure that cost is a significant evaluation factor under the RFP and that it is considered in the evaluation. See Electronic Design, Inc., supra (an evaluation and source selection that fails to give significant consideration to cost or price cannot serve as a reasonable basis for award).

[5] USAID identified two additional technical weaknesses in Checchi's oral presentation that are not protested.

[6] Checchi protests that the removal of DPK's COP from its proposal rendered the agency's evaluation and selection of DPK's proposal for award improper. Because we sustain the protest and recommend that the agency amend the solicitation, we need not decide this issue. We note, as does the agency in its administrative report, that the RFP did not specify that an offeror's COP had to be a citizen of the United States, and we recommend that the agency review the RFP and amend it, if necessary, to reflect the agency's actual requirement.

individual it initially proposed as its COP. Id. at 14, 16. After requesting and receiving a debriefing, Checchi filed this protest.[7]

Checchi protests that the agency's evaluation of its proposal, including its discussions/oral presentation, was unreasonable. In reviewing an agency's decision to exclude a proposal from the remainder of a competition, we look first to the agency's evaluation to determine whether it had a reasonable basis. Although in reviewing an agency's evaluation we will not independently determine the merits of a proposal or presentation, we will examine the record to ensure that the evaluation was reasonable and consistent with the evaluation criteria. J&J Maintenance, Inc., B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106 at 3; Essex Electro Eng'rs, Inc., B-284149, B-284149.2, Feb. 28, 2000, 2000 CPD ¶ 72 at 6.

FAR § 15.102(e) requires that agencies maintain a record of oral presentations. The source selection authority selects the method of recording, and FAR § 15.102(e) gives the following examples: videotaping, audio tape recording, written record, government notes, and copies of offeror briefing slides or presentation notes. Although the FAR thus does not require a particular method of establishing a record of what was said or occurred during oral presentations, the fundamental principle of government acountability dictates that an agency maintain a record adequate to permit meaningful review. J&J Maintenance, Inc., supra; see Delta Int'l, Inc., B-284364.2, May 11, 2000, 2000 CPD ¶ 78 at 4; Telos Field Eng'g, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240 at 9.

Here, the contemporaneous record of the Checchi's discussion/oral presentation session consists only of Checchi's presentation materials and the evaluators' scoresheets. Although the agency has supplemented the contemporaneous record with detailed declarations supporting its version of what occurred during the discussions/oral presentation, the protester has submitted detailed declarations that persuasively state, with references to Checchi's phase I proposal and oral presentation materials, that its discussions/oral presentation did not, as the agency

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[7] As a preliminary matter, the agency contends that Checchi's protest is untimely because USAID's telephonic notification to Checchi that it had been excluded from the remainder of the competition constituted an attempt to debrief Checchi, which failed only because of Checchi's negative reaction to the agency's notification that Checchi was being excluded from the competition. Agency Report at 18-19. Contrary to the agency's characterization in its report, the record reflects that the agency's telephonic notification that Checchi was being excluded from the remainder of the competition was intended and served only as such a notice and not as an attempt to debrief the protester, and that the agency debriefed Checchi by letter dated June 21, 2000. Agency Report, Tab 4, Declaration of the Regional Contracting Officer at ¶ 46-48; Tab 29. Accordingly, there is no basis to find the protest untimely.

contends, unduly focus on human rights, or overemphasize the public defender's office instead of focusing on the attorney general and police. As explained below, we cannot find based upon this record that the agency acted reasonably in its evaluation of Checchi's oral presentation.

As noted, Checchi contends it did not focus or otherwise emphasize human rights in its technical proposal or during its discussions/oral presentations. Protester's Comments at 33-34; Protester's Comments, exh.B, Declaration of Checchi's Senior Associate/Home Office Project Manager, at 6-7. In support of this, Checchi points to the presentation materials it furnished the agency at the discussion/oral presentation, and contends that, contrary to the agency's characterization, its oral presentation did not focus on human rights activities, but rather, in accordance with its understanding of the solicitation, "focused on the need to strengthen police and prosecutorial activities." Agency Report, Tab 21, Checchi Phase II Presentation Materials; Protester's Comments, exh. C, Declaration of Checchi's COP, at 2.

The protester also argues that the agency unreasonably concluded that Checchi emphasized activities with the public defender's office instead of the attorney general's office, contending that it clearly addressed and placed the proper emphasis on the role of the attorney general's office in both its written techical proposal and during its discussion/oral presentation session. Protest at 10-11; Protester's Comments at 24-27. In support of its position, the protester points to its phase I written proposal, its phase II discussion/oral presentation materials, and detailed declarations furnished by two of its proposed key personnel--its proposed Home Office Project Manager and COP--who participated in Checchi's discussion/oral presentation session. Agency Report, Tabs 7 and 21, Checchi's Technical Proposal and Presentation Materials; Protester's Comments at 24-27, exhs. B & C, Declarations of Checchi's proposed Home Office Project Manager and COP.

Our review confirms that Checchi's presentation materials include no specific mention of human rights. Nor, as argued by Checchi (and not refuted by the agency) do the presentation materials appear to emphasize activities with the public defender's office rather than with the police or attorney general. In light of the content of Checchi's presentation materials, the fact that Checchi maintains through, among other things, the declarations of two of its proposed key personel who participated in its discussion/oral presentation that its discussion/oral presentation did not focus on human rights or emphasize the activities with the public defender's office rather than with the police or the attorney general's office, and the lack of any contemporaneous record of what Checchi actually said during its discussion/oral presentation session, we cannot find that the agency acted reasonably in

downgrading Checchi's oral presentation for these perceived weaknesses.[8] Agency Report, Tabs 7 and 21, Checchi's Technical Proposal and Presentation Materials; Protester's Comments at 24-27, exhs. B & C, Declarations of Checchi's proposed Home Office Project Manager and COP.

The agency's phase II evaluation of Checchi was also flawed because the agency, by completely disregarding Checchi's phase I written proposal in determining to exclude Checchi from phase III of the evaluation process, failed to evaluate Checchi's submissions in accordance with the terms of the solicitation. Specifically, with regard to Checchi's claim that the role of the attorney general's office is clearly addressed and properly emphasized in Checchi's technical proposal, the agency asserts that it "designed the RFP so that the offerors' written proposals would be evaluated seperately from their discussions/oral presentations." Agency's Reply to Checchi's Comments, Sept. 8, 2000, at 2; Agency Report at 26-27. The agency explains with regard to its evaluation of the discussions/oral presentations that "at this point, the TEC was rating the Phase II offerors on their Phase II discussions/oral presentations--not on their Phase I written technical concept papers." Agency Report at 26.

Checchi asserts, and we agree, that the solicitation did not provide that phase I technical proposals would be excluded from consideration during phase II. First, the agency does not argue (and we are unaware of any basis to claim) that the RFP informed offerors that the agency would completely disregard the offerors' phase I technical proposals during its consideration of the phase II discussions/oral presentations. Rather, as explained below, the RFP can only be reasonably read as providing just the opposite. For example, the RFP provided that the agency "would like to see," among other things, a discussion of the offeror's organization/ corporation and its technical and management/adminstrative approach. RFP at 74. This outline, by tracking the outline provided for the submission of the offerors' phase I technical proposals, which provided that the proposals were to address, among other things, the "[o]rganizational experience and qualifications" of the offeror, as well as the offeror's technical and management approach, suggested that the discussion/oral presentation session was meant to "augment" the offeror's phase I proposals. RFP at 72-73; see FAR § 15.102 (oral presentations "may substitute for, or augment, written information").

The solicitation also provided that, for phase III, the offeror(s) continuing to have a reasonable chance for award were to submit a "revised proposal," which was to include "amendment(s), if any to the original proposal." RFP at 74. Given that the RFP specifically identifies the phase III written proposals as revisions of the

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[8] The agency does not contend that Checchi's phase II presentation materials support the agency's conclusion that Checchi overemphasized human rights or the public defenders office.

offeror(s) phase I proposals and provides for their evaluation, the agency's position would appear to be that the RFP provided for the consideration of the offerors' phase I proposals only during phase I and III of the evaluation process, and their complete exclusion from phase II of the evaluation process. Absent some express language in the RFP, we do not agree with the agency that the RFP can reasonably read as providing that the evaluation would be conducted in this manner.

The RFP's indication that the discussion/oral presentation sessions were meant to augment the offerors' phase I proposals was strengthened by the agency's actions during the conduct of the procurement. As mentioned previously, the agency invited the firms to participate in oral presentations and discussions by letter, and these letters provided "a list of proposal strengths and weaknesses as reported by the technical evaluation committee" to "assist [each offeror] in being fully prepared for the oral presentations." Agency Report, Tabs 9 and 10, Letters from USAID to Checchi and DPK. In our view, the letters notifying offerors of the evaluated weaknesses in their phase I proposals so that they could be better prepared for their phase II oral presentations cannot be reconciled with the agency's position that the offerors' phase I written proposals were in essence irrelevant to phase II of the evaluation process.

In sum, the agency did not act in accordance with the terms of the solicitation when it disregarded Checchi's phase I technical proposal during its consideration of Checchi's phase II discussion/oral presentation, and its conclusion that Checchi's approach included an undue emphasis on human rights and on activities with the public defender's office instead of the attorney general's office and the police is not reasonably supported by the record.[9]

Checchi also argues that it was not provided with meaningful discussions. Discussions must be meaningful, equitable, and not misleading; in order for discussions to be meaningful the agency is obligated to point out significant weaknesses, excesses, and deficiencies in the proposals. In reviewing whether an agency conducted meaningful discussions with a protester, our Office looks to whether, among other the things, the agency gave the offeror reasonable notice of its

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[9] For much the same reasons, the record also does not support USAID's determination that Checchi planned to use IDHUCA "as a lead institution for Checchi's training activities." Agency Report at 27, Tab 3 Negotiation Memorandum, at 13. The agency's conclusion that IDHUCA would carry out Checchi's training activities is unsupported by the record, given that it is inconsistent with Checchi's phase I proposal, its phase II presentation materials, and the declarations of the individuals who participated in Checchi's oral presentation. Agency Report, Tabs 7 and 21, Checchi's Technical Proposal and Presentation Materials; Protester's Comments at 29-32, exh. B, Declaration of Checchi's Senior Associate/Home Office Project Manager, at 5-6.

specific concerns regarding the offeror's proposal. Professional Performance Dev. Group, Inc., B-279561.2 et al., July 6, 1998, 99-2 CPD ¶ 29 at 5.

Checchi contends that it was not informed by the agency in either the letter to Checchi that invited the firm to participate in discussions/oral presentations or during the discussion/oral presentation of the perceived weakness concerning the alleged lack of political balance of its local partners. Protest at 9-10. The agency responds only that its May 17 letter to Checchi addressed this issue by listing as a weakness the agency's assessment that Checchi's "[l]ocal [non-governmental organization] partners are not focused on prime issues of contract." Agency Report at 29; Tab 9, Letter from USAID to Checchi. The agency has not explained how this comment reasonably apprised Checchi of the agency's concern that its "[p]roposed institutions lack political balance," and we agree with the protester that it did not do so. Thus, the agency did not conduct meaningful discussions in this respect.

In response to Checchi's contention that meaningful discussions were not conducted regarding Checchi's alleged undue emphasis on human rights, the agency claims that it commented during Checchi's discussions/oral presentation that one of Checchi's proposed partner's "heavy focus on human rights does not parallel the main focus of the RFP." Agency Report at 28; Tab 5, Declaration of TEC Member, at 3-4. Because, as discussed above, the record of the discussions/oral presentations consists only of Checchi's presentation materials and the evaluators' scoresheets, the agency can only point to the scoresheets of two of the evaluators who attended the discussions/oral presentations in support of its assertion that it did raise this issue with Checchi. However, the fact that two of the evaluators noted that Checchi's approach focused on human rights does not equate to contemporaneous documentation that this perceived weakness was discussed with, or in any way conveyed to, Checchi.

Although the agency has also furnished the declaration of one of these evaluators recalling that during the discussion/oral presentation session with Checchi two TEC members made "the point that [one of Checchi's partners'] heavy focus on human rights does not parallel the main focus of the RFP," we note that this declaration was prepared by the agency solely for the purpose of defending this protest. Agency Report, Tabs 5 and 23, Declaration of TEC Member, at 4; Evaluator Scoresheets. Given Checchi's contention that its perceived focus on human rights was not mentioned or otherwise raised by the agency during the discussion/oral presentation session, and the fact that Checchi's presentation materials do not contain any specific mention of human rights, as well as the lack of any contemporaneous documentation or record establishing or otherwise showing that this issue was raised with Checchi, we cannot find that this matter was raised with Checchi based solely on an evaluator's declaration prepared for the purpose of defending this protest. See Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 6 (our Office accords greater weight to contemporaneous evaluation and source

selection materials than to the parties' later explanations, arguments, and testimony).

We conclude that the agency failed to conduct meaningful discussions because it did not reasonably apprise the protester of significant weaknesses that caused the protester's proposal to be eliminated from the competition.

The protest is sustained.

We recommend that the agency review the terms of the RFP and, should the agency still want to refrain from considering the offerors' phase I written proposals during consideration of the offerors' phase II discussions/oral presentations, it should amend the solicitation accordingly. As discussed above, the agency should also review and amend the RFP to provide for the consideration of cost/price as a significant evaluation factor, to state the phase III evaluation factors, and to state the U.S citizenship requirement for the COP. The agency should then request and evaluate proposals in a manner consistent with the solicitation as amended, and make a new source selection decision. If a proposal other than DPK's is selected for award, the agency should terminate the contract previously awarded to DPK. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its claim for costs, detailing and certifying the time expended and cost incurred, with the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
Acting General Counsel