Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: NWT, Inc.; PharmChem Laboratories, Inc.

File: B-280988; B-280988.2

Date: December 17, 1998

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Edward L. Williamson, Esq., and Lynette R. Miserez, Esq., Department of the Army, for the agency.
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DIGEST

1. Allegation that agency used non-cost factors to select a commercial proposal upon which to base a cost comparison pursuant to Office of Management and Budget Circular No. A-76 is untimely where request for proposals specifically stated that technical considerations are more important than cost, and protest was filed after the closing date for receipt of proposals.

2. Allegation that agency could not lawfully initiate cost comparison pursuant to Office of Management and Budget Circular No. A-76 because agency allegedly failed to satisfy threshold conditions is untimely where protester either knew or should have known of the basis for its protest before the closing date for receipt of proposals, and protest was not filed prior to that time.

3. Allegation that agency improperly evaluated proposals is denied where the record shows that the agency evaluated the proposals in accordance with the evaluation factors announced in the solicitation and record reasonably supports overall technical ratings.

4. Protest of agency determination based on cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76 that required services could be performed more economically in-house is denied where protester has not shown that agency conducting the cost comparison failed to comply with the applicable procedures in selecting in-house performance over contracting.

DECISION

NWT, Inc. and PharmChem Laboratories, Inc. protest the decision of the Department of the Army, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to provide drug testing for the Army National Guard and the U.S. Coast Guard in-house at the Tripler Army Medical Center, Forensic Toxicology Drug Testing Laboratory, rather than to contract for these services under request for proposals (RFP) No. DASW01-97-R-0034. NWT argues that the Army's evaluation of technical proposals was unreasonable. NWT also maintains that the agency improperly failed to select its proposal as the one upon which to base its cost comparison, and contends that the Army's conduct of the cost comparison was improper. PharmChem argues that the Army improperly failed to follow the requirements for comparison of a "best value" commercial offer with the in-house offer contained in OMB Circular No. A-76, and the Revised Supplemental Handbook (March 1996) (the Supplement). PharmChem also challenges the cost comparison on several grounds.

We deny the protests.

BACKGROUND

The agency synopsized the solicitation in the Commerce Business Daily (CBD) on November 29, 1996, announcing that the RFP was being issued as part of a cost comparison pursuant to OMB Circular No. A-76. The RFP, issued on March 19, 1997, contemplated the award of a fixed-price requirements contract for 1 year with up to four 1-year option periods to provide drug testing services for the Army National Guard and Coast Guard (ANG/CG). RFP § 52.216-1, and at 2-9. The required services include analysis of urine samples for drugs of abuse, compilation and reporting of test results, and litigation support. RFP, Attachment 1, Statement of Work (SOW). The RFP contained the clause found at Federal Acquisition Regulation (FAR) § 52.207-2, "Notice of Cost Comparison (Negotiated)," which in part advises that the solicitation is part of a "Government cost comparison to determine whether accomplishing the specified work under contract or by Government performance is more economical." RFP at 14.

The RFP stated that the government would evaluate all technical proposals in accordance with the following five factors listed in the RFP (maximum number of points available under each factor is shown in parenthesis): corporate experience and quality of work (5,500); corporate personnel (1,500); corporate structure (2,000); contract administration (1,750); and corporate past performance (2,000). RFP at 50-53. Within each factor, the RFP listed subfactors and the maximum number of possible points each was worth. The maximum possible score a proposal could earn was 12,750 points.

The RFP stated that while not numerically scored, price would be a substantial factor considered and that price reasonableness would be evaluated. RFP at 50. In determining the best overall response, the RFP stated that "technical superiority will be the most important consideration." Id. The agency would select the responsible offeror whose offer was determined to be most advantageous to the government. RFP § 52.212-2 at 18.

The agency received three proposals from commercial firms in response to the RFP. A technical evaluation panel (TEP) evaluated initial proposals; the agency conducted discussions with all three offerors; and requested best and final offers (BAFO) from all three firms. The TEP evaluated proposals based on the BAFOs, with the following results:

Offeror	Point Score	BAFO Price
PharmChem	11,245	$6,328,704.22
NWT	11,650[1]	7,503,396.00
Offeror A	11,230	7,142,847.76

CO Statement of Facts at 4. Based on the results of the final evaluation, the TEP unanimously recommended to the SSA that PharmChem's proposal be selected for purposes of the cost comparison. Specifically, the TEP found that the strengths identified in NWT's proposal, including the firm's experience with drug testing, did not justify NWT's price premium of over $1 million given PharmChem's highly rated proposal. TEP's Technical/Price Tradeoff Assessment and Recommendation for Tentative Award Selection Memorandum at unmarked page 6.

The CO agreed with the TEP's recommendation. Source Selection Decision Memorandum at 15. Subsequently, the CO requested that the TEP review the in-house technical proposal, the Management Plan/Most Efficient Organization (MP/MEO), and supporting documents that had been submitted by Tripler. The TEP reviewed but did not numerically score Tripler's submission in several areas including laboratory organization/personnel/experience; equipment; standard operating procedures; certification/inspections; and

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[1]The TEP's post-BAFO technical score of NWT's proposal was 11,450 points. However, the contracting officer (CO), who was the source selection authority (SSA) for the procurement, disagreed with a concern raised by the TEP regarding NWT's financial reliance on maintaining two Army contracts as a significant source of corporate resources, and adjusted NWT's score up by 200 points. Source Selection Decision Memorandum, Apr. 24, 1998 at 9.

facility. The TEP found that Tripler's submission exceeded the requirements of the solicitation under several categories (laboratory organization/personnel/ experience; equipment; SOP; and certifications/inspections). Based on its review, the TEP concluded that Tripler's submission was "highly acceptable and clearly has the capability to perform this effort at a satisfactory or better level." Technical Evaluation of Tripler Proposal at 2. The agency then conducted a cost comparison between PharmChem's evaluated price and the in-house cost estimate and concluded that the effort could be performed more economically by Tripler.[2]

By letters dated May 20, 1998, the CO informed the protesters that PharmChem's proposal had been selected as the "best value" offer to form the basis for the cost comparison. Those letters further advised that based upon the results of the cost comparison, the agency had tentatively decided that the effort could be performed more economically in-house.

Both NWT and PharmChem appealed the decision to convert the work to in-house performance to the Army's Administrative Appeals Board convened pursuant to Army regulations and OMB Circular No. A-76. In decisions dated August 27, 1998, the Board denied PharmChem's and NWT's appeals. These protests to our Office followed written debriefings by the agency.

The Selection Process under OMB Circular No. A-76 and GAO's Review

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of governmental functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel.

The process set out in OMB Circular No. A-76 and the Supplement broadly encompasses three steps in the conduct of a public-private competition. First, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement is conducted. The Supplement was amended in 1996 to permit a "best value" approach (such as was used in this case) to selecting the private-sector proposal. See 61 Fed. Reg. 14,338, 14,339, 14,345 (1996).

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[2]After making adjustments to PharmChem's BAFO price in accordance with OMB Circular No. A-76, PharmChem's evaluated price for the cost comparison was $6,499,449.80, including option periods, while the in-house cost estimate was $6,362,922, a difference of $136,527.80 in favor of in-house performance. Cost Comparison of In-House Performance v. Contract or ISSA Performance, Oct. 28, 1997.

Second, the winning private-sector's offer is compared with the in-house "offer" and, if necessary, the in-house offer is adjusted to match the performance level of the private-sector one. Specifically, after selecting the "best value" private-sector offer, the CO is to submit to a reviewing authority the government's in-house management plan, which must comply with the requirements of the solicitation. Supplement Ch. 3 at ¶ H.3.d. The reviewing authority then evaluates the in-house offer and assesses whether or not the private-sector offer's level of performance and performance quality will be achieved under the in-house plan.[3] Id. The government then makes changes if necessary to ensure that the in-house plan meets the performance standards of the selected private-sector offer, revises its in-house cost estimates, and submits the revised estimates to an "independent review officer" for acceptance. Id. at ¶ H.3.e. This process is designed to ensure that the government's in-house cost estimate is based upon the same scope of work and performance levels as the private-sector "best value" offer. Id.

Finally, once the playing field is thus leveled, there is a straightforward cost competition between the private-sector and in-house offers. Specifically, the CO opens the government's in-house cost estimate for comparison with the private-sector offer's proposed price.[4] Id. at ¶ J.3; see also FAR § 7.306(b).

Where, as here, an agency has conducted an A-76 competition, thus using the procurement system to determine whether to contract out or perform work in-house, our Office will consider a protest alleging that the agency has not

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[3]The Supplement does not explicitly require that the reviewing authority document the assessment of whether or not the same level of performance and performance quality will be achieved in-house. Nonetheless, our cases consistently emphasize the importance of a well-documented evaluation record and selection decision to show that the assessment is not arbitrary or unreasonable, or not contradicted by the record. See, e.g., Northwest EnviroService, Inc., B-247380.2, July 22, 1992, 92-2 CPD ¶ 38 at 11. We see no reason to conclude that a reviewing authority's assessment of the comparability of proposals in the context of an OMB Circular No. A-76 comparison should be subject to any different standard. Accordingly, despite the lack of guidance on this point in the Supplement, we think the reviewing authority's decision should be documented contemporaneously with that decision.

[4]The Supplement establishes a minimum cost differential of the lesser of 10 percent of personnel costs (line 1 of the Cost Comparison Form) or $10 million over the performance period that must be exceeded before converting to or from in-house or contract performance. This minimum differential is meant to ensure that the government will not convert for marginal estimated savings. See id. Ch. 4 at ¶ A.1. Accordingly, the evaluated cost estimate for in-house performance in this case incorporates a 10 percent increase of personnel costs.

complied with the applicable procedures in its selection process or has conducted an evaluation that is inconsistent with the solicitation criteria or otherwise unreasonable.[5] See Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335 at 4; Base Servs., Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 at 2.

NWT's Protest

NWT challenges the agency's decision on numerous grounds, including that the Army was prohibited by law from conducting the procurement. NWT also challenges the evaluation of its and PharmChem's proposals and the cost comparison.

NWT first argues that the Army was prohibited by 10 U.S.C. § 2462(a) (1994) from using a "best value" approach to determine whether to contract for the drug-testing services or to perform the work in-house.[6] NWT maintains that in accordance with that statute, the agency is prohibited from selecting a commercial proposal primarily on the basis of non-cost factors.

Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R.

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[5]To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but also that its failure could have materially affected the outcome of the cost comparison. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30 at 2. This is consistent with our position that our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

[6]That statute states in pertinent part:

> In general.--Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order or regulation) than the cost at which the Department can provide the same supply or service.

§ 21.2(a)(1) (1998). Here, the RFP contained FAR § 52.207-2, "Notice of Cost Comparison," which clearly advised offerors that the solicitation was part of a cost comparison to determine whether accomplishing the work under contract or by the government is more economical; listed the technical evaluation factors and their relative numerical weights; and specifically announced that the agency would select the commercial proposal deemed "most advantageous" to the government. RFP § 52.212-2(a), and addendum at 50 ("award shall be made to that responsible offeror whose offer, conforming to the solicitation, is determined to be the best overall response . . . technical superiority will be the most important consideration"). NWT's protest that the RFP's evaluation and selection methodology were contrary to law--because the Army should have placed greater emphasis on cost--constitutes an allegation of a solicitation impropriety that was apparent before the closing date for receipt of initial proposals. Since the RFP clearly provided that in evaluating proposals, technical superiority would be the most important consideration, NWT's protest on this issue, filed on September 8, 1998, more than a year after the closing date of May 14, 1997, is untimely and will not be considered.[7] See DWS, Inc., B-229963, March 17, 1988, 88-1 CPD ¶ 283 at 4.

NWT also argues that the Army could not lawfully initiate a conversion from contract to in-house performance.[8] In this connection, NWT points to various procedures set out in OMB Circular No. A-76, and in several related Department of Defense (DOD) and Army regulations, to argue that the agency improperly failed to meet three threshold conditions that allegedly must be satisfied before an agency may consider a conversion to in-house performance of services that were previously obtained under contract.[9]

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[7]NWT argues that we should consider these allegations under the significant issue exception to the timeliness rules. 4 C.F.R. § 21.2(c). We do not think that this is an appropriate case to invoke the significant issue exception. In any event, as discussed further below, the procedures set out in the Supplement (and used in this procurement) are consistent with 10 U.S.C. § 2462(a), since the decision of whether to perform the services in-house or by contract is ultimately based strictly on cost.

[8]PharmChem raises a similar argument for the first time in its comments.

[9]In this connection, NWT maintains that before initiating a conversion to in-house performance, the agency must first determine that NWT's price (as the incumbent) has become unreasonable or its performance unsatisfactory; that the CO must be unable to negotiate reasonable prices or be unable to obtain acceptable performance from NWT; and that the agency must re-solicit the requirement from sources in the private sector. NWT Protest at 16-20.

As the incumbent providing drug-testing services to the National Guard since 1988, NWT either knew or should have known whether the agency failed to meet the alleged threshold conditions before initiating the cost comparison process. For instance, after the agency synopsized the procurement in the CBD, and following issuance of the RFP in March, 1997, the protester either knew or should have known whether the Army had attempted to negotiate better prices with NWT or found its performance unacceptable--conditions the protester alleges must be met before the agency may initiate the cost comparison process. In fact, NWT asserts that on four occasions--on August 9, 1996, February 20, 1997, October 1, 1997, and March 20, 1998--the Army extended NWT's contract at the rates proposed by NWT without objection or negotiation on price. NWT Protest at 10. NWT further maintains that it believed that the National Guard was "entirely satisfied with NWT's management and drug-testing performance during this period." Id.

It is clear, therefore, that by the time the agency issued the solicitation announcing the cost comparison, NWT either knew or should have known that the agency had not attempted to negotiate better prices with the firm, and that the agency was not dissatisfied with its performance--i.e., that the Army had failed to meet the alleged "conditions precedent" before initiating the cost comparison process. NWT's argument that the Army could not lawfully initiate the cost comparison process is thus an untimely challenge to the terms of the solicitation and will not be considered. 4 C.F.R. § 21.2(a)(1); PSC, Inc., B-236004, Oct. 26, 1989, 89-2 CPD ¶ 380 at 3-4.

In any event, even assuming that the matter were timely raised, it is not for our review. An agency's decision concerning whether an activity should be the subject of a cost comparison study at all--which is essentially the decision challenged by NWT here--is a matter of compliance with executive branch policy which we do not review. Northrop Worldwide Aircraft Servs., Inc., B-243318, Apr. 12, 1991, 91-1 CPD ¶ 371 at 1-2.

We next turn to the protester's arguments that the Army acted unreasonably in its evaluation of NWT's and PharmChem's proposals. Specifically, NWT challenges the evaluation of its proposal in several areas, including corporate experience/quality of work; corporate personnel; corporate structure; and corporate past performance. NWT also challenges the evaluation of PharmChem's proposal.

Our Office's review of an A-76 competition's first step, the competition among private offerors, is no different from our review of any other competition for a federal contract. We will not engage in an independent evaluation of proposals nor make an independent determination of their relative merits. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 9. Rather, we review the agency's evaluation only to ensure that it was reasonable and

consistent with the terms of the solicitation. Sensis Corp., B-265790.2, Jan. 17, 1996, 96-1 CPD ¶ 77 at 6. A protester's mere disagreement with the agency's conclusions does not render the evaluation unreasonable. ESCO, Inc., B-225565, April 29, 1987, 87-1 CPD ¶ 450 at 7. Based on our review of the record, including the TEP's narrative in support of its evaluation, we conclude that the numerical ratings assigned the proposals are reasonably supported. Below we discuss a representative sample of the TEP's findings in support of our conclusion.

NWT's proposal earned 5,300 points of the 5,500 available under the corporate experience/quality of work factor, losing 100 points in each of two subfactors--drug testing productivity and lysergic acid diethylamide (LSD) confirmation testing. Under the drug-testing productivity subfactor, the TEP was to evaluate the offerors' past experience and capability in volume drug testing over the past 2 years. RFP at 51. Under this subfactor, the TEP awarded NWT's proposal a total of 400 out of a maximum of 500 points.

The evaluators downgraded NWT's proposal as a result of several identified weaknesses. For instance, the TEP found that in August 1996, NWT experienced quality assurance problems, such as incorrectly reporting the results of 42 drug samples, under NWT's current Military Entrance Processing Station (MEPS) contract when the workload under that contract doubled. In addition, the TEP found that NWT did not add sufficient senior personnel to its staff to manage the increased work. The record shows that the agency issued discussion questions to NWT specifically identifying this weakness. In particular, the agency recognized that NWT had taken corrective action to resolve the computer software problem apparently causing the misreporting, but asked how NWT would respond to future increases in workload and remain productive. NWT's response did not overcome the evaluators' concern in this regard.

NWT argues that its proposal should not have been downgraded in this area because NWT did not incorrectly report any drug test results to a "field" activity. Rather, NWT maintains that the 42 samples were reported to and stored in an ancillary MEPS "look-up" database, and that the incorrect reporting was due to a software problem to which the government contributed. The evaluation record shows, however, that the TEP recognized that a software limitation was in part to blame for the incorrect reporting of the 42 samples, and that NWT had taken steps to correct that problem, but that other identified weaknesses in the proposal warranted the proposal being downgraded. For example, NWT had an incident in September 1996, where due to the lack of laboratory certifying officers (LCO), MEPS drug testing results were released prior to full review by the laboratory. The TEP felt that the doubling of sample workload and the laboratory not adding additional senior level personnel--specifically additional LCOs--to the MEPS contract in

the initial start-up period led to the September 1996 incident. In our view, the record reasonably supports the TEP's downgrading NWT's proposal under this subfactor.[10]

With respect to corporate personnel, offerors were required to identify key personnel proposed to perform the required services, their experience, task function, reporting requirements and relationship to upper management. RFP at 43. To assist in the evaluation under this factor, offerors were required to submit the resumes of several key personnel identified in the RFP, including a Director of Technical Operations. RFP at 43 and 51. For each proposed key employee, resumes were to be evaluated in the areas of education, technical and/or management experience, and professional development. RFP at 51. The RFP stated that each resume "shall contain at a minimum, statements and supporting documentation that provide evidence that personnel identified, to manage, and support the work under the solicitation possess the necessary skills, knowledge, and experience to carry out the terms of this solicitation." RFP at 43.

The TEP awarded NWT's proposal a total of 1,200 points (out of a maximum of 1,500) under this factor. The record shows that the evaluators recognized that NWT had proposed senior personnel with many years of experience in forensic urine drug testing. However, two evaluators on the panel noted that NWT's proposed Director of Technical Operations was not board certified and considered this a weakness, downgrading the proposal accordingly.

NWT argues that the TEP improperly deducted points under this factor because the solicitation did not require key personnel to possess any minimum levels of education, experience, or certifications. According to the protester, the TEP evaluated its proposed key personnel against unstated criteria.

As relevant here, the RFP's SOW stated that the position of Director of Technical Operations "will be Ph.D qualified in forensic toxicology or an equivalent degree," SOW at 1, and that "[s]uch qualification in forensic toxicology shall include one or more of the following qualifications." Id.

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[10]The TEP also deducted 100 points from the maximum score (1,000 points) under the LSD confirmation testing subfactor because NWT failed the drug testing demonstration required by the RFP. The record shows that PharmChem also failed this test. By amendment No. 0003, the agency deleted this requirement from the RFP, but neglected to restore the points which had initially been deducted. NWT has not established that it and PharmChem were treated differently in this regard; in any event, in light of the small number of points involved, this issue could not affect the relative rankings of proposals.

(emphasis added). The SOW listed several qualifications, including being certified by the American Board of Forensic Toxicology. Id. One evaluator who downgraded NWT's proposal under this factor explained the significance of the concern, stating that experience alone does not substitute for board certification because it is narrow in focus, unlike board certification which demonstrates proficiency in all areas of forensic toxicology.[11] In view of the specific requirement in the SOW, and given the evaluators' concern, we think that the rating assigned NWT's proposal is reasonably supported.

In another area where NWT's proposal was downgraded, the TEP awarded NWT's proposal 1,500 of 2,000 available points under the corporate past performance factor, downgrading the proposal under two subfactors--quality of service and timeliness of performance. Under the first subfactor, the TEP was to evaluate the extent to which offerors demonstrated quality of service on prior and/or recent projects similar in size or scope to those described in the SOW. Under the second subfactor, offerors were to be evaluated for timeliness of performance. RFP at 52-53. Offerors were required to provide references that demonstrated experience similar in nature and scope, and which could also confirm the offeror's adherence to delivery schedules, the accuracy and completeness of reports and documentation, and the offeror's problem-solving capability. RFP at 46-47.

The TEP deducted 400 points under the quality of service subfactor as a result of a documented continuing pattern of problems NWT experienced under its recent contract, in part due to the firm's inability to handle large drug testing workloads.[12] The protester maintains that this weakness did not warrant a

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[11]The evaluation record also shows that the TEP downgraded NWT's proposal slightly because other proposed personnel did not possess professional degrees beyond the Bachelor or Master's levels. While the TEP recognized that the RFP did not require advanced degrees, the evaluators felt that not having certain advanced professional degrees in the relevant fields was a weakness, and reasonably downgraded the proposal.

[12]The TEP noted that after the increase in workload under its current MEPS contract, NWT reported inaccurate results on two occasions; in one case 42 samples were incorrectly reported. NWT argues that the TEP improperly "double counted" this weakness because, as discussed above, it had already deducted points for this weakness under the first evaluation factor. An agency may properly penalize an offeror more than once for a single deficiency so long as the deficiency reasonably relates to more than one evaluation criterion. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255 at 7. In our view, the identified weakness is reasonably related to the corporate past performance, as well as the corporate experience/quality of work factors.

point deduction because the incorrect results were never reported to a "field" activity and NWT promptly corrected the errors.

While we think that the TEP's ratings here are reasonably supported, the record shows that the weaknesses the TEP identified in NWT's past performance did not affect the SSA's decision not to select NWT's proposal for the cost comparison. Although the TEP reasonably concluded that the problems identified were serious enough to warrant deducting points from NWT's proposal under the quality of service subfactor, the SSA discounted those weaknesses in her decision. Specifically, the SSA explicitly stated that while NWT had experienced some problems during the start-up of its current MEPS contract, the weakness associated with NWT's past performance under that contract "is not of itself the discriminator that resulted in their non-selection under this solicitation." Memorandum of Decision at 9. Rather than focusing her selection on this weakness, the record shows that the SSA concluded that the strengths associated with NWT's proposal did not justify its significant price premium over PharmChem's highly rated proposal. Id. Thus, even assuming that the point deduction in this area was improper, it had no effect on the SSA's ultimate decision. Based on our review of the record, we have no basis to object to the TEP's evaluation of NWT's proposal.

NWT also argues that PharmChem's technical proposal was evaluated improperly. In this regard, NWT maintains that PharmChem did not have at the time of the evaluation, and does not currently have, the capability to perform LSD confirmation testing. Thus, according to NWT, the agency should have deducted the entire 1,000 points available under the LSD confirmation subfactor (under the corporate experience and quality of work factor) from the rating assigned PharmChem's proposal. NWT also challenges the evaluation of PharmChem's proposal under the corporate past performance factor.

The protester's arguments are without merit. The TEP awarded PharmChem's proposal only 100 out of a maximum possible score of 1,000 points under the LSD confirmation testing subfactor. The TEP found that PharmChem does not have 2 years of experience using its LSD confirmation procedures, and had not confirmed LSD samples on prior DOD contracts. In addition, the TEP found that while PharmChem's LSD confirmation procedure has in-house certification, it has been used to confirm only positive samples. In our view, the TEP's rating of only 100 points under this subfactor reasonably credited PharmChem's proposal for having acceptable operating procedures for LSD confirmation testing and for having dedicated instrumentation for LSD confirmation testing, as well as for having in-house LSD confirmation testing. We have no basis to find that the very low (100-point) score assigned was unreasonably high and that PharmChem should have received zero points under this subfactor.

In the corporate past performance area, PharmChem's proposal received the maximum score of 2,000 points. NWT maintains that this score overstates the point score PharmChem should have received under this subfactor because of performance problems. For instance, NWT states that PharmChem, among other things, reported a false positive drug test that resulted in administrative action against a member of the military, and failed two successive proficiency challenge tests. As a result, NWT asserts, PharmChem was temporarily suspended from reporting out a required drug on an Army drug-testing contract. NWT also argues that PharmChem's proposal should have been downgraded for PharmChem's failure to meet the Armed Forces Institute of Pathology open proficiency certification standards.

The evaluation documents show that although some members of the TEP had limited knowledge of the incidents NWT refers to, the TEP concluded that it could not properly consider them in evaluating PharmChem's proposal because they occurred in June 1992, beyond the 3-year window for evaluating offerors' past performance. The TEP recognized that PharmChem did, in fact, fail 2 consecutive months for PCP certification, in April and May, 1995, but concluded that PharmChem's failure on the PCP samples was not significantly relevant to successfully performing the contemplated contract.

In addition, the TEP evaluated past performance evaluations from five respondents who evaluated PharmChem's performance on recent contracts. According to the evaluations, in virtually all cases, the references provided excellent ratings for PharmChem in areas identified as quality of service and timeliness of performance. Based on the firm's recent performance as reflected in the results of the past performance surveys, the TEP reasonably awarded PharmChem's proposal the maximum number of points under this subfactor. Based on our review of the record, we have no basis to object to the evaluation of proposals or to the selection of PharmChem's proposal for the cost comparison.

Cost Comparison and Evaluation of Tripler's Submission

NWT alleges that the Army improperly conducted the cost comparison between the government's in-house proposal and that of PharmChem, that is, what is described above as the third step in the A-76 selection process. In addition, NWT argues that the Army failed to properly apply the "best value" evaluation criteria announced in the RFP to Tripler's submission.

Since we have found that the Army's evaluation of proposals here was unobjectionable, and, thus, that the selection of PharmChem's proposal over NWT's was reasonable, we deny NWT's protest on that ground. As a result, NWT is not an interested party to protest the conduct of the cost comparison as it would not be eligible for award even if the protest were sustained. See

4 C.F.R. § 21.0(a); ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 14. For the same reason, NWT is not an interested party to challenge the evaluation of Tripler's submission.

PharmChem's Protest

PharmChem argues that the Army improperly failed to follow the requirements contained in OMB Circular No. A-76 and the Supplement for comparison of a "best value" commercial offer with the in-house offer. In this connection, PharmChem primarily argues that the agency erred by not ensuring that Tripler's proposal offered the same level of performance or performance quality as PharmChem's proposal. PharmChem maintains that, instead of following the RFP's evaluation criteria weighting scheme in evaluating Tripler's proposal, the Army treated the comparison between PharmChem's and Tripler's proposals as a sealed bid procurement where award would be based on the lowest cost, technically acceptable offer. PharmChem also challenges the cost comparison itself, the third step in the selection process, on several grounds.

Here, our review indicates that the Army properly conducted both the second step (the process of "leveling the playing field" between the winning private-sector offer and the government's in-house offer) and the third step (the cost comparison) pursuant to OMB Circular No. A-76 and the Supplement.

With regard to the challenge to the conduct of the second step, the record contains virtually no contemporaneous documentation indicating that the performance levels of PharmChem's and Tripler's offers were compared.

In response to the protest, the CO states that, although Tripler's submission did not undergo a point-scoring evaluation and the OMB Circular No. A-76 Generic Cost Comparison Form (CCF) that records the cost comparison does not provide for a narrative discussion explaining anything other than cost entries, she concluded that the Tripler level of performance met or exceeded both the SOW requirements[13] and the performance level proposed by

[13]As a preliminary matter, and as PharmChem recognizes, we note that there is no legal requirement that the in-house proposal be formally evaluated using the same point-score method or evaluation criteria weighting scheme as is applied to the private-sector proposals

PharmChem.[14] CO's Statement of Facts at 9. For example, the CO states that she found Tripler's DOD-focused drug testing experience to be exceptional and "highly related" to the requirements in the SOW. She points out that Tripler's laboratory has had drug testing experience since 1984, when it became a forensic toxicology drug-testing laboratory. Id. at 5. According to the CO, PharmChem, on the other hand, has only performed some DOD drug testing from 1991 to 1996, and has not in the past 2 years performed any DOD drug-testing contracts relevant to this effort. Id. at 9. In addition, the CO states that Tripler has been performing LSD testing since 1996 under DOD standards--its sole function has been to test for drugs of abuse under DOD standards. Id. at 5. The CO adds that the Tripler laboratory has been continually monitored by the Armed Forces Institute of Pathology and the U.S. Army Alcohol and Drug Organization Agency. Id. Based on her assessment, the CO concluded that Tripler's level of performance exceeded that which was required in the SOWand at a minimum was comparable to the level of performance and standards contained in PharmChem's proposal.

PharmChem relies on our decision in Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, to argue that the CO's post-protest written determination of comparable performance quality is arbitrary and unreasonable and should not be accorded any weight. The Boeing case involved a post hoc reevaluation and cost/technical tradeoff late in the protest process where no tradeoff had been made during the initial source selection. Further, the agency continued to assert there was no error, but in order to immunize itself against losing the protest, submitted a reevaluation that it argued was not necessary. We concluded that it was not appropriate to give weight to the agency's after-the-fact decisional materials prepared for the purpose of ensuring that our Office would conclude there was no prejudice to the protester.

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[14]In response to the protest, the Chairperson of the TEP also provided a statement in response to this issue in which he states "the TEP believes that the TRIPLER technical submission . . .[is] at least of the same comparable level of performance and quality standards as the [PharmChem] proposal. In the 11 May 1998 TEP memorandum to the [CO], the TEP expressly noted that the Tripler technical submission exceeded many of the technical requirements necessary to perform this drug testing effort." TEP's Sept. 30, 1998, Response to Consolidated Protests, at 9. The record also contains a copy of an electronic message from an evaluator dated July 22, 1998, before PharmChem filed its protest, stating that the TEP found Tripler's proposal "offered comparable performance to the proposal from PharmChem Laboratories, Inc." Electronic Mail Message from [DELETED] July 22, 1998.

While we are generally skeptical of reevaluations prepared in the heat of the adversarial process, id. at 15, we conclude that the protester's reliance on the Boeing decision here is misplaced. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, as is the case here, simply fill in previously unrecorded details, and will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. See Northwest Management, Inc., B-277503, Oct. 20, 1997, 97-2 CPD ¶ 108 at 4 n.4. Based on the entire record in this case, including the transcript of a hearing our Office conducted in connection with this protest, we conclude that while not recorded at the time, the agency did compare the performance levels offered by Tripler and PharmChem prior to the selection decision. Accordingly, we view the post-protest documentation as merely a memorialization of contemporaneous analysis and judgment.

Specifically, at the hearing conducted by our Office, the TEP acting chairperson testified that, prior to the selection decision, the TEP compared Tripler's and PharmChem's proposals and concluded that the proposals were comparable. Video Transcript (VT) at 14:26:21, 14:40:29, 14:51:02, 15:27:17. The TEP acting chairperson testified that, in fact, Tripler's proposal was found to be superior to PharmChem in several areas such as capacity, VT at 14:39:59, and experienced personnel. VT at 14:42:13. The CO also testified that (again, prior to the selection decision) she reviewed all of the technical proposals submitted by the commercial firms and the TEP's evaluation worksheets to make sure that the strengths and weaknesses the TEP had identified were actually in the proposals. VT at 15:40:48-15:41:22. The CO testified that she conducted her own independent review of proposals, the results of the TEP's evaluation of Tripler's proposal, and Tripler's proposal itself. VT at 15:50:28, 15:51:15, 15:55:41. Based on her independent review, the CO testified that she also concluded that Tripler's proposal was superior to PharmChem's. VT at 15:50:41, 16:23:28. For example, the CO found that Tripler's proposal was superior to PharmChem with respect to personnel, DOD certification, and experience with LSD testing. VT at 15:59:17, 15:59:41. She also found that Tripler had experience operating under DOD standards and had passed the sample proficiency test. VT at 15:59:59, 16:00:18. The CO testified that after selecting PharmChem's as the "best value" proposal, she again reviewed Tripler's proposal to make sure that the comparison was "apples to apples and not apples to oranges and that they were the same grade of apples." VT at 16:02:09.

In our view, the CO's post-protest explanation of her conclusion that Tripler's proposal is comparable to PharmChem's is sufficient to show that her decision was reasonable. See Quality Elevator Co., Inc., B-276750, July 23, 1997, 97-2 CPD ¶ 28 at 3-4. Further, unlike in Boeing, the CO's statement in response to the protest and her testimony at the hearing are not new analyses

based on hypothetical assumptions or a reevaluation of Tripler's MP/MEO to attempt to justify a post-protest decision in the face of a protest. Rather, the CO's statement, as confirmed by her testimony, reflects her understanding before the selection decision of the relevant facts concerning Tripler and PharmChem which formed the basis of her contemporaneous conclusion that Tripler's proposal offered at least the same level of performance quality as PharmChem's proposal. In view of the guidance provided in the Supplement for conducting a cost comparison, and based on our review of the record, including the TEP's contemporaneous review of Tripler's MP/MEO, we see no basis to question the CO's determination that at least the same level of performance and quality as offered by PharmChem will be achieved in-house.[15]

PharmChem next argues that Tripler's cost estimate does not include the total cost to the government of in-house performance.[16] In this connection, PharmChem argues that Tripler's cost estimate was based on the incremental cost of performing the additional ANG/CG work, and did not reflect Tripler's total cost of performance. PharmChem points to more than $5 million which Tripler labeled in Tab G of its management plan as "common costs."[17] According to PharmChem, since Tripler has stated that the ANG/CG work will account for 26.4 percent of its workload, adding 26.4 percent of the total "common costs" (adjusted for inflation) to Tripler's estimate results in a total cost estimate of $11,917,074, which is more than PharmChem's total evaluated price.

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[15]In its comments, PharmChem argues that in several areas "more closely related to the RFP's evaluation factors," Tripler's proposal does not offer the same level of performance as PharmChem. Comments at 11. For instance, PharmChem points to several aspects of its proposal related to timeliness of performance, laboratory information system, and the firm's size and capacity. While these may be strengths in PharmChem's proposal, they do not demonstrate that the agency's determination that the same level of performance and quality could be achieved in-house was unreasonable.

[16]To the extent that PharmChem argues that Tripler improperly prorated the costs of performance of the additional ANG/CG work, we note that the Supplement does not preclude the prorating of such costs, where such an approach reflects the amount actually attributable to the work in question. See, e.g., EPD Enters., Inc., B-236303, Oct. 30, 1989, 89-2 CPD ¶ 393 at 3-4.

[17]In its management plan, Tripler listed what it described as "common costs" totaling $5,224,775. Tripler Management Plan, Oct. 28, 1997, Tab G. According to the management plan, these are projected costs that will be the same whether the forensic drug testing is transferred to Tripler or remains with a commercial laboratory. Id. at 11.

The agency responds that Tab G of Tripler's management plan was mislabeled as "common costs." The agency explains that the costs listed in Tab G reflect Tripler's annual budget and expenses for its entire operations and that these costs will not change even if the work required by the RFP is not transferred to Tripler. The agency further explains that Tripler identified its annual laboratory budget and expenses in Tab G to reflect what Tripler's annual fixed expenses were projected to be without the additional drug-testing workload. The agency further asserts that these costs were either directly or proportionately already included in Tripler's cost estimate in the applicable cost comparison form lines, or were already part of the OMB Circular 12 percent overhead calculations. PharmChem has provided no basis for us to question the agency's explanation in this regard.

The record shows that in response to a request by the administrative board that reviewed PharmChem's appeal of the cost comparison, the Army Audit Agency (AAA) reviewed Tripler's in-house cost estimates, with a view towards determining whether the estimates were accurately calculated using an acceptable method consistent with the Supplement. Cost Validation of A-76 Study, August 13, 1998 at 2. The AAA's review revealed that Tripler had prepared and submitted three in-house cost estimates.

The record shows that the AAA reviewed all three of Tripler's estimates and supporting documentation, including the cost methodologies used in each of the three estimates. The AAA analyzed and compared the methodology used for each cost estimate to the cost accounting principles in the Supplement. Based on an extensive review, the AAA concluded that the methodology Tripler used in its third estimate (dated July 14, 1998) was the most acceptable method for estimating the costs if the work was to be performed in-house by Tripler. Id. at 2. Specifically, the AAA found that the methodology used in that estimate was more rational in that it included additional costs attributable to performing the work in-house and provided a more equitable basis for comparison. However, the AAA found that some in-house costs needed to be adjusted to more accurately estimate in-house costs in accordance with standard cost estimating procedures in the Supplement.[18]

The result of the AAA's revisions was to reduce Tripler's third cost estimate from $6,475,692 to $6,362,922, which is $136,527 lower than PharmChem's

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[18]For example, the AAA decreased "other specifically attributable costs" by a total of $168,433 (including the deduction for material and supply costs), because facility capital improvements should have been depreciated over the useful life of the facility, but were expensed in the period incurred in the cost estimate. In addition, the AAA's adjustments were based on more reliable and accurate financial data concerning base operations support that was not previously available.

evaluated price of $6,499,449 after making the appropriate OMB Circular No. A-76 adjustments. The record thus shows that an independent reviewing body performed an in-depth review of Tripler's cost estimate and concluded that with some minor adjustments it accurately reflected the costs of in-house performance. We see no basis to question this conclusion.

PharmChem maintains, however, that Tripler's estimate is understated in several other areas. Specifically, PharmChem asserts that Tripler's cost estimate omits the costs for two additional full-time equivalent (FTE) employees required to perform LSD testing. According to the protester, including these two FTEs for LSD screening would result in a total Tripler cost estimate exceeding PharmChem's price. In this regard, we have held that a determination by an agency of the number of employees needed to accomplish a performance work statement is largely a management decision involving judgmental matters that are inappropriate for our review. Raytheon Support Servs. Co., B-228352, Jan. 19, 1988, 88-1 CPD ¶ 44 at 3. We believe the agency should be free to make its own management decisions on staffing levels, so long as they are not made fraudulently or in bad faith, and so long as the subsequent cost comparison is done in accordance with established procedures. Id. Here, the record shows that Tripler fully costed the 9.2 FTEs, the number it determined would be needed to perform the ANG/CG drug testing, and PharmChem has not shown that Tripler's proposed staffing was made fraudulently or in bad faith.[19]

In any event, in responding to PharmChem's administrative appeal, the Board found that as a result of new technology for LSD testing, Tripler's laboratory has become more efficient. For instance, as relevant to PharmChem's allegation, the agency explains and the Board found that one technician can operate two radioimmunoassay (RIA) batches to screen for LSD in 4 hours with half of the time being free while waiting for incubation and instrument analysis. Appeals Board Decision, Aug. 27, 1998, at 3. According to the agency, this equates to a maximum of 1,022 hours annually or .6 FTE (511

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[19]PharmChem also argues that the Army improperly failed to consider that Tripler's proposal is based on an assumption that a significant portion of Tripler's current workload in support of Fort Bragg (approximately 18 percent) will be transferred to Fort Meade. This argument is without merit. The short answer is that the Fort Bragg drug-testing workload is not a requirement of the RFP and, therefore, should not be included in the cost comparison. As such, the Board found that the location of the Fort Bragg drug testing is irrelevant. Accordingly, the 9.2 FTEs included in Tripler's proposal represent the direct labor costs for the ANG/CG work, regardless of where the Fort Bragg work is performed. In any event, the Board could find no indication that Tripler's proposal to transfer the Fort Bragg work to Fort Meade would have any impact on its estimate.

batches divided by 2 batches every 4 hours).[20] Tripler Response to Protests, Sept. 23, 1998, at 11. In addition, the agency explains that the technician doing RIA analysis could also simultaneously run the instruments for performing tests for other drugs. Id. According to the agency, this same technician can run three batches on three instruments in 1.5 hours, for all the other drugs. While PharmChem disagrees with Tripler's and the Board's conclusions in this regard, PharmChem has not shown that the agency acted contrary to cost comparison guidelines or in bad faith in its determination, and PharmChem's mere disagreement with the study results is not sufficient to establish that the cost comparison was flawed. See Trend W. Technical Corp., B-221352, May 6, 1986, 86-1 CPD ¶ 437 at 3-6.

The protests are denied.

Comptroller General
of the United States

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[20]According to Tripler, the projected NG/USCG workload equates to approximately 511 batches for the year. A technician running 2 batches for LSD in 4 hours will have half of the time--or 2 hours--free while waiting for incubation and instrument analysis. Tripler states that this equates to a maximum of 1,022 hours annually or 0.6 FTE. Tripler Response to Protests, Sept. 23, 1998, at 11.