Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Metro Machine Corporation

File: B-281872; B-281872.2; B-281872.3; B-281872.4

Date: April 22, 1999

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DIGEST

Where source selection authority considered protester's proposed approach to perform production shop work at a remote location to be unacceptable, and believed that the solicitation requirements established that only a proposal to perform production shop work on-site would be acceptable, agency misled protester during discussions by effectively communicating that modifications or enhancements to the protester's proposal to perform production shop work at the remote location would be sufficient to make proposal of that location acceptable.

DECISION

Metro Machine Corporation protests the Department of the Navy's award of a contract to Atlantic Dry Dock Corporation (ADD) under request for proposals (RFP) No. N62678-98-R-0025 for drydocking operations and ship repair work for four classes of Navy ships homeported at the Mayport Naval Station in the Jacksonville, Florida area. Metro raises a number of protest issues, most significantly that the agency failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

On March 4, 1998, the Navy issued the RFP at issue for drydocking facilities and repair services for four classes of Navy ships over a 5-year period. The solicitation provided that offerors could propose to use, as government-furnished property, a Navy floating drydock with the designation "AFDM-7" and the name *Sustain* which is currently in the Navy's inactive fleet, or alternatively, a contractor-furnished drydock. The RFP contained multiple contract line item numbers (CLIN), each of which specified certain contract requirements. CLIN 0001 called for preparing the site, towing, setting up the dry dock, and obtaining certification. CLIN 0002 (and corresponding option year CLINs) called for operation and normal maintenance of the proposed dry dock. CLIN 0003 (and corresponding option year CLINs), which was applicable only to offerors proposing to use the *Sustain*, called for repairs to the *Sustain* which exceeded the normal maintenance contemplated under CLIN 0002. CLINs 0004 through 0007 (and corresponding option year CLINs) called for specific work to be performed on each of the four different classes of Navy ships to be serviced at the dry dock.[1] RFP attachment J-5 listed 22 ships which the Navy contemplated would be drydocked and repaired under this procurement, stating:

> Twenty-two (22) ships make up this requirement. Currently, there are twelve (12) CNO drydocking availabilities scheduled for FY-99 [fiscal year 1999] thru FY-03 [fiscal year 2003]. All of these vessels are subject to unscheduled, emergent drydockings.

Section M of the RFP provided that proposals would be evaluated on the basis of six non-price evaluation factors which, taken together, were significantly more important than price. RFP § M.1.B. The RFP provided that two of the non-price evaluation factors--facility site requirements and contractor-furnished drydock requirement--would be evaluated on a pass/fail basis.[2] Id. §§ M.2.1, M.2.2. The four

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[1]CLIN 0004 contemplated work on FFG-class vessels; CLIN 0005 contemplated work on DDG-class vessels; CLIN 0006 contemplated work on CG-class vessels; and CLIN 0007 contemplated work on DD-class vessels. For each of these CLINs, the RFP contained an extensive list of possible work to be performed. Offerors were required to submit fixed prices for each listed item, and the RFP contemplated issuance of delivery orders specifying the particular work to be performed for each drydocked vessel.

[2]With regard to the facility site requirements evaluation factor, section M.2.1 stated: "[t]he site proposed for the dry dock must meet all distance, commute time, water depth, and access requirements stated in Section C of the solicitation." With regard to contractor-furnished dry dock requirements evaluation factor, section M.2.2 stated: "the proposed dry dock must have the capacity and size requirements to dry dock the ships as stated in Section C of the solicitation."

remaining non-price evaluation factors, listed in descending order of importance, were: technical;[3] earliest date able to commence drydock operations; environmental impact; and past performance. RFP § M.1.C.

Regarding evaluation under the most important "technical" factor, RFP section M.2.3 stated:

> Technical (Organization and Management, Manpower, and Facilities) will be evaluated to determine the offeror's overall risk in being able to perform the requirements of this contract relative to operating and maintaining the dry dock and performing the required dry dock repairs to applicable ships.

Regarding evaluation of price proposals, RFP section M.3 provided that proposals would be evaluated by adding the total prices proposed for all CLINs, except CLIN 0003 (and corresponding option year CLINs),[4] and that price proposals "will be reviewed for . . . cost to the Government to accomplish the requirements of the solicitation."

Metro and ADD submitted proposals by the May 15, 1998 closing date. ADD proposed to use the government-furnished dry dock, *Sustain*, at ADD's facility in Jacksonville. Metro proposed to use its own dry dock, the *Old Dominion*, at a site to be leased from the Jacksonville Port Authority (JPA). Metro also proposed to perform required production shop work[5] at its facility in Norfolk, VA.[6]

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[3]The technical evaluation factor contained three subfactors: organization and management, manpower, and facilities. RFP § L.2.7, at 206-07.

[4]Section M provided that, for evaluation purposes, $650,000 would be added as an evaluation factor for CLIN 0003 and each corresponding option year CLIN for proposals offering to use the *Sustain*. RFP § M.3.

[5]Production shop work generally includes machine shop work, pipe shop work, electrical shop work, steel and aluminum fabrication, and sheet metal work.

[6]The Navy was aware that Metro had previously used its Norfolk production shop to successfully perform drydocking and repair of Navy ships at remote locations. In evaluating Metro's past performance, the agency stated: [deleted].

In evaluating Metro's proposal, the technical proposal evaluation team (TPET) expressed concern regarding Metro's proposed performance of production shop work in Norfolk, stating:

> [deleted]

TPET Summary Report, July 15, 1998 at 9.

On July 17, written discussion questions were sent to both offerors. Only one of the 14 agency questions addressing Metro's technical proposal referenced Metro's proposed use of its Norfolk production shop facilities. That question stated:

> It is noted that you expect to heavily utilize Norfolk facilities and resources. What actions do you propose to mitigate the problems associated with the physical distance between Jacksonville and Norfolk?

Letter from the Contracting Officer to Metro Machine Corp. enclosure 1, at 3 (July 17, 1998).

Final revised proposals were submitted by Metro and ADD on September 1. In response to the agency question quoted above, Metro specified the proposed actions that it believed would mitigate the potential problems posed by its proposal to perform production shop work in Norfolk, stating:

> [deleted]

Metro Final Revised Proposal, Responses to Q&A, at 20-21.

The agency's contemporaneous evaluation documentation shows that the agency found Metro's final revised proposal to be unacceptable. Specifically, the source selection document states:

> [deleted]

Business Clearance Memorandum, Dec. 21, 1998, at 9-10.

In part because the agency's documentation regarding its determination that Metro's proposal was unacceptable incorporated several different factors, GAO conducted a hearing to clarify the specific basis for the agency's determination that Metro's

proposal was unacceptable.[7] At that hearing, the source selection authority (SSA) testified as follows:

> Q. [D]id the Navy know, at the time the discussion questions were sent, did the Navy believe at that time that [Metro's] proposing production facilities in Norfolk failed to meet the RFP requirements?
>
> A. Yes.
>
> . . . . .
>
> Q. It's my recollection that you testified earlier that you believed . . . Metro's proposal with regard to the production shop facilities in Norfolk made it -- from that you concluded that the proposal failed to meet certain RFP criteria, am I correct?
>
> A. Yes.
>
> Q. In your mind, as of the final evaluation, in your mind, did the proposal fail to meet the RFP requirements?
>
> A. Yes.

Hearing Transcript (Tr.) at 167, 384-85.

The SSA also testified:

> Q. Can you think of an example of something they [Metro] could have done which would have continued to have them propose to do the production work in Norfolk and would have made their proposal acceptable?
>
> A. No. The answer is no to that . . . .

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[7]As discussed below, in arguing that the protest should be denied for lack of prejudice, the agency maintains that each of the factors on which the agency relied in finding Metro's proposal unacceptable constituted an independent basis for rejecting Metro's proposal.

> Q. No. In other words, it was the Navy's view that proposing to do the production work in Norfolk made the proposal unacceptable?
>
> A. Yes.

Tr. at 168-69.

Notwithstanding the SSA's testimony, the TPET chair--who was responsible for preparing the technical discussion questions--testified as follows:

> Q. Did you view [Metro's] proposal of a production shop in Norfolk as failing to meet the RFP criteria? Or failing to meet the RFP requirements, I'm sorry.
>
> A. I'll have to say no.

Tr. at 253.

ADD's final evaluated price was $238,494,739--[deleted] Metro's evaluated price of [deleted]. Nonetheless, the agency selected ADD's proposal for award, noting, as discussed above, that Metro's proposal was unacceptable. Apparently because of the agency's determination that Metro's proposal was unacceptable, there was no trade-off between the relative technical merits of ADD's and Metro's proposals and the costs to the government.

The contract was awarded to ADD on December 29. This protest followed.

DISCUSSION

Metro contends that the agency conducted materially misleading discussions regarding Metro's proposal to perform production shop work in Norfolk. We agree.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. SRS Techs., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6; Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 at 4. Specifically, 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; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Management Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4. More specifically, when an agency asks a general question indicating concern regarding a perceived weakness in an offeror's proposal, then subsequently rejects the proposal as technically unacceptable on the basis of this concern, a question which could not reasonably be

construed as putting the offeror on notice of the agency's actual concern regarding the acceptability of its proposal does not constitute adequate discussions. Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD 300 at 5-6.

Here, as noted above, it was the SSA's perception that Metro's proposal to perform production shop work in Norfolk was inconsistent with a material solicitation requirement, thereby rendering the proposal unacceptable.[8] In explaining the basis for her conclusion regarding the solicitation requirements, the SSA referred to the provisions under CLIN 0001 in RFP § C, which state:

> The contractor will prepare and provide an operating basin and mooring site acceptable to the Government and will provide necessary supporting facilities to accommodate the AFDM-7 or a contractor-furnished dry dock. The proposed mooring location for the dry dock must be within a 75-mile radius and a 90-minute commute of the Mayport Naval Station.
>
> . . . . .
>
> The proposed facility will have pier facilities, utilities, production facilities, and support facilities to accommodate the dry dock and the ships to be docked as required to accomplish the repairs to be furnished under the contract.

RFP § C, at 144, 146; Tr. at 162-64.

In fact, there is nothing in the above RFP provisions that necessarily precludes an offeror's use of a Norfolk production shop. Clearly, the 75-mile radius and 90-minute commute requirements apply to the "mooring location for the dry dock." The subsequent requirements for "pier facilities, utilities, production facilities, and support facilities" are not limited by geographic location, but rather may reasonably be interpreted as imposing limitations on location only to the extent that such facilities must be provided, "as required to accomplish the repairs."

The agency's assertion that the RFP provisions "clearly" required that production facilities, as well as pier facilities, support facilities, and utilities, were to be located at or relatively near the proposed site," see Agency Post Hearing Brief at 47, is

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[8]The agency categorically states: "[t]he Navy's requirement for on-site production facilities was a material requirement." Agency Post Hearing Brief at 51. Accordingly, if the agency properly believed that Metro's proposal failed to comply with a material solicitation requirement, the proposal should have been considered technically unacceptable. International Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 146 at 2.

inconsistent with the TPET Chair's own testimony that he did not view the RFP requirements as precluding Metro's proposed use of its Norfolk production shop. Tr. at 253. In addition, the agency's assertion that the 75-mile radius and 90-minute commute requirements apply to all support facilities appears inconsistent with the provisions of RFP § L.2-7 which states:

> If the company has offices or plants in other areas outside the geographical cognizance of SupShip Jacksonville, the organizational chart must clearly show those involved in this effort.

RFP § L.2-7, at 206.

In any event, even if the agency had reasonably viewed the RFP as mandating the provision of production facilities within the geographic limitation applicable to the mooring location, it would have been misleading for the agency to suggest during discussions that Metro could propose actions to "mitigate the problems associated with the physical distance between Jacksonville and Norfolk." Rather, if the SSA's stated views regarding the RFP requirement for production facilities to be located near Jacksonville were correct, that fact should have been communicated to Metro.[9]

Although the SSA testified that it was her belief, at the time the discussion questions were sent to Metro, that Metro's proposal failed to comply with the solicitation requirements, see Tr. at 167, this issue was apparently never discussed with the TPET chair, who was responsible for preparing the technical discussion questions.[10] The SSA also acknowledged that, during subsequent face-to-face discussions with Metro, the agency did not indicate that Metro's proposed use of its Norfolk production shop facilities rendered its proposal unacceptable. Tr. at 160-66. Nonetheless, as noted above, the SSA did not believe there was any acceptable response that Metro could have provided other than to propose to perform the production shop work in the Jacksonville area. Tr. at 168-169. In short, the agency's discussions effectively communicated to Metro that its proposal to perform production shop work in Norfolk was acceptable, though in need of enhancements

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[9][deleted].

[10]The TPET chair testified:

> Q. Did you ever discuss this issue in terms of the RFP requirements in the context of Metro's proposal of the production shop facility in Norfolk with [the SSA]?
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> A. I can't remember. I don't think so.

Tr. at 253.

or modifications to mitigate problems associated with distance, when, in fact, only a proposal to perform the production shop work in the Jacksonville area would have been considered acceptable.

Under these circumstances, in order for the discussions to be meaningful, the agency was required to convey to Metro that its proposed approach to performing production shop work would have to be fundamentally altered--not merely explained or enhanced. Accordingly, on the record here, the agency failed to conduct meaningful discussions with Metro.

The agency argues that, even if its discussions with Metro were inadequate, the protest should be denied for lack of prejudice because there were other factors affecting the agency's determination. The agency contends that any defect in its discussions could not have prejudiced Metro because Metro's proposal would not have been selected in any event.

Competitive prejudice is an essential element of a viable protest; GAO will not sustain a protest where no prejudice is evident. Microeconomic Applications, Inc., B-258633.2, Feb. 14, 1995, 95-1 CPD ¶ 82 at 10. Nonetheless, to establish prejudice, a protester is not required to show that, but for the alleged error, the protester would have been awarded the contract. Management HealthCare Prods. & Servs., B-251503.2, Dec. 15, 1993, 93-2 CPD ¶ 320 at 4; Manekin Corp., B-249040, Oct. 19, 1992, 92-2 CPD ¶ 250 at 5. Rather, it is enough that the record contain evidence reflecting a reasonable possibility that, but for the agency's actions, the protester 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 (Fed. Cir. 1996).

Here, we find that, but for the agency's failure to conduct meaningful discussions, there was a substantial chance that Metro would have been selected for award. Our conclusion in this regard is significantly affected by the [deleted] difference in the evaluated prices of the two proposals. As noted above, applying the price evaluation methodology which the agency established in the solicitation, ADD's price of $238,494,739 was [deleted] more than Metro's price of [deleted].[11]

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[11]The agency suggests that the difference in evaluated prices is not a valid measurement of the actual costs of contract performance, noting that the prices reflect a summation of all possible tasks that could be performed on each of the four classes of ships to be serviced. While it is true that not all tasks priced and evaluated will be ordered for any given availability, it is also true that each CLIN reflects the pricing for only a single ship, while the agency asserts that as many as eight ships may be drydocked and serviced in any given year.

The agency first argues that, although Metro's proposed prices for the actual ship repair work (CLINs 0004 through 0007) were considerably lower than ADD's corresponding prices, Metro's proposal would not have been selected for award in any event because Metro's price proposal was unbalanced. The agency's assertions regarding unbalancing are based on the fact that Metro's prices for CLINs 0001 and 0002 were considerably higher than ADD's CLIN 0001 and 0002 prices.[12] The agency asserts that there was some risk that ship repair work under CLINs 0004 through 0007 would not "materialize," Agency Report at 26, and expresses concern about paying Metro's higher CLIN 0001 and CLIN 0002 prices "regardless of whether any ship repair work was ordered under the [CLINs 0004 through 0007] IDIQ line items." Agency Post Hearing Brief at 84.

A critical element to determining whether unbalancing exists between line items is the accuracy of the government projections regarding the quantities of work to be obtained under each line item.[13] Sanford Cooling, B-242423, Apr. 15, 1991, 91-1 CPD ¶ 376 at 4. Estimates must be based on the most current information available and be reasonably accurate representations of the government's anticipated actual needs. Duramed Homecare, B-245766, Jan. 30, 1992, 92-1 CPD ¶ 126 at 6. Where the agency concludes that the estimates in the solicitation do not have a reasonable probability of being accurate, the solicitation should be cancelled. Food Servs., Inc., B-243173, B-243173.2, July 10, 1991, 91-2 CPD ¶ 39 at 5.[14] If the solicitation estimates are accurate, there can be no material unbalancing. Landscape Builders Contractors, B-225808.3, May, 21, 1987, 87-1 CPD ¶ 533 at 2.

As noted above, RFP attachment J-5 listed twenty-two ships that, at the time the solicitation was issued, the agency intended to drydock and service under this procurement. In asserting that it was concerned that the originally projected drydock and repair work might not "materialize," the agency has not suggested that it plans to drydock and repair any of the twenty-two vessels elsewhere,[15] nor has it

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[12]The agency acknowledges that it did not develop a government cost estimate for CLINs 0001 and 0002 (and corresponding option year CLINs) "[b]ecause the scope of work for CLINs 0001 and 0002 could vary among offerors." Agency Report at 24.

[13]Although unbalancing in connection with quantity estimates usually arises in the context of requirements contracts, we believe that it could arise in the context of a single-award, task-order contract such as this one.

[14]Our Office has previously cautioned the Navy that, in issuing solicitations, the agency has an affirmative duty to use the best quantity estimates available. Sanford Cooling, B-242423, Apr. 15, 1991, 91-1 CPD ¶ 376 at 8.

[15]In responding to Metro's protest, the agency explained the rationale underlying (continued...)

identified any other specific factor which suggests that its initial projections were inaccurate.[16] Because of the lack of any reasoned analysis which raises a serious question whether the number of ships estimated at the time the solicitation was issued will be substantially diminished, there is no reasonable basis for the agency's concern that Metro's proposal is materially unbalanced.

Finally, the agency argues that, notwithstanding the inadequate discussions, Metro's protest should be denied for lack of prejudice on the basis that Metro's site lease with JPA does not comply with the solicitation requirements. In this regard, the agency relies on RFP section H-9 which provides: "The contract maximum amount shall be defined as 200% of the total amount of CLINs 0003 through 0007 for the base year." Because each of the four ship repair CLINs contain requirements for a single ship, the agency concluded that offerors must be able to drydock a maximum of eight ships per year.

In its initial proposal, Metro provided a copy of its lease with JPA, which the Navy viewed as limiting Metro to five ship dockings per year. During discussions the agency advised Metro of its concern. In response, Metro provided the agency with a letter from JPA stating: "Use of the layberth for dockings in excess of 5 drydockings per year allowed as part of the lease agreement is available to Metro." Letter from JPA to the President, Metro Machine Corp. (July 22, 1998). Metro's final revised proposal further explained that it was not limited to five dockings per year, but that, "[f]or emergency drydockings and whenever the number of scheduled

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[15](...continued)
this procurement, as follows:

> The establishment of a dry dock capability in the Jacksonville homeport area has been a matter of deep importance to the Navy. Presently, Navy vessels homeported in the Jacksonville area must be sent outside the homeport for dry dock-related repair work. Requiring the dry dockings to take place outside of the Jacksonville area adversely impacts the quality of life for the ships' crews and their families. There is significant concern within the Navy that the reduced quality of life produced by extended maintenance periods out of the homeport area will adversely affect crew morale, retention, and readiness.

Agency Report at 7-8.

[16]Rather, the Navy asserts, generally, that its "uncertainty" regarding the amount of ship repair work that will actually be required under this contract is based on "downsizing within the DoD and the Navy, ships being decommissioned, or dry dock maintenance cycles being lengthened." Agency Report at 26.

drydockings exceeds five, Metro will be required to pay to JPA its published tariff . . . . The Navy will see no additional charges for any such eventualities covered by this contract." Metro Final Revised Proposal, Responses to Q&A, at 17-18.

Following submission of Metro's final revised proposal, the agency's best value advisory committee (BVAC) acknowledged that the lease did not limit Metro to five drydockings per year, stating: "As a result of discussions, [JPA] issued a letter allowing Metro, as well as others, use of the layberth area in excess of five drydockings per year." Memorandum from the BVAC to the Contracting Officer at 5 (Dec. 14, 1998). Similarly, at the hearing, both the SSA and TPET Chair acknowledged that Metro's proposal was not limited to 5 drydockings per year. Tr. at 100-101; 258.

Based on this record, it is clear that Metro's proposal does not take any exception to the solicitation requirement establishing the maximum quantity of eight ships that may be required to be drydocked in a given year.[17]

The protest is sustained.

RECOMMENDATION

We recommend that the agency reopen negotiations, conduct meaningful discussions with both offerors, request best and final offers, and evaluate those proposals consistent with the solicitation's stated requirements. In the event that the RFP does not reflect the agency's actual requirements, the solicitation should be modified.[18] If, as a result of this reevaluation, Metro's proposal is selected for

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[17]To the extent the agency was concerned that, in performing the contract, Metro [deleted], such concern does not constitute a failure to comply with the solicitation requirements.

[18]Metro also protests that the agency failed to properly assess the relative risks associated with ADD's proposed use of the *Sustain*, as required by RFP § M.2.3, which, as noted above, advised offerors that proposals "will be evaluated to determine the offeror's overall risk in being able to perform the requirements of this contract relative to operating and maintaining the dry dock and performing the required dry dock repairs to applicable ships." The agency acknowledges that it "did not qualitatively assess [ADD's] proposed use of *Sustain*," arguing that, despite the express language of RFP § M.2.3, "It would be patently unfair . . . to . . . subject the offerors proposing to use *Sustain* to a comparative assessment against any privately owned dry dock that might be offered." Agency Post Hearing Brief at 34, 37. In light of our decision regarding the agency's inadequate discussions, we do not reach the merits of Metro's protest regarding the agency's evaluation of

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award, the agency should terminate ADD's contract for the convenience of the government and make award to Metro. We also recommend that Metro be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

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[18](...continued)
proposals pursuant to the provision in RFP § M.2.3 quoted above. Nonetheless, we recommend that, concomitant with reopening negotiations, the agency consider whether this section of the RFP should be revised to clearly reflect the manner in which the agency intends to evaluate the revised proposals.

Finally, Metro has raised various other protest allegations, including the assertions that the agency improperly evaluated the costs associated with ADD's proposal to use the government-furnished drydock, that the agency erred in its evaluation of Metro's proposed CAPE (compliant all-position enclosure) system, and that the agency improperly evaluated proposals under the past performance factor, the environmental factor, and the start-up schedule factor. We have considered these other protest allegations and found they provide no basis for sustaining the protest.