



United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

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## Decision

**Matter of:** Nova Group, Inc.

**File:** B-282947

**Date:** September 15, 1999

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Carol L. O'Riordan, Esq., O'Riordan & Associates, for the protester.  
Michael H. Payne, Esq., Starfield & Payne, for Healy Tibbitts Builders, Inc., the intervenor.

Ron R. Ashlock, Esq., and Richard G. Welsh, Esq., Department of the Navy, for the agency.

Henry J. Gorczycki, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency reasonably evaluated protester's construction management plan as satisfactory, rather than outstanding, on the basis that the plan does not contain sufficient details to satisfy the agency that the plan had a high probability of success, but only contained promises to perform acceptably.
2. Protest is sustained where agency improperly downgraded protester's past performance based merely on protester's history of contract claims, with no allegation that protester abused the claims process.

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### DECISION

Nova Group, Inc. protests the award of a contract to Healy Tibbitts Builders, Inc. under request for proposals (RFP) No. N62742-97-R-1313, issued by the Department of the Navy, Naval Facilities Engineering Command, for pierside construction projects at the Naval Station, Pearl Harbor, Hawaii. Nova protests the agency's evaluation of technical proposals.

We sustain the protest because the Navy's evaluation of past performance improperly penalized the protester simply for using the contract claims process.

The RFP, issued on December 11, 1998, contemplated the award of a fixed-price construction contract for two projects with options for eight additional projects. The RFP stated a best value evaluation plan under which the technical evaluation

factors were said to be approximately equal to price. The RFP listed the technical evaluation factors in descending order of importance as follows: (a) construction management plan; (b) experience/past performance; (c) experience of key personnel; and (d) small business subcontracting. RFP amend. 0004, § 00202, at 1-4.

Under factor a, construction management plan, the RFP stated:

The Offeror's construction management plan will be evaluated for management; coordination; phasing; conflict resolution and scheduling of the various trades to minimize disruption of the Navy's dock operations.

Id. at 1.

Under factor b, experience/past performance, the RFP stated:

(1) The Offeror's experience will be evaluated for completed projects of similar dollar value/scope/complexity projects (e.g., construction/renovation of piers/wharves that included waterfront concrete piles and steel sheet pile installation; and pierside electrical utilities).

(2) The Offeror's past performance will be evaluated for customer satisfaction in similar dollar value/scope/complexity projects (e.g., construction/renovation of piers/wharves that included waterfront concrete piles and steel sheet pile installation; and pierside electrical utilities) completed within the past fifteen years. Customer satisfaction will be measured based on quality of workmanship; timely completion of work; reasonableness of price; cooperation/responsiveness and safety.

(3) The Offeror's past performance will be evaluated for general trends in customer satisfaction (as defined above) in all types of completed projects for the past fifteen years.

Id. at 1-2.

The corresponding proposal submission requirements for factor b required offerors to submit the experience/past performance information for similar projects as well as to submit other past performance information that may not be related to such projects. The other past performance information that was requested included "identify[ing] any and all claims submitted, reason for claim and disposition." Id. at 2.

Initial proposals were due by February 16, 1999. The Navy convened a technical evaluation board (TEB) that evaluated the seven proposals received, including

Nova's and Healy Tibbitts'. The TEB evaluated technical proposals on an adjectival scale (outstanding, satisfactory, marginal, unsatisfactory) detailed in the RFP. RFP amend. 0004, at 5-6. The initial evaluation ratings for Nova and Healy Tibbitts were as follows:

	<b>Nova</b>	<b>Healy Tibbitts</b>
Construction Management Plan	Marginal	Marginal
Experience/Past Performance	Satisfactory	Outstanding
Experience of Key Personnel	Satisfactory	Outstanding
Small Business Subcontracting	Outstanding	Satisfactory
<b>Overall</b>	<b>Satisfactory</b>	<b>Satisfactory</b>

Agency Report at 4, encl. 4, at 8.

Nova's proposal was rated marginal under the construction management plan factor essentially because it did not contain a plan that explained Nova's strategy for completing the work requirements. Agency Report, encl. 4, at 2. In this regard, Nova's initial proposal offered to develop such a plan upon award of the contract. Although Healy Tibbitts' proposal did contain a construction management plan that addressed its strategy for performing the work, the TEB rated it marginal under this factor because of certain specific evaluated weaknesses in the plan. Id. at 1.

With regard to the experience/past performance factor, the TEB found that both Nova and Healy Tibbitts had successfully performed similar projects. Nova's proposal was rated satisfactory, rather than outstanding, due to a number of claims, the dispositions of which were not clearly addressed in its proposal. Agency Report at 5, encl. 4, at 2. The TEB determined that Nova's claims record "did not demonstrate a general trend for outstanding past performance in terms of customer satisfaction." Id. encl. 4, at 2. The Navy found that Healy Tibbitts did not have any claims under federal contracts for the past 15 years, although it did have a pending claim under a contract with the state of Hawaii.<sup>1</sup> Id. at 1-2.

On March 23, the Navy commenced written discussions with all seven offerors. The Navy discussion letter to Nova addressed the agency's concerns under every evaluation factor. Under the construction management plan factor, the letter stated that, given Nova's proposal to develop a plan after award, the proposal failed to demonstrate a strategy for completing the work and asked Nova to demonstrate its strategy for successfully completing the work. Agency Report, encl. 6, Letter from Agency to Nova 2 (Mar. 23, 1999). Under the experience/past performance factor,

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<sup>1</sup>This claim was the only noted weak aspect under this factor and the TEB did not consider it to detract from Healy Tibbitts' otherwise outstanding record under this factor.

the agency requested Nova to provide information about the dispositions of its claims. Id. at 3.

The Navy requested and received revised proposals by April 16. In its revised proposal, Nova had rewritten the entire portion of its proposal that addressed the construction management plan factor. The TEB increased Nova's marginal rating under the construction management plan factor from marginal to satisfactory because Nova's plan now met the requirements of the RFP, albeit with some notable weaknesses. Agency Report, encl. 9, at 3. Among the evaluated weaknesses in Nova's proposal was that its proposed project manager would be located in California and would visit the construction site in Hawaii only 1 week every month, which the TEB determined lowered the probability of prompt resolution of problems and was not conducive to addressing issues as they arise on-site.<sup>2</sup> Id. at 4. Also, the TEB found that Nova's proposed plan to drive fender piles from the pier did not fully validate the pier capability to proceed with this approach, nor precisely explain how this work was to be accomplished.

Nova's revised proposal did provide information about the dispositions of its claims. Of nine claims, one was paid as submitted without dispute, three were resolved after requesting contracting officer's decisions, and five were resolved after Nova appealed to the Armed Services Board of Contract Appeals (ASBCA). Id.; Agency Report, encl. 7, Letter from Nova to the Navy 9-13 (Apr. 14, 1999). The TEB determined that this claims record raised "question[s] regarding the reasonableness of price, effectiveness of management (some claims were subcontractor related issues), and cooperation/responsiveness with regards to customer satisfaction subfactors." Agency Report, encl. 9, at 4. As a result, the TEB did not change Nova's satisfactory rating under the experience/past performance factor.

In addition to the satisfactory ratings under the first two factors, Nova's revised proposal received outstanding ratings under the final two factors, which included an

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<sup>2</sup>Nova's initial proposal proposed a senior project manager, who would be located in California and would visit the construction site once a month, and also proposed an assistant project manager who would be at the construction site full time and who had full authority to act on behalf of Nova in matters concerning completing the contract. Nova's Initial Proposal, Factor A, at 3-4, 15. Nova's revised proposal eliminated the assistant project manager position in response to a discussion question from the Navy, which recognized the assistant project manager as the "on site project manager" and requested additional information on his experience. Agency Report, encl. 7, Letter from Nova to the Navy 14 (Apr. 14, 1999). Nova stated that it did not intend to have the assistant project manager in charge of the project. Nova's revised proposal did not increase the on-site presence of the senior project manager.

increase under the third factor from satisfactory to outstanding. The TEB determined that Nova's overall rating remained satisfactory. *Id.* at 3-5.

The TEB increased Healy Tibbitts' rating under the construction management plan to outstanding. *Id.*, at 2. Healy Tibbitts' revised proposal addressed the agency's concerns raised during discussions and provided a detailed description of its strategy for performing the work. Its proposal included a plan that was found to significantly reduce the risk of delays due to unanticipated conflicts; the plan included schedule flexibility, installation methods with a high probability of success, and an on-site manager to provide constant oversight of the construction projects. The TEB did not identify any weaknesses in Healy Tibbitts' revised proposal under this factor.

Healy Tibbitts' initial outstanding ratings under the second and third factors did not change, and its revised proposal earned an outstanding rating under the final factor. The TEB thus rated Healy Tibbitts' revised proposal outstanding under each of the four technical factors, and outstanding overall.<sup>3</sup>

The source selection board (SSB) concurred in the TEB's evaluation of revised proposals and recommended a competitive range of four proposals, including Nova's and Healy Tibbitts'. Agency Report, encl. 12, at 2-4. By letters of May 13, the Navy requested final proposal revisions by May 18. Other than some revisions to Nova's small business subcontracting plan, neither offeror's technical proposal changed and the technical ratings remained unchanged. The SSB elaborated on its evaluation of Nova's construction management plan, expressing concern about congestion of space availability on the docks. Agency Report, encl. 17, at 2.

Healy Tibbitts' proposal was ranked first with an overall outstanding rating and Nova's was ranked second with an overall satisfactory rating. Nova submitted the lowest proposed total price of \$29,214,405, and Healy Tibbitts proposed the next lowest price of \$29,488,058. *Id.* The SSB recommended award to Healy Tibbitts as the offeror submitting the best value proposal based on the following price/technical tradeoff decision:

Although [Healy Tibbitts]'s price proposal exceeded [Nova]'s price by \$273,653 the SSB determined that the 0.94 [percent] difference was negligible considering [Healy Tibbitts]'s superior technical proposal. The SSB considered the complexity of this project and concluded that a contractor such as [Healy Tibbitts] offered a higher probability for successful completion of this project.

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<sup>3</sup>Contrary to Nova's allegation, the record shows that the overall ratings were not assigned based on a curve established by the proposals received.

Id. at 3.

On May 26, the Navy awarded the contract to Healy Tibbitts. Nova requested and received a debriefing. This protest followed.<sup>4</sup>

Nova protests the evaluation of its proposal under the first two evaluation factors. We will not question an agency's evaluation of proposals unless the agency deviated from the solicitation evaluation criteria, procurement laws or regulations, or the evaluation was otherwise unreasonable. HSG-SKE, B-274769, B-274769.3, Jan. 6, 1997, 97-1 CPD ¶ 20 at 3. A protester's disagreement with the agency does not render the evaluation unreasonable. Sarasota Measurements & Controls, Inc., B-252406.3, July 15, 1994, 94-2 CPD ¶ 32 at 4. Although we find that the agency's evaluation under the first factor was reasonable, its evaluation under the second factor was improper because the Navy's evaluation of past performance improperly penalized the protester simply for using the contract claims process.

Under the first factor, construction management plan, Nova basically alleges the Navy unreasonably found the following weaknesses --(1) a failure to fully address the pier load restrictions and pier congestion in light of Nova's proposed shore-side crane and pile driving operations, and (2) the senior project manager would be stationed off-site and would visit the construction site only on a monthly basis. Comments at 11-20; Supplemental Comments at 2-6, 12-14.

Regarding the pier load restriction and congestion weaknesses, Nova's initial proposal did not state that it intended to locate a crane on the piers. Its revised proposal stated that it intended to locate a crane on the piers and perform 95 percent of the operation shore-side, that it had researched the pier load restrictions and would comply with them, and that it intended to sequence the work in the order identified in the schedule in order to minimize disruptions. Agency Report, encl. 7, Revised Factor A, at 4-7. The agency reasonably found that Nova's proposal did not contain sufficient details about its plan to demonstrate a high probability of successful performance. For example, although Nova's proposal stated that it had considered and would comply with the pier load restrictions in locating a crane on the piers, Nova's proposal did not discuss how it would comply or provide any calculations to illustrate such compliance. Also, although Nova proposed to perform 95 percent of the work shore-side, it did not detail how it would address congestion on the piers that could arise under such a plan. On the other hand, Healy Tibbitts' proposal provided more precise information about its strategy for successfully

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<sup>4</sup>By letter of August 4, 1999, the Navy stated that the head of the procuring activity made a written finding that performance of the contract "is in the best interests of the United States; or urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest."

completing the work, which provided the agency with a construction management plan containing specific information upon which an outstanding rating under this factor could be based.

Nova nevertheless alleges that by not rating its plan outstanding for these reasons, the Navy essentially created an unstated solicitation requirement for supporting information to validate an offeror's plan and/or an unstated preference for water-based operations rather than primarily pier-based operations such as proposed by Nova. Comments at 19. The record does not support this allegation.

Neither the RFP nor the Navy expressed a preference for any particular construction methodology. Agency Supplemental Report at 6-8. The RFP did state that, to be rated outstanding, a proposed construction management plan had to indicate a high probability of successfully completing the project. RFP amend. 0004, § 00202, at 5. We believe that it was reasonable for the evaluators to find that a plan that lacks precise details about critical aspects of the strategy for successfully completing the work does not provide a sound basis for the agency to evaluate potential performance risks. Thus, we do not think that the Navy's evaluation of Nova's proposal indicates an agency preference for anything more than a construction management plan that demonstrates a high probability of success, as opposed to offeror promises without adequate supporting details to perform acceptably. Under the circumstances, the agency's evaluation of Nova's proposed use of a pier-based crane was reasonable and was not based on matters not intrinsic to the construction management plan evaluation factor.

Regarding the off-site senior project manager weakness, Nova's revised proposal eliminated a full-time, on-site assistant project manager and left unchanged the off-site senior project manager, who would visit the construction site only once a month. Agency Report, encl. 7, Letter from Nova to the Navy 14, Revised Factor A, at 7 (Apr. 14, 1999). The Navy concluded that this was not the best plan for expeditiously addressing issues as they arise in the field. Agency Report, encl. 9, at 4. Given that the evaluation factor stated that management and coordination would be evaluated, we cannot find the agency evaluation of the limited on-site presence of Nova's project manager to be unreasonable or inconsistent with the stated evaluation plan.<sup>5</sup>

In sum, the agency reasonably rated Nova's proposal satisfactory under the construction management plan factor.

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<sup>5</sup>Although Nova complains of not being informed of this and other concerns until after award, Comments at 9-11, 18-19, Nova also explicitly states that it is not protesting the adequacy of discussions. Supplemental Comments at 11-12.

Under the second factor, experience/past performance, Nova complains that the Navy improperly considered Nova's contract claims as the basis for downgrading its rating. Nova states that there was no basis to support this downgrade because Nova has an above average record of contract performance and, although it has used the contract dispute process, it has not exhibited obstructive or disputatious conduct in the process. Protest at 21; Comments at 26-27; Supplemental Comments at 18-20.

Absent some evidence of abuse of the contract disputes process, contracting agencies should not lower an offeror's past performance evaluation based solely on its having filed claims. AmClyde Engineered Prods. Co., Inc., B-282271, B-282271.2, June 21, 1999, 99-2 CPD ¶ 5 at 6 n.5. Contract claims, like bid protests, constitute remedies established by statute and regulation, and firms should not be prejudiced in competing for other contracts because of their reasonable pursuit of such remedies in the past. Id.; See Contract Disputes Act, 41 U.S.C. §§ 601-613 (1994).

Here, Nova's performance under past contracts for similar work received ratings from the respective contracting agencies of average to outstanding. Agency Report, encl. 9, at 4. The record shows that the sole basis for Nova's satisfactory rating under the experience/past performance factor was due to nine claims that were evaluated as actions in which Nova and the contracting agency "could not reach bilateral agreement," and that Nova's proposal would otherwise have likely received an outstanding rating under this factor.<sup>6</sup> Id.; Agency Report, encl. 17, at 3. The final SSB report stated the following:

[Nova]'s rating of satisfactory was based on [Nova]'s identification of nine claims since claims was considered a weakness in terms of customer satisfaction (e.g., effectiveness of management, reasonableness of price cooperation/responsiveness).

Agency Report, encl. 17, at 3.

There is no evidence in the record that Nova's contract claims lacked merit or that they had an adverse impact on contract performance. As the TEB stated, some of Nova's claims involved contracts for which Nova received outstanding performance evaluations. Agency Report, encl. 9, at 4. Nova's revised proposal stated Nova's basis for pursuing each of the disputed claims, and the record shows that the overall disposition of these disputes was in Nova's favor. Agency Report, encl. 7, Nova's

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<sup>6</sup>To the extent Nova protests the agency's consideration of safety issues under this same factor, the record shows, and the Navy states, that the evaluation of safety did not result in downgrading Nova's rating under this factor. Agency Report at 12-14, encl. 9, at 4-5, encl. 17, at 3; Supplemental Agency Report at 14. We thus need not consider this issue further.

Letter to the Navy 9-13 (Apr. 14, 1999). In this regard, Nova claimed compensation for post-award contract changes totaling more than \$11 million. Of the nine claims, eight were resolved with the contracting agency agreeing to pay more than \$8 million (the final claim for nearly \$2 million is pending). In addition to this record of resolution favorable to Nova, the number of claims does not appear extraordinary for a period covering 15 years. The record lacks even a scintilla of evidence suggesting that Nova's participation in the contract dispute process was frivolous or was intended by Nova to be obstructive.

The Navy does not allege that Nova's claims were indicative of poor performance, nor that they were frivolous or filed in bad faith. Rather, the Navy concludes that the failure to reach bilateral agreement raised questions under the customer satisfaction subfactors (quoted above) of the experience/past performance factor concerning reasonableness of price, effectiveness of management, and cooperation/responsiveness. Agency Report, encl. 17, at 3. While it is true that these disputes are instances where the parties failed to reach agreement without recourse to the statutory claims resolution process, the agency's resulting conclusions are not reasonable. For example, since Nova's claims have largely been resolved with Nova receiving most or all of the claimed amounts, this suggests that it was ultimately found that the prices claimed were not unreasonable. Also, since there is no evidence suggesting that Nova failed to perform the contract changes effectively, delayed contract performance, or failed to respond to or cooperate with the agency in performing the contract changes, the record does not evidence that these claims indicate problems in management effectiveness, responsiveness or cooperation.

We find from this evaluation record that Nova was downgraded simply because it has actively pursued claims through the statutory contract claims resolution process on nine occasions over 15 years. Such an evaluation essentially penalized Nova simply for using the contract dispute process. The RFP did not state or reasonably indicate that this was how claims histories would be considered in the evaluation process. Nor would such consideration be proper, given that the protester was merely using the framework for resolving such disputes that Congress established in the Contract Disputes Act. We think that it would be improper for contracting agencies to impose evaluation penalties merely for an offeror's having availed itself of the contract claims process, such as occurred here; imposing such penalties would create barriers to legal remedies created by Congress. See AmClyde Engineered Prods. Co., Inc., *supra*.

Since, absent this evaluation penalty, the record shows that Nova would likely have received an outstanding rating under three of the four evaluation factors, and thus could well have received an overall rating of outstanding, the same as Healy Tibbitts' proposal, the Navy could reasonably have selected Nova's lowest-priced proposal for award. Thus, there was a reasonable likelihood that Nova was prejudiced by the improper evaluation of its past performance.

We recommend that the agency reopen discussions if necessary, evaluate proposals consistent with this decision, and make a new source selection decision. If a proposal other than Healy Tibbitts' is selected for award, the Navy should terminate the contract previously awarded to that firm. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General  
of the United States