



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: DevTech Systems, Inc.

File: B-418273.3; B-418273.4

Date: December 22, 2020

David B. Dixon, Esq., Robert C. Starling, Esq., and Toghrul Shukurly, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

C. Peter Dungan, Esq., and Holly Drumheller Butler, Esq., Miles & Stockbridge P.C., for International Development Group Advisory Services, LLC, the intervenor.

John B. Alumbaugh, Esq., and Eugene J. Benick, Esq., United States Agency for International Development, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency failed to conduct meaningful discussions during corrective action is denied where the agency reasonably limited discussions to revisions to key personnel. Protest that the agency conducted unequal discussions is sustained where the agency requested that the awardee confirm that its proposed subcontractors would comply with a cost ceiling, but did not provide the protester with an opportunity for discussions.
2. Protest that the agency's technical and cost evaluations unreasonably changed over the course of three evaluations, two of which were the result of corrective action in response to prior protests, is denied, where a different source selection authority was responsible for the final award.
3. Protest that the agency unreasonably evaluated technical proposals is denied where the evaluations were reasonable and consistent with the terms of the solicitation.
4. Protest that the agency unreasonably evaluated the realism of offerors' proposed costs is sustained where the agency concedes that errors were made in the evaluation, and other areas of the evaluation are not supported by the record.

DECISION

DevTech Systems, Inc., of Arlington, Virginia, a small business, protests the issuance of a task order to International Development Group Advisory Services, LLC (IDG), also a small business, of Arlington, Virginia, under request for task order proposals (RFTOP) No. 7200AA19R00062, which was issued by the United States Agency for International Development (USAID) for support of the Indo-Pacific Opportunity Program (IPOP). DevTech argues that the agency failed to conduct meaningful and equal discussions and unreasonably evaluated the protester's and awardee's technical and cost proposals.

We sustain the protest.

BACKGROUND

USAID issued the solicitation on July 31, 2019, which limited competition to small business firms that hold Public Financial Management II (PFM-II) indefinite-delivery, indefinite quantity (IDIQ) contracts awarded by USAID. Agency Report (AR), Tab 4, RFTOP at 1.¹ The RFTOP sought proposals to provide public financial management services in Indo-Pacific countries in support of the IPOP. *Id.* The IPOP will “target activities that improve the macroeconomic policy environment to promote sustainable economic growth and prosperity, improved regional economic cooperation, sound management of institutions, and good governance while also leveling the playing field for business[es] in the Asia region.”² *Id.* at 10. The contractor will be required to support the mission of the agency's Asia Bureau to “improve policy climates for investment that generate more productive employment and inclusive growth, including consideration of issues specific to women and other disadvantaged and marginalized populations.” *Id.* The solicitation anticipated the issuance of a cost-plus-fixed-fee task order with a base period of 2 years, and three 1-year options. *Id.* at 1.

The RFTOP advised offerors³ that proposals would be evaluated on the basis of cost and the following five non-cost evaluation factors: (1) technical approach (45 points), (2) management plan (15 points), (3) key personnel and staffing plan (15 points),

¹ Citations to documents in the agency report are to PDF document pages.

² The countries where services may be provided are Nepal, Sri Lanka, Maldives, Bangladesh, Burma, Cambodia, Vietnam, Laos, India, Philippines, Thailand, Indonesia, Timor-Leste, and the Pacific Islands (Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu). RFTOP at 12.

³ Although firms that compete for task and delivery orders under multiple award IDIQ contracts are commonly referred to as “vendors,” our decision uses the term “offeror” to be consistent with the record provided by the agency.

(4) monitoring, evaluation and learning (10 points), and (5) organizational capacity and experience (15 points).⁴ RFTOP at 48-49. Although each technical evaluation factor was assigned a possible number of points, the RFTOP stated that “[t]he factors are in descending order of importance.” *Id.* at 48. For purposes of award, the technical factors were “significantly more important than cost.” *Id.* In addition, the RFTOP advised that the agency would evaluate cost proposals for realism and fair and reasonable pricing. *Id.* at 49.

USAID received proposals from four offerors, including DevTech and IDG, by the closing date of September 3, 2019. AR, Tab 70, Final SSD at 2. The agency’s initial evaluation of DevTech’s and IDG’s proposals, which was conducted by a technical evaluation committee (TEC) and a cost evaluator, was as follows:

	DEVTECH	IDG
Technical Evaluation (100 Total Points)	94	85
Technical Approach (45 points)	42	35
Management Plan (15 points)	14	13
Key Personnel and Staffing Plan (15 points)	13	13
Monitoring, Learning and Evaluation (10 points)	10	9
Organizational Capacity and Experience (15 points)	15	15
Proposed Cost	\$34,680,464	\$26,989,682

AR, Tab 23, Initial TEC Evaluation at 4-10, 14-17; Tab 16, DevTech Proposal Cost at 6; Tab 20, IDG Cost Proposal at 10.

The first contracting officer⁵, who was also the source selection authority (SSA), selected IDG’s proposal for award on September 27, 2019. COS at 1. As explained by the first contracting officer in a declaration submitted in response to this protest

⁴ While the RFTOP numbers the evaluation factors as 1 through 4, the evaluations and source selection decisions (SSDs) treat them as five separate factors. *E.g.*, AR, Tab 70, Final SSD at 6-11 (treating management plan (15 points) and staffing plan (15 points) as one factor).

⁵ The first and second contract awards were made by the first contracting officer; a second contracting officer was responsible for the third award, which is the subject of this protest. Contracting Officer’s Statement (COS) at 4. We refer to the individual responsible for the third award as the contracting officer.

(B-418273.3; B-418273.4), she made the initial award decision based on a review of offerors' proposals and the agency's evaluations. AR, Tab 83, Decl. of First Contracting Officer, Sept. 20, 2020, at 1. The first contracting officer states, however, that she did not prepare a written source selection decision due to the high number of actions with limited staff. *Id.* at 1-2. The first contracting officer explained that in selecting the proposal that represented the best value to the government, she considered: the proposals, the signed TEC consensus memorandum, the TEC's cost realism evaluation, the independent government cost estimate, her unwritten analysis of the four cost proposals. *Id.* She also stated she made no changes to the proposed costs, so the evaluated cost was the same as the proposed cost for both DevTech and IDG. *Id.*

On November 12, DevTech filed a protest (B-418273) with our Office challenging the first award to IDG. On December 12, the agency advised that it would take corrective action in response to the protest. AR, Tab 30, Agency Req. for Dismissal (B-418273), Dec. 12, 2019, at 1. The agency stated that it would take the following actions: "(1) Request an extension of the period of availability of DevTech's and IDG's proposals to permit the corrective action to occur; (2) Re-evaluate the initial proposals in accordance with Section M of the [RFTOP]; and (3) Make a new source selection decision and award the contract based on the re-evaluation." *Id.* Based on the agency's proposed corrective action, we concluded that the protest was rendered academic and dismissed the protest. *DevTech Sys., Inc.*, B-418273, Dec. 16, 2019, at 1-2 (unpublished decision).

The agency's corrective action included the assignment of a new three-member TEC, which was comprised of the original TEC chair and two new members, and the assignment of a new contract specialist to evaluate cost proposals. COS at 2, 17. The corrective action was limited to DevTech and IDG. AR, Tab 49, Second SSD at 2.

On January 16, 2020, USAID contacted the remaining two offerors and advised that because "so much time has transpired since the initial proposal submission," the agency requested "additional confirmation that all key personnel proposed by each offeror are still available and remain committed to serving for the duration of the IPOP project once the corrective action is completed." AR, Tab 36, Agency Request to Confirm Key Personnel, Jan. 16, 2020, at 1. The agency requested that offerors confirm the availability of their key personnel, but also stated: "In the event that some key personnel are not available, offerors will be allowed until 9:00 A.M. Tuesday, January 28, 2020 to respond with proposals of qualified replacement key personnel accompanied by the required paperwork, in accordance with Section L3 of the RFTOP." *Id.*

DevTech confirmed the availability of two of its three proposed key personnel, and provided an alternate candidate for the third. AR, Tab, 38, Letter from DevTech to Agency, January 20, 2020, at 1. IDG confirmed the availability of all of its proposed key personnel, and did not change any proposed individuals. AR, Tab, 37, Letter from IDG to Agency, January 17, 2020, at 1.

In addition to the exchanges concerning key personnel, on March 9, the agency requested that the awardee “confirm” that its proposed subcontractors will comply with “Article B.7.LABOR of the Public Financial Management-II IDIQ [which] sets the unburdened ceiling daily rates that apply to the prime [and] all subcontractors. . . .” AR, Tab 40, Email from First Contracting Officer to IDG, Mar. 9, 2020. IDG responded on March 10 that “both subcontractors agree to and will comply with this requirement.” AR, Tab 41, Email from IDG to First Contracting Officer, Mar. 10, 2020.

The agency’s second evaluation of proposals was as follows:

	DEVTECH	IDG
Technical Evaluation (100 Total Points)	58.5	74
Technical Approach (45 points)	24	32
Management Plan (15 points)	5	13
Key Personnel and Staffing Plan (15 points)	10	10
Monitoring, Learning and Evaluation (10 points)	7	7
Organizational Capacity and Experience (15 points)	12.5	12
Proposed Cost	\$34,680,464	\$26,989,682
Evaluated Cost	\$35,330,349	\$26,089,682

AR, Tab 49, Second SSD at 4-7; Tab 16, DevTech Proposal Cost at 6; Tab 20, IDG Cost Proposal at 10.

On March 30, the first contracting officer again selected IDG’s proposal for award. AR, Tab 49, Second SSD at 9. DevTech filed a protest (B-418273.2) with our Office on April 10, challenging the second award to IDG. On May 11, the agency advised that it again would take corrective action in response to the protest. Agency Req. for Dismissal (B-418273.2), May 11, 2020, at 1. The agency stated that it would take the following actions:

- (1) Request an extension of the period of availability of DevTech’s and IDG’s proposals to permit the corrective action to occur;
- (2) Review and make corrections as needed to the evaluations of [the] August 2019 initial proposals with the January 2020 key personnel updates in accordance with Section M of the [RFTOP];
- (3) Make a new source selection decision and award the contract based on the re-evaluation; and
- (4) Other actions as the Agency sees fit to maintain the integrity of the procurement process.

Id. Based on the agency’s proposed corrective action, we concluded that the protest was rendered academic and dismissed the protest. *DevTech Sys., Inc.*, B-418273.2, May 14, 2020, at 1-2 (unpublished decision).

During the corrective action in response to DevTech’s second protest, the agency replaced the first contracting officer with the contracting officer responsible for the award challenged here. COS at 4. The agency’s third evaluation of proposals, which was again limited to DevTech and IDG, was as follows:

	DEVTECH	IDG
Technical Evaluation (100 Total Points)	65	74
Technical Approach (45 points)	26	32
Management Plan (15 points)	10	13
Key Personnel and Staffing Plan (15 points)	10	10
Monitoring, Learning and Evaluation (10 points)	7	7
Organizational Capacity and Experience (15 points)	12	12
Proposed Cost	\$34,680,464	\$26,989,682
Evaluated Cost	\$39,270,198	\$29,344,566

AR, Tab 70, Final SSD at 6-11; Tab 16, DevTech Proposal Cost at 6; Tab 20, IDG Cost Proposal at 10.

The contracting officer, who was also the SSA, concluded that IDG’s technical proposal provided “the lowest performance risk due to its superior technical approach and management plan” as compared to DevTech’s proposal. AR, Tab 70, Final SSD at 11-12. The contracting officer noted that the technical approach and management plan were the most heavily weighted evaluation factors. *Id.* at 13. With regard to the other evaluation factors, the contracting officer stated that “the results of both approaches would serve to meet the requirements of the RFTOP within each evaluation category without exceeding any one requirement.” *Id.* Based on IDG’s more highly rated technical proposal and lower evaluated cost, the contracting officer selected its proposal for award. *Id.* at 13-14.

The agency provided DevTech with a debriefing, which concluded on September 9. COS at 3. This protest followed.⁶

⁶ The value of the protested task order exceeds \$10 million. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B).

DISCUSSION

DevTech raises four primary challenges to USAID's award of the task order to IDG: (1) the agency failed to conduct meaningful discussions with DevTech and also conducted unequal discussions with IDG; (2) the agency's changes to the technical and cost evaluations over the course of the three evaluations were unreasonable and not adequately explained; (3) the agency unreasonably evaluated the technical proposals; and (4) the agency unreasonably evaluated the realism of the offerors' proposed costs.⁷ Protest at 8-45.⁸ For the reasons discussed below, we agree with the protester that the agency conducted unequal discussions and sustain the protest on this basis. We also sustain the protest because the agency concedes that its cost realism evaluation was flawed with regard to some of the adjustments made to the protester's proposal, and because certain other of the agency's adjustments to the offerors' proposals are not supported by the record. We conclude that the remainder of the protester's arguments do not provide a basis to sustain the protest.

This task order competition was conducted among PFM-II IDIQ contract holders pursuant to the provisions of Federal Acquisition Regulation (FAR) subpart 16.5. In reviewing protests of awards in task order competitions, we do not reevaluate proposals or quotations but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors or vendors equally and evaluate their proposals or quotations evenhandedly against the solicitation's requirements and evaluation criteria. *Sumaria Sys., Inc.; COLSA Corp.*, B-412961, B-412961.2, July 21, 2016, 2016 CPD ¶ 188 at 10. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that the agency acted unreasonably. *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. See *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21-22. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest

⁷ DevTech also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest, aside from those specifically identified here.

⁸ Citations to the protest are to the Consolidated Amended and Supplemental Protest filed by DevTech on October 2, 2020. This document comprises DevTech's initial (B-418273.3) and supplemental (B-418273.4) arguments challenging the current award. See Protester's Clarification of Supplemental Protest Grounds, Oct. 7, 2020, at 1-2.

even if a defect in the procurement is found. See *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12.

Failure to Conduct Discussions with DevTech

DevTech argues that USAID improperly failed to conduct meaningful discussions with it in connection with the agency's request to update key personnel. The protester also argues that the agency conducted unequal discussions when it requested that IDG confirm that its proposed subcontractors would comply with the cost provisions of the underlying IDIQ contract. For the reasons discussed below, we agree with the protester that the agency conducted unequal discussions regarding its exchange with IDG concerning its subcontractors, and sustain the protest on this basis.

Although the regulations concerning discussions in procurements conducted pursuant to FAR part 15 do not, as a general rule, govern task order competitions conducted pursuant to FAR subpart 16.5, when an agency engages in exchanges with vendors in task order competitions, such exchanges must be fair. *Tetra Tech, Inc.*, B-416861.2, B-416861.3, May 22, 2019, 2019 CPD ¶ 196 at 8; *AT&T Corp.*, B-414886 *et al.*, Oct. 5, 2017, 2017 CPD ¶ 330 at 4; *CGI Fed. Inc.*, B-403570 *et al.*, Nov. 5, 2010, 2011 CPD ¶ 32 at 9. Our analysis regarding fairness, will, in large part, reflect the standards applicable to the negotiated procurements in FAR part 15. *Technatomy Corp.*, B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7.

The discussions provisions of FAR part 15 describe a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR 15.306(a); *SOC LLC*, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 7. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *Highmark Medicare Servs., Inc., et al.*, B-401062.5 *et al.*, Oct. 29, 2010, 2010 CPD ¶ 285 at 11; see FAR 15.306(d). Under the negotiated procurement provisions of FAR part 15, discussions, when held, must identify, at a minimum, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR 15.306(d)(3).

Failure to Conduct Meaningful and Non-Misleading Discussions

DevTech argues that USAID's request that offerors confirm their key personnel constituted discussions, and that the agency failed to conduct meaningful and non-misleading discussions because it did not advise the protester of deficiencies or significant weaknesses in its proposal. We agree with the protester that the request

was discussions, but conclude that the agency's limitation on the discussions to key personnel was reasonable.

As noted, during the agency's corrective action in response to DevTech's first protest, the agency requested that offerors confirm the availability of their proposed key personnel. AR, Tab 36, Agency Request to Confirm Key Personnel, Jan. 16, 2020, at 1. The agency also permitted offerors to revise their key personnel. *Id.*

Our Office has explained that where an agency permits offerors or vendors to update key personnel during corrective action, those requests are discussions. See *Peraton Inc.*, B-416916.8 *et al.*, Aug. 3, 2020, 2020 CPD ¶ 248 at 4-6. Where an agency's proposed corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. See *Consolidated Eng'g Servs., Inc.*, B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 3-4; *Computer Assocs. Int'l., Inc.*, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5. In reviewing the reasonableness of an agency's restrictions on the extent of discussions to implement corrective action, we will consider whether the discussions, and permitted revisions in response to discussions, are expected to have a material impact on other areas of the offeror's or vendor's proposal. *Evergreen Helicopters of Alaska, Inc.*, B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8; *Honeywell Tech. Solutions, Inc.*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4. As relevant here, in *ActioNet, Inc.*, B-416557.4, Feb. 27, 2019, 2019 CPD ¶ 97 at 5-6, we found that an agency's request that offerors confirm the availability of key personnel during corrective action was a reasonable limit on the scope of discussions.

DevTech acknowledges that agencies may limit the scope of discussions during corrective action. See Comments at 11. The protester contends, however, that our decisions addressing an agency's discretion in this regard do not apply here because the agency's January 16, 2020, request to confirm or update key personnel did not limit what offerors could revise in response to the request. *Id.* The protester therefore argues that offerors were permitted to revise any aspect of their proposals. *Id.* As a result, the protester argues that the agency's failure to advise DevTech of deficiencies and significant weaknesses in its proposal constituted non-meaningful discussions, because those discussions deprived the protester of the opportunity to address these issues. *Id.* at 11-12.

The record here shows that the revisions permitted in the agency's request to confirm the availability of key personnel were limited to key personnel. The agency requested that offerors provide "confirmation that all key personnel proposed by each offeror are still available and remain committed to serving for the duration of the IPOP project once the corrective action is completed." AR, Tab 36, Agency Request to Confirm Key Personnel, Jan. 16, 2020, at 1. In the event personnel were not available, the agency permitted offerors to "respond with proposals of qualified replacement key personnel accompanied by the required paperwork, in accordance with Section L3 of the RFTOP." *Id.* The request for confirmation did not otherwise request or permit offerors to submit

revised proposals. For this reason, we find no merit to the protester's argument that the agency was required to conduct broader discussions that advised it of any deficiencies or significant weaknesses in its proposal.⁹

Unequal Discussions

Next, DevTech argues that USAID conducted unequal discussions with IDG when it requested that IDG "confirm" that its subcontractors would comply with the cost limits in its PFM-II IDIQ contract. The protester contends that, under the circumstances here, the agency's request for confirmation from IDG constituted discussions, and that the agency was therefore required to conduct discussions with DevTech as well. For the reasons discussed below, we agree and sustain the protest on this basis. As an initial matter, however, we set forth below certain additional background necessary for this analysis. This additional background covers: (1) the RFTOP and IDIQ contract provisions at issue; (2) the March 2020 exchanges with IDG and the second cost realism evaluation; and (3) the third cost realism evaluation. We will then turn to the specific arguments raised and our analysis.

Additional Background--RFTOP and IDIQ Contract Provisions

Clause B.6 of the RFTOP stated that proposed labor costs must comply with the terms of the PFM-II IDIQ contract: "All labor under this task order must comply with the requirements of the labor categories and ceiling rates set forth in Article B.7 of the IDIQ." RFTOP at 8. Section L of the RFTOP required major subcontractors to submit budgets and stated that the direct labor salary and wages must be in accordance with the PFM-II IDIQ contract. *Id.* at 44-45.

The PFM-II IDIQ contracts awarded to each offeror contained article B.7, which concerns limits on the salary or consulting rates under task orders, as follows:

⁹ Aside from this contention, DevTech does not argue that the agency unreasonably limited discussions to key personnel revisions because of the effect of those revisions on other parts of its proposal. Because the protester does not argue that the limitation on proposal revisions was unreasonable due to the impact on other parts of its proposal, we find no basis to conclude that the agency was required to permit offerors to submit revisions to other parts of their proposals. *See Evergreen Helicopters of Alaska, Inc., supra.*

B.7 LABOR

* * * * *

(c) Unburdened Ceiling Daily Rates (CDR)

(1) The task order rates must not exceed the ceiling daily rates set forth in the table below.

Each CDR for personnel listed below is “unburdened” and must only include salary costs or consulting rates of the individual providing the services.

* * * * *

Actual salaries for all personnel will be negotiated under task orders and final approval is provided by the [task order contracting officer]. The ceiling rates presented below do not constitute approval of final salary rates above the Contractor Salary Threshold (CST) (see [USAID automated directive System (ADS)] 302).

IDG Response to GAO Questions, Dec. 3, 2020, attach. 1, IDG IDIQ Contract at 7-8.

USAID explains that the CDR refers to the ceiling for the unburdened daily cost of labor--salary or consulting rates--that may be charged by a contractor under a task order. Agency Response to GAO Questions, Dec. 8, 2020, at 2. Each firm’s IDIQ contract specified a maximum daily rate for unburdened labor--a CDR--that may be charged for a particular labor category. *Id.*

The agency explains that the CST is a cost ceiling rate set forth in USAID regulations that applies to labor costs and is “equivalent to the maximum rate at Federal agencies.” *Id.* (quoting ADS 302.3.6.9). As article B.7 of the IDIQ contract provides, the fact that a CDR set forth in the IDIQ contract exceeds the CST rate does not mean that the agency approves reimbursement of rates above the CST rate. See Agency Response to GAO Questions, Dec. 8, 2020, at 3; IDG Response to GAO Questions, Dec. 3, 2020, attach. 1, IDG IDIQ Contract at 8.¹⁰ The agency’s evaluation of DevTech’s and IDG’s proposed costs applied a CST rate that limited daily unburdened labor costs to \$698.07

¹⁰ For example, the CDR set forth in an IDIQ contract for a position could be \$700 while the CST is \$698. This could occur when the CDR is increased annually due to the escalation rate while the CST is held constant as a result of the regulatory restriction. Agency Response to GAO Questions, Dec. 8, 2020, at 8.

in 2020. COS at 14. The agency also explains that its evaluation did not apply escalation to the CST rate because “there is no guarantee that the rate will be increased for years two through five.” Agency Response to GAO Questions, Dec. 8, 2020, at 8-9.

Additional Background--March 2020 Exchanges with IDG and Second
Cost Realism Evaluation

On March 9, during the corrective action in response to DevTech’s first protest (B-418273)¹¹, the first contracting officer sent IDG an email with the following subject line: “Confirmation of IDIQ Unburdened ceiling daily Rates for RFTOP 7200AA19R00062.” AR, Tab 40, Email from First Contracting Officer to IDG, Mar. 9, 2020. The first contracting officer requested that the protester address the following question, which was styled as a “clarification.”

The following is a request for clarification in accordance with [FAR] 15.306(a)(1).

Article B.7.LABOR of the Public Financial Management-II IDIQ sets the unburdened ceiling daily rates that apply to the **prime, all subcontractors, consultants, [third country nationals], and [cooperating country nationals]**. The IDIQ ceiling on labor rates and salaries also applies to the unburdened component paid for labor under fully burdened rates in all T&M/LH subcontracts. **Please confirm that your subcontractors agree to and will comply with this requirement.**

Please provide your yes/no answer no later than COB Wednesday, March 11, 2020.

Id. (emphasis in original).

IDG responded as follows: “We have consulted with our two proposed subcontractors. I confirm that both subcontractors agree to and will comply with this requirement.” AR, Tab 41, Email from IDG to First Contracting Officer, Mar. 10, 2020.

The contracting officer states that she does not know why the first contracting officer issued the request to IDG:

In response to the question presented by the GAO, I searched my emails and the contract file, but could find no documentation as to the rationale for the Tab 40 message. I asked the TEC chairperson to conduct a

¹¹ The documentation for the agency’s first cost realism evaluation, which took place prior to the initial award on in September 2019, is a short checklist that did not specifically address offerors’ labor rates. AR, Tab 24, Initial Cost Realism Evaluation at 4. As noted above, the agency did not prepare a source selection document for the first award.

search of her emails and files and she could not find any documentation as to the rationale for the Tab 40 message.

Agency Response to GAO Questions, Dec. 1, 2020, at 2. In response to a question from our Office, the contracting officer states that she believes the March 9 request could have referred to either the CDR or the CST. Agency Response to GAO Questions, Dec. 8, 2020, at 6.

The agency's second cost realism evaluation, which took place after the March 9-10 exchanges, examined the rate for the [DELETED] position to be provided by [DELETED], IDG's proposed major subcontractor. AR, Tab 45, Second Cost Realism Evaluation at 25. The agency noted in the evaluation that "the CDRs in the IDIQ apply to all subcontractors." *Id.* As relevant here, the CDR for the [DELETED] position in IDG's IDIQ contract was \$[DELETED] for year 1 of contract performance; based on the application of the 3 percent annual escalation rate in the IDIQ contract, the CDR for the second year of performance for the IDIQ contract (when the second task order award was made) was \$[DELETED]. IDG Response to GAO Questions, Dec. 3, 2020, attach. 1, IDG IDIQ Contract at 8.

The fully-burdened daily rate for the [DELETED] position proposed by [DELETED] was \$[DELETED]. AR, Tab 22, IDG Cost Proposal at 19; *id.*, Tab 21, IDG Cost Summary Spreadsheet at "[DELETED]" Tab. The awardee's proposal stated that the fully-burdened [DELETED] daily rates include an indirect cost multiplier of [DELETED] for non-US expatriate personnel.¹² AR, Tab 22, IDG Cost Proposal at 23. Assuming the [DELETED] multiplier was applied to [DELETED]'s fully-burdened daily rate of \$[DELETED], the unburdened daily rate would be \$[DELETED], which is higher than IDG's second-year CDR for the [DELETED] position of \$[DELETED].

The agency's second cost realism evaluation examined [DELETED]'s [DELETED] rate, but did not calculate the unburdened direct labor amount. AR, Tab 45, Second Cost Realism Evaluation at 25. Instead, the agency found that the "actual unburdened rate" would be limited to \$[DELETED]. *Id.* This rate was the same as the CDR for IDG's IDIQ contract in the second year. IDG Response to GAO Questions, Dec. 3, 2020, attach. 1, IDG IDIQ Contract at 7-8. The agency found that this rate "will be . . . in accordance with the PFM II IDIQ." AR, Tab 45, Second Cost Realism Evaluation at 25. For this reason, the evaluation concluded as follows: "The Analyst recommends that proposed subcontract rates be deemed fair and reasonable based on *the Offeror's confirmation* above." *Id.* (emphasis added).

¹² The intervenor also contends that a higher multiplier than identified in its proposal was applied. IDG Response to GAO Questions, Dec. 3, 2020, at 4. By applying the higher multiplier, the intervenor contends that the unburdened daily rate for the [DELETED] position would be significantly lower than the CDR or CST rate. *Id.* The intervenor, however, does not explain the basis for its claim that a higher multiplier applied.

As the protester notes, the only other reference to “confirmation” by IDG in the cost realism evaluation pertained to the rates of another of IDG’s subcontractors (not at issue here):

The Analyst recommends that proposed subcontract rates be deemed fair and reasonable *based on the Offeror’s March 10, 2020 confirmation* that subcontractor has agreed to and will comply with the requirement that the unburdened ceilings on labor rates and salaries in IDIQ Article B.7 also apply to the unburdened component paid for labor under fully burdened rates in all T&M/LH subcontracts.

Id. at 26 (emphasis added).

Additional Background--Third Cost Realism Evaluation

The contracting officer explains that during the third and final evaluation, she was “responsible for conducting and documenting an independent evaluation of both companies’ cost proposals in accordance with Section M.3 (Tab 4) of the RFTOP.” COS at 4. She further states that the March 9-10 exchanges between the agency and IDG “did not factor into my analysis, or ultimate source selection decision,” and that she “considered the cost proposals in light of Article B.7 and without regard to the [March 9-10 exchanges], and adjusted them accordingly for the Most Probable Cost.” Agency Response to GAO Questions, Dec. 1, 2020, at 4.

The third cost realism evaluation found that the fully burdened [DELETED] rate was \$[DELETED], and that this rate was “fair, reasonable, and realistic.” AR, Tab 67, Final IDG Cost Realism Evaluation at 17. The evaluation did not discuss this rate in the context of the CDR for IDG’s IDIQ contract, but stated that “[g]iven that there are no changes to the [level of effort (LOE)] or the daily rate, costs associated with this line item remain constant.” *Id.* The agency concluded that although [DELETED] budgeted an escalation for salaries at the CST level, USAID did not apply the escalation and the proposed salaries for [DELETED] “remained at the 2020 CST rate of \$698.07 a day.”¹³ *Id.* at 16.

The contracting officer states that the third cost realism adjustment found that both offerors’ proposals included daily rates that exceeded the CST rate because they applied an escalation factor in years 2-5. Agency Response to GAO Questions, Dec. 8, 2020, at 8-12 (*citing* AR, Tab 64, Final DevTech Cost Realism Evaluation Spreadsheet; Tab 65, Final IDG Cost Realism Evaluation Spreadsheet; Tab 66, Final DevTech Cost Realism Evaluation; Tab 67, Final IDG Cost Realism Evaluation). The contracting

¹³ At the time of the third award to IDG, the second year CDR of \$[DELETED] would have been escalated 3 percent for the year 3 IDIQ, which would have been higher than the 2020 CST rate of \$698.07.

officer states that she made downward cost realism adjustments to both proposals to address this matter.¹⁴ *Id.*

Protester's and Agency's Arguments

DevTech argues that the March 9-10 exchanges with IDG were discussions because they permitted the awardee to revise its proposal. USAID argues that the exchanges were not discussions because they merely clarified the awardee's obligation to comply with the requirements of IDIQ contract article B.7. Memorandum of Law (MOL) at 15-16. In this regard, the agency notes that it requested only a yes/no confirmation that the awardee's subcontractors would comply with the CDR and CST rate ceilings imposed by IDIQ article B.7.

The record shows that USAID requested that IDG "confirm that your subcontractors agree to and will comply with" article B.7 of the IDIQ contract--i.e., the contract between IDG and USAID. AR, Tab 40, Email from First Contracting Officer to IDG, Mar. 9, 2020. IDG responded that it contacted its subcontractors as requested, and received confirmation that the subcontractors also would comply with the ceiling rates in IDG's IDIQ contract. AR, Tab 41, Email from IDG to First Contracting Officer, Mar. 10, 2020. The record further shows that the agency's evaluation of IDG's proposal expressly considered whether the proposed [DELETED] rate for [DELETED] (IDG's subcontractor) complied with article B.7 of IDG's IDIQ contract. AR, Tab 45, Second Cost Realism Evaluation at 25. The agency found that although the proposal included a rate for [DELETED]'s [DELETED] that exceeded the CDR, the rate would be assessed at no higher than the CDR based on the "Offeror's confirmation." *Id.* For this reason, the agency found that the rate was "in accordance with the PFM II IDIQ."¹⁵ *Id.*

As our Office has explained, communications that do not permit an offeror to revise or modify its proposal, but rather request that the offeror confirm what the offeror has

¹⁴ The protester and intervenor each contend that none of their own proposed labor rates exceed the CST, but that some of the opposing party's rates exceed the CST. See Protester's Response to GAO Questions, Dec. 9, 2020, at 7-8; Intervenor's Response to GAO Questions, Dec. 9, 2020, at 2. The agency explains that it assumed that the CST would not be escalated during the course of contract performance, and that as a result, several of the proposed rates for each offeror exceeded the CST in the second through fifth contract years. Agency Response to GAO Questions, Dec. 8, 2020, at 8-12. Neither offeror specifically disputes the agency's findings regarding their proposed rates for the CST during these years.

¹⁵ In response to a question from our Office, the contracting officer states that none of the awardee's proposed rates exceeded the CDR because the CDR has a built in 3 percent escalation rate. Agency Response to GAO Questions, Dec. 8, 2020, at 8. As discussed above, however, even the unburdened rate proposed by IDG for the [DELETED] position exceeds the CDR for the position in year two of the awardee's IDIQ contract of \$[DELETED]; the burdened rate was considerably higher.

already committed to do in its proposal, are normally viewed as clarifications and not discussions. *Highmark Medicare Servs., Inc., supra*. In this instance we reach a different conclusion. Specifically, we disagree with the agency's argument that the first contracting officer was "simply clarifying a minor irregularity in the proposal," concerning "the proposal of rates and salaries above the Article B.7 ceiling, despite the controlling nature of Article B.7." Agency Response to GAO Questions, Dec. 1, 2020, at 4.

Instead, we agree with DevTech that the March 9-10 exchanges constituted discussions because they permitted the awardee to address--and rehabilitate--an area of its proposal that, prior to the inquiry, did not comply with the RFTOP requirement that costs comply with article B.7 of the offeror's IDIQ contract. In essence, IDG's confirmation modified its proposal by assuring that its proposed subcontractors would comply with the CDR, rather than exceed them, despite the content of the proposal. See *Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5 (in situations where there is a dispute regarding whether an exchange between an agency and an offeror constituted discussions, the "acid test" is whether an offeror has been afforded an opportunity to revise or modify its proposal).

Because the agency conducted discussions with IDG, it was obligated to provide the protester with an opportunity for discussions. *Tetra Tech, Inc., supra* (where an agency elects to conduct exchanges that would otherwise amount to discussions under FAR part 15 with one vendor, it must conduct discussions with all vendors included in the competitive range).¹⁶ As the protester notes, the agency's second evaluation identified a deficiency and three significant weaknesses¹⁷ that were not present in the agency's initial evaluation of the protester's proposal. Compare AR, Tab 23, Initial TEC Evaluation at 5-10 (assigning no deficiencies or significant weakness) with Tab 42, Second TEC Evaluation at 5-12 (assigning one deficiency and three significant weakness). Upon identification of those concerns, and in light of the fact that the agency had conducted discussions with IDG, the agency was obligated to conduct meaningful discussions with DevTech that addressed these concerns. See *Enterprise Servs. LLC*, B-414230.3, B-414230.4, Sept. 17, 2018, 2018 CPD ¶ 323 at 11 (when an agency engages in discussions with a vendor in a task order procurement, the

¹⁶ The agency contends that it did not establish a competitive range for the second evaluation, which was conducted during corrective action in response to the first protest (B-418273). MOL at 5-6. For this reason, the agency contends that it was not obligated to conduct discussions. *Id.* at 6. The agency acknowledges, however, that the corrective action considered only two offerors for award, IDG and DevTech. See *id.* at 5; AR, Tab 36, Agency Request to Confirm Key Personnel, Jan. 16, 2020, at 1. Under these circumstances, we find no basis to conclude that the agency's lack of a formal establishment of a competitive range permitted the agency to treat offerors unequally in the conduct of discussions.

¹⁷ Although DevTech refers to a concern regarding the availability of the protester's chief of party as two separate deficiencies, the agency refers to it as a single deficiency. As discussed below, this deficiency was removed in the third and final evaluation.

discussions must be meaningful, that is, they must lead the vendor into the areas of its proposal that require correction or amplification).

USAID next argues that, even if the March 9-10 exchanges were discussions, the protester was not prejudiced for two reasons. First, the agency contends that DevTech was not prejudiced because the protester and intervenor each proposed unburdened daily rates that exceeded the CST rate, and the agency treated offerors equally by adjusting their proposals in the third and final cost realism adjustments. MOL at 17-18. Regardless of the fact that the agency's third cost realism evaluation concluded that a cost realism evaluation could account for the proposed daily rates that exceeded the CST rate through a downward cost adjustment, the record shows that the agency's second evaluation required confirmation that IDG's subcontractors would comply with the IDIQ article B.7 requirements concerning the CDR in order for the costs to be deemed fair and reasonable. See AR, Tab 45, Second Cost Realism Evaluation at 25. In this case, the agency was requesting information not already contained in IDG's proposal. For this reason, we agree with DevTech that the agency was required to conduct discussions with DevTech in connection with the second evaluation, during the first corrective action. Had the agency done so at that point in the competition, the protester could have materially improved its prospect for award. This constitutes prejudice.

USAID also argues that the third and final evaluation of DevTech's proposal revised the importance of the concerns identified in the protester's proposal during the second evaluation, by omitting the previously identified deficiency and finding that the concerns identified as significant weaknesses were only weaknesses. MOL at 14-15; *compare* AR, Tab 42, Second TEC Evaluation at 5-12 (assigning a deficiency and three significant weaknesses), *with* Tab 63, Final TEC Evaluation at 6-12 (omitting the deficiency and identifying the former three significant weaknesses as weaknesses). The agency argues, in effect, that its revised evaluation rendered the issue of discussions moot because the protester's proposal no longer had significant weaknesses or deficiencies that required discussions. See MOL at 14-15.

As discussed above, when agencies conduct exchanges with offerors during a task order competition under the provisions of FAR subpart 16.5, those exchanges must be fair. *Tetra Tech, Inc., supra; AT&T Corp., supra*. In assessing the fairness of exchanges, we look to the principles of FAR part 15 for guidance. *Technatomy Corp., supra*.

Here, the fact that the agency's third evaluation unilaterally reduced the significance of the concerns identified in the protester's proposal during the second evaluation does not remedy the failure to treat the offerors fairly or equally during the second evaluation-- where the agency conducted discussions with IDG, but not DevTech. In this regard, the agency's argument presupposes that the only outcome of discussions would have been the reduction of the seriousness of the agency's concerns previously identified as significant weaknesses to the level of weaknesses. The protester, however, was deprived of the same opportunity provided to the awardee: to modify its proposal in

response to the agency's concern, and thereby improve its prospect for award. Specifically, the protester was not given the opportunity to improve its proposal to the best of its ability, including the elimination of the agency's concerns or even the improvement of its proposal to the level of favorable consideration.

We recognize that at the time the agency conducted discussions with IDG, the awardee's proposal was not assigned any deficiencies or significant weaknesses. See AR, Tab 42, Second TEC Evaluation at 12-18; Tab 49, Second SSD at 6-7. Thus, conducting discussions with DevTech to address the deficiency and significant weakness assigned to its proposal would arguably provide the protester with a broader opportunity to revise its proposal as compared to the awardee. We conclude, however, that permitting the protester the opportunity to revise its proposal to address the deficiency and significant weaknesses assigned to its proposal is the outcome that would have been required under discussions conducted under FAR part 15, and that this outcome is also correct when applying the fairness principles of FAR subpart 16.5.¹⁸ We therefore find no basis to conclude that the agency's subsequent evaluation excused the lack of discussions.

In sum, we conclude that the agency conducted discussions with IDG in connection with the March 9-10 exchanges, prior to the second award, and failed to conduct equal and meaningful discussions with DevTech.¹⁹ We therefore sustain the protest on this basis.

Revisions to Technical and Cost Evaluations During Corrective Action

DevTech argues that USAID's final technical and cost evaluations are unreasonable and unequal because they differ from the evaluations that occurred during the course of the prior two evaluations. The protester argues that while these proposals remained the same throughout the three rounds of evaluations (apart from the issues relating to discussions with IDG, above), the agency's overall technical ratings and cost realism adjustments changed significantly. See Protest at 19-21, 38-40. We find no basis to sustain the protest based solely on the fact that the technical and cost evaluations were revised.

¹⁸ In this regard, discussions conducted under FAR part 15 must be tailored to the circumstances of each offeror's proposal. FAR 15.306(d)(1); *WorldTravelService*, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. The fact that the differing circumstances of each offeror's proposal means that discussions provide one offeror an opportunity to address more deficiencies or significant weakness, and another offeror fewer, does not mean that the discussions are unequal, or that an agency is excused from conducting discussions due to the disparity between the defects in each offeror's proposal. See *id.*

¹⁹ We also note that this unequal discussions challenge is timely, as it was raised within 10 days of receiving agency report documents in connection with this protest on September 22, 2020. See 4 C.F.R. § 21.2(a)(2).

Our Office has consistently stated that the fact that a reevaluation of proposals after corrective action varies from the original evaluation does not constitute evidence that the reevaluation was unreasonable, since it is implicit that a reevaluation can result in different findings and conclusions. See *Marcola Meadows VA LLC*, B-407078.2 *et al.*, Jun. 4, 2013, 2013 CPD ¶ 141 at 8. In this regard, our Office has recognized that it is not unusual for different evaluators, or groups of evaluators, to reach different conclusions and assign different scores or ratings when evaluating proposals, since both objective and subjective judgments are involved. *MILVETS Sys. Tech., Inc.*, B-409051.7, B-409051.9, Jan 29, 2016, 2016 CPD ¶ 53 at 7.

The agency explains that the initial evaluation utilized a scoring method that “started from the top score and only adjusted down based on weaknesses.” AR, Tab 70, Final SSD at 3. During the first corrective action, the new TEC concluded that this approach “did not leave room to adjust the score up based on strengths or significant strengths.” *Id.* For this reason, the TEC utilized a new scoring method that began “with a middle score for each factor or subfactor for meeting the Government’s baseline requirements . . . then adjusted the score up or down depending on the evaluation criteria.” *Id.* The agency states that this revised scoring method was responsible for much of the change in technical scores assigned to these proposals. See AR, Tab 87, Decl. of TEC Chair at 6-7; COS at 17-18.

DevTech argues that the record shows the evaluation was unreasonable because the agency did not adequately explain why each of the evaluations changed. As the protester correctly notes, we have found that, under certain unique circumstances, an agency is obligated to explain the reasons why an evaluation changed during corrective action. See *eAlliant, LLC*, B-407332.6, B-407332.10, Jan. 14, 2015, 2015 CPD ¶ 229 at 10. In *eAlliant, LLC*, we found that where an SSA was personally involved with reviewing proposals and affirmed specific conclusions about an offeror’s proposal, the SSA was obligated to reconcile or explain in the award decision why that evaluation differed so starkly from prior evaluation conclusions she had personally affirmed. *Id.* at 11-12.

Here, USAID explains that the initial evaluation of technical proposals was conducted by a three-member TEC, and the cost realism evaluation was conducted by a contract specialist. COS at 2; AR, Tab 23, Initial TEC Evaluation at 23. Those evaluations, and the initial cost evaluations, were reviewed by the first contracting officer, who was the SSA for the first award. COS at 2. The second evaluation of technical proposals, which took place in response to DevTech’s first protest (B-418273), was conducted by a new TEC, which was comprised of two new TEC members and the original TEC chair, and a different contracting specialist. COS at 2, 17; AR, Tab 42, Second TEC Evaluation at 18. This second evaluation was also reviewed by the first contracting officer, who was the SSA for the second award. COS at 3.

The third and final technical evaluation was conducted by the TEC that was responsible for the second evaluation. Those findings were reviewed by the current contracting officer, who was also the SSA for the award challenged here. *Id.* at 3-4. The

contracting officer also states that she was “responsible for conducting and documenting an independent evaluation of both companies’ cost proposals in accordance with Section M.3 (Tab 4) of the RFTOP.” *Id.* at 4. The contracting officer further states that she did not review the evaluations that were prepared for the prior two rounds of corrective action. *Id.* at 18 (“[A]s the new [contracting officer], I reviewed the TEC’s second corrective action (third evaluation) consensus memorandum . . . without knowledge of the details of the prior evaluations.”).

Because the contracting officer for the award challenged here was not involved with the first two award decisions, we find no basis to conclude that the circumstances here are the same as those in *eAlliant, LLC*. We therefore find no basis to conclude that the third award decision was defective because it did not provide an explanation for why the final evaluations and award decision by the contracting officer differed from the prior evaluations that were relied upon by the first contracting officer for the first two award decisions. See *MILVETS Sys. Tech., Inc., supra*. We therefore deny this protest argument.

Technical Proposal Evaluation

DevTech argues that USAID unreasonably evaluated the protester’s and awardee’s proposals under each of the five non-cost evaluation factors. Protest at 21-31. As discussed above, we find no merit to the protester’s arguments that the changes that occurred over the course of the three evaluations rendered them inherently improper. Apart from the changes to the evaluations, the protester argues that the final evaluations are unreasonable. We conclude that none of these arguments provide a basis to sustain the protest, and address a representative example.

DevTech challenges the assignment of a weakness to its proposal under the technical approach evaluation factor. Protest at 23-24. As relevant here, the solicitation stated that proposals would be evaluated based on the following criteria:

- A. Offeror will be evaluated by the extent to which they convincingly demonstrate the technical requirements and an ability to achieve the outcomes and related tasks leading to the achievement of objectives in the [statement of work (SOW)] in a sustainable and innovative manner.
- B. Offeror must demonstrate a clear understanding of the relevant challenges, needs, and opportunities that exist in order to assist the Asia Bureau in achieving the goals of the [Indo-Pacific Strategy] in a dynamic political and budget environment and across a diverse region.
- C. The Technical Approach will also be assessed based on the extent to which the approach demonstrates innovation and systems thinking and is likely to encourage self-reliance of local institutions and engage the private sector.

RFTOP at 48.

The SOW required offerors to provide services that address two “components”:
“Component 1: Technical expertise, including strengthened understanding of leading practices and tools,” and “Component 2: USAID Operating Unit and Partner Country Support.” *Id.* at 13-14. As relevant here, the component 2 requirement stated the following:

Component 2: USAID Operating Unit and Partner Country Support
The contractor must provide, at the initiative of the Asia Bureau or the request of USAID field missions or other operating units, specialized or rapid in-field support, so as to give missions access to state-of-the-art services and to take advantage of the technical oversight and leadership that the Asia Bureau can offer. Support will be in the technical subject areas described in [the solicitation] and may include current situational analysis, reform recommendations, and implementation. Support may be provided to USAID missions or to host-country counterparts.

Id. at 14.

DevTech’s proposal stated that it addressed the requirements for component 2 through “an illustrative field request” that explained “how IPOP, implemented by the DevTech Team, can assist a USAID Mission and government counterparts, through an informed and collaborative approach and tried and tested tools and expertise, to assess, design, and implement solutions to a particular and important development issue in an [Indo-Pacific] country.” AR, Tab 15, DevTech Technical Proposal at 17. The proposal also stated that a second, “more abbreviated illustrative case” is used to “demonstrate how IPOP can use a market-friendly approach to project assistance, especially through private sector engagement and [blanket activity announcement/adaptive market actor agreement].” *Id.*

USAID assigned DevTech’s proposal the following significant weakness under the technical approach factor during the corrective action in response to the first protest (B-418273):

In its proposal, [DevTech] chooses to use the method of using two country examples to demonstrate how it would implement IPOP. The Pacific Islands example on page 16 is extremely brief and not fulsome, and thus does not demonstrate the technical requirements and an ability to achieve the outcomes and related tasks leading to the achievement of objectives in the SOW. For example, the Pacific Island case study does not sufficiently discuss the types of technical approaches that one might expect for a potential energy program under IPOP. Thus, because a substantial portion of the technical proposal relies on the use of only two case examples to illustrate the goals, outcomes, and specific activities for IPOP projects, the technical section is lacking evidence to support the

overall approach that would lead to successful project implementation. The case study of Laos (on pages 9 through 15) alone is not sufficient to demonstrate [DevTech's] ability to achieve the tasks across a diversity of Indo-Pacific countries.

AR, Tab 42, Second TEC Evaluation at 7.

During the agency's second corrective action, in response to DevTech's second protest (B-418273.2), the agency identified the same concern in the protester's proposal, but concluded that it merited a weakness, rather than a significant weakness. The revised evaluation was as follows:

In its proposal, [DevTech] chooses the method of using two country examples to demonstrate how it would implement IPOP. However, one of these two case studies, the Pacific Islands case study on page 16, does not sufficiently discuss the types of technical approaches that one might expect for a potential energy program under IPOP. Because a substantial portion of the technical proposal relies on the use of only two case studies to illustrate the goals, outcomes, and specific activities for IPOP projects, and only one case study is acceptable, the technical section lacks evidence to support the overall approach that would lead to successful project implementation. The case study of Laos (on pages 9 through 15) alone is not sufficient to demonstrate [DevTech's] ability to achieve the tasks across a diversity of Indo-Pacific countries. As such, [DevTech] does not convincingly demonstrate an ability to achieve the outcomes and related tasks to achieve the objectives of the SOW thereby representing a flaw in the proposal that increases the risk of unsuccessful contract performance.

AR, Tab 63, Third TEC Evaluation at 7-8.

DevTech argues that the weakness was unreasonable because its proposal "contains substantial detail explaining how it will support USAID in a way that will lead to successful project implementation." Protest at 19. Specifically, the protester contends that table 1 of its proposal addressed the concerns raised in the weakness. *Id.* As the agency notes, however, table 1 of the protester's proposal addressed component 1 of the SOW requirements, rather than component 2. AR, Tab 87, Decl. of TEC Chair at 15 (*citing* AR, Tab 15, DevTech Technical Proposal at 12).

DevTech also argues, generally, that "the illustrative case studies further demonstrate that DevTech is aware of and understands the specific problems and challenges that these countries face, including natural disasters, financial sector crises, deficits, revenue shortfalls, inconsistent spending reporting, increased debt, among others." Protest at 19. The protester, however, does not specifically dispute the agency's conclusion that the second case study, which concerned an energy program in the Pacific Islands, failed to sufficiently discuss the types of technical approaches that

would be expected for a potential energy program under IPOP. AR, Tab 87, Decl. of TEC Chair at 16. Similarly, the protester does not specifically dispute the agency's conclusion that the first case study, which concerned only Laos, did not "demonstrate [the protester's] ability to achieve the tasks across a diversity of Indo-Pacific countries." AR, Tab 63, Third TEC Evaluation at 7-8. On this record, we conclude that DevTech's disagreement with the agency's assignment of a weakness to its proposal does not provide a basis to sustain the protest.

Cost Realism Evaluation

DevTech argues that USAID unreasonably evaluated the realism of the protester's and awardee's proposed costs. As discussed above, we find no merit to the protester's arguments that the changes that occurred over the course of the three evaluations were unreasonable. Apart from the changes to the evaluations, the protester argues that the final evaluations are unreasonable. For the reasons discussed below, we sustain the protest based on concessions by the agency of errors in the evaluation of the protester's proposal, as well as other areas of the evaluation that are not supported by the record.

When an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, the offeror's or vendor's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.404-1(d), 16.505(b)(3); *AECOM Mgmt. Servs., Inc.*, B-418467 *et al.*, May 15, 2020, 2020 CPD ¶ 172 at 4. Consequently, the agency must perform a cost realism analysis to determine the extent to which the offeror's or vendor's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1); *see Noridian Admin. Servs., LLC*, B-401068.13, Jan. 16, 2013, 2013 CPD ¶ 52 at 4. An agency is not required to conduct an in-depth cost analysis, or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. *See Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8; *see FAR 15.404-1(c)*. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonable; a protester's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest. *Imagine One Tech. & Mgmt., Ltd.*, *supra* at 14-15.

USAID's final cost realism evaluation made upward adjustments of \$4,589,734 to DevTech's proposed costs, which changed the proposed cost from \$34,680,464 to \$39,270,198. AR, Tab 70, Final SSD at 10; Tab 16, DevTech Cost Proposal at 6. The agency made upward adjustments of \$2,354,884 to IDG's proposed costs, which changed the proposed cost from \$26,989,682 to \$29,344,566. AR, Tab 70, Final SSD at 11; Tab 20, IDG Cost Proposal at 10. This final evaluation resulted in a difference of \$9,925,632.

DevTech's Cost Realism Adjustments

USAID acknowledges that its evaluation of the realism of DevTech's proposed costs was flawed with respect to the calculation of costs for one of DevTech's proposed subcontractors. COS at 18; Agency Response to GAO Questions, Dec. 1, 2020 at 8-10. The agency states that correction of these errors results in a downward adjustment to the protester's evaluated costs of \$3,124,767. Agency Response to GAO Questions, Dec. 1, 2020, at 8.

Next, DevTech challenges upward adjustments to its proposed costs in the following areas: (1) addition of an information systems officer; (2) addition of an economic policy expert; (3) addition of a mid-level business enabling expert; (4) addition of a mid-level labor economist; (5) adjustment of the chief of party salary; and (6) adjustment of the contract manager salary. Comments at 53-55 (*citing* AR, Tab 66, Final DevTech Cost Realism Evaluation at 7-11). The total value of the adjustments was \$569,378. *Id.* We agree with the protester that the agency's responses to the protester's arguments do not clearly explain the basis for the adjustments, and we therefore cannot conclude that they are reasonable. For example, as the protester notes, the agency's explanation that full-time support from an information systems officer was necessary based on the contracting officer's experience with similar projects, fails to demonstrate that it was a requirement under the terms of the solicitation or how the agency found that IDG's proposal included a similar level of staffing. See *id.* at 53-54; COS at 20; AR, Tab 66, Final DevTech Cost Realism Evaluation at 10. We therefore recommend that the agency reevaluate and adequately document these items.

With regard to the remainder of the protester's challenges to the evaluation of its proposal, we find no basis to sustain the protest, and address a representative example. DevTech argues that USAID unreasonably added four positions for its proposed home office costs: financial analyst, accountant, procurement specialist and contract specialist. Comments at 54. We find no merit to this argument.

The agency states that these positions were added because:

1. None of these positions were included in DevTech's cost proposal.
2. DevTech did not state in [its] cost narrative that (a) these duties would be assumed by individuals already proposed on the project or (b) the company would absorb the costs associated with these positions and not bill the project.
3. Home office support is critical to successful project implementation and reduces the risk of financial mismanagement and potential contractual issues.

AR, Tab 66, Final DevTech Cost Realism Evaluation at 11. The addition of these four positions resulted in an upward adjustment to the protester's proposed costs of \$235,598. *Id.* at 11-13.

The protester does not dispute the agency's finding that these positions were required and that its proposal did not include them. See Comments at 54. Instead, the protester argues that the agency's evaluation was unreasonable because IDG proposed a lower level of home office staffing as compared to the protester, and the agency did not make adjustments to the awardee's level of effort to account for this difference. *Id.* The agency's evaluation of the awardee's proposal, however, concluded that IDG's costs for home office support did not require adjustment for the following reason: "It is IDG's practice to directly bill Home Office Support Staff for time in the field and for specific technical scopes of work under activities. IDG will provide a full team of home office backstop support at no direct cost." AR, Tab 67, Final IDG Cost Realism Evaluation at 4. We find no basis to sustain the protest based on the protester's disagreement with the agency's judgment.

IDG's Cost Realism Adjustments

DevTech argues that the agency unreasonably evaluated the realism of the awardee's proposed costs for project management. The agency's initial evaluation found that IDG's proposed costs were "[o]verall" realistic despite a finding that the proposed costs were not realistic based on the following concern: "There is only one project manager proposed and the proposed LOE is very low (40 days each year). As multiple projects will likely run concurrently, this is not enough project management support." AR, Tab 24, Initial Cost Realism Evaluation at 4.

The agency's final evaluation of IDG's proposed costs during the corrective action in response to DevTech's second protest (B-418273.2) again identified this issue and increased the level of effort to 100 days per year. AR, Tab 67, Final IDG Cost Realism Evaluation at 8. The protester contends that the agency's evaluation was unreasonable because, even with this adjustment, IDG's proposed level of effort for project management is significantly lower than the 1,300 days per year proposed by the protester. Comments at 46. The protester contends that the agency should have adjusted IDG's proposed costs upward by \$1 million to account for the difference. *Id.* at 47.

In response to the protest, the agency contends that, although the agency's final cost realism adjustment adjusted IDG's level of effort to 100 days per year, IDG's proposal in fact shows that it will provide 237 days per year for its program management staff, and that this was a realistic level of effort. AR, Tab 87, Decl. of TEC Chair at 42. We agree with the protester that the citations provided by the agency do not show how the agency's response to the protest calculated this amount, or why it differed from the amount stated in the contemporaneous evaluation. See *id.* We therefore sustain the protest on this basis.

In sum, the agency concedes an error in the evaluation of DevTech's proposed subcontractor costs that should have resulted in a downward adjustment of \$3,124,767. We also agree with DevTech that the record does not clearly support the agency's failure to adjust IDG's proposed costs for project management, which DevTech contends should have resulted in an approximately \$1 million upward adjustment to IDG's costs. We further agree that the record does not clearly support upward adjustments to DevTech's proposed labor costs in the amount of \$569,378. The combined effect of these cost adjustments results in a potential downward adjustment to DevTech's evaluated costs of \$3,694,145, and a potential upward adjustment of IDG's evaluated costs of approximately \$1 million. Based on these potential adjustments, the difference between the offerors' evaluated costs would be reduced from \$9,925,632 to \$5,231,487. We therefore sustain the protest on this basis.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that USAID conducted unequal discussions with IDG and that the agency's cost realism evaluation was unreasonable. We further conclude that DevTech was prejudiced by these errors because, but for the agency's failure to conduct discussions and properly evaluate costs, the protester would have had a substantial chance of receiving the award.

We recommend that the agency conduct meaningful discussions with the offerors and permit them to submit revised proposals. The agency should evaluate the revised proposals consistent with this decision, and make a new award decision. We also recommend that the agency reimburse the protester's costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel