United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Kathpal Technologies, Inc.; Computer & Hi-Tech Management, Inc.

File: B-283137.3; B-283137.4; B-283137.5; B-283137.6

Date: December 30, 1999

Robert M. Nutt, Esq., for Kathpal Technologies, Inc., and Edward J. Tolchin, Esq., Fettman, Tolchin & Majors, for Computer & Hi-Tech Management, Inc., the protesters.
Terry Hart Lee, Esq., Department of Commerce, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under a solicitation for the award of multiple indefinite-delivery, indefinite-quantity, government-wide acquisition contracts for information technology services and products, the procuring agency improperly excluded the protesters' technically acceptable offers from consideration for award based upon the ratings of a single technical subfactor without considering price or evaluating the complete proposals under all of the solicitation factors.

2. In not allowing technically acceptable offerors to make oral presentations as part of their technical proposals, agency acted inconsistently with the solicitation provision that all offerors would be afforded the opportunity to make oral presentations.

DECISION

Kathpal Technologies, Inc. and Computer & Hi-Tech Management, Inc. (CHM) protest the rejection of their proposals under request for proposals (RFP) No. 52-SAAA-9-00010, issued by the Department of Commerce for the award of government-wide acquisition contracts, referred to as the Commerce Information Technology Solutions (COMMITS) program. Kathpal and CHM contend that Commerce did not evaluate their complete technical and price proposals before eliminating their proposals from the competition.

We sustain the protests.

The RFP, issued as a total small business set-aside, provided for the award of multiple indefinite-delivery, indefinite-quantity contracts to provide a "full range of information technology" resources (services and products). The RFP contemplated awards in three functional areas: information systems engineering (ISE); information systems security (ISS); and systems operations and management (SOM). RFP § C.1. The statement of work described generally the resources that could be ordered under each of the functional areas. RFP § C.2. Offerors were informed that they could offer services in one or more of the functional areas, but that each offer for a functional area must be a separate proposal. RFP § L.6.

The RFP also provided that a maximum number of contracts to be awarded had not been established, but that the agency would award a reasonable number of contracts considering such factors as maintaining a sufficient number of contractors to allow for adequate task order competition; avoiding unecessary and burdensome contract administration; and ensuring that all contractors have an opportunity to receive a meaningful level of task order work.[1] RFP § M.1. The RFP also stated that the maximum cumulative value that could be awarded to all contractors combined was $1.5 billion. RFP § B.2.

The RFP provided for award, without discussions, on a cost/technical tradeoff basis, and stated the following evaluation criteria for award:

Non-Price Factors
1. Past Performance a. Quality Recognition/Certifications (QRC) b. Past Performance Management (PPM)
2. Team Composition
Price Factors
1. Realism
2. Reasonableness

RFP §§ M.2.b, M.2.f, M.3.a. The past performance factor was stated to be significantly more important than the team composition factor. Within the past performance factor, the QRC subfactor was stated to be significantly more important than the PPM subfactor. Each of the non-price factors was stated to be more important than the price factor, and together the non-price factors were stated to be significantly more important than the price factor. RFP § M.3.b.

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[1] While a maximum number of contracts to be awarded was not established, the agency's "goal" was to award 36 contracts--12 contracts in each functional area. Declaration of Contracting Officer, Oct. 25, 1999, at 5.

Regarding the QRC subfactor, the RFP stated that the agency would evaluate the quality, relevance and currency of the offerors' recognition or certification. In this respect, the RFP informed offerors that more evaluation weight would be given for international or national quality performance awards, such as the Malcolm Baldridge National Quality Award or the President's Quality Award, and for international and national quality certifications, such as ISO 9000 or Carnegie Mellon University's Software Engineering Institutes Capability Maturity Level certifications. The RFP also provided that "[w]hile important, less evaluation weight will be given for local and regional awards." Id. Offerors were instructed to identify the award or certification and date received, to provide the criteria used by the issuing organization for the award or certification, and to provide a copy of the actual award or certification. RFP § L.8.

Regarding the PPM subfactor, the RFP stated that the agency would evaluate an offeror's past performance in the management of complex information technology service efforts in the functional area proposed, and that:

> [t]he evaluation will focus on the management tools and techniques applied to previous efforts and the results achieved. Special emphasis will be placed on the application and use of performance and customer satisfaction metrics.

RFP § M.3.b.

Offerors were requested to complete an Oral Past Performance Reference List (RFP attach. J-8); "[t]his reference asks the offeror in the oral presentation to focus on the management tools and techniques applied to previous efforts and the results achieved, including the application and use of performance and customer satisfaction metrics." RFP § L.8. For this part of the offerors' proposals, the RFP also requested that the offeror prepare a two-page executive summary of the content of the offeror's planned oral presentation, attach a copy of intended oral presentation slides, and complete a team composition form.[2]

Detailed instructions were provided for the oral presentation, which was to be limited to 1 hour. Offerors were informed that "[t]he COMMITS evaluation will make maximum use of oral presentations in the evaluation for award of the COMMITS contracts." Id. Although offerors were not restricted as to what they could present, the RFP "strongly encouraged" offerors to address a number of "recommended presentation topics," including the QRC subfactor ("[t]he presentation should provide the Government with a clear understanding of the significance of the award or quality certification") and the PPM subfactor ("the government is interested in

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[2] Offerors were informed that only those slides that were actually presented at the oral presentation would be evaluated by the agency. RFP § L.8.

understanding both the selected quality metric as well as actual performance against the metrics"). Id. The RFP further provided that it would not engage in discussions, as defined by Federal Acquisition Regulation (FAR) Part 15, at the oral presentations.

The RFP stated that it was the agency's "intention" to provide each offeror with an opportunity to participate in oral presentations. In addition, the RFP stated that the government reserved the right to conduct a "voluntary down-select," whereby the agency would "suggest to Offerors that they should drop out of the competition" and "[t]he Offeror must make the business decision as to whether to continue in the competition." RFP § M.1.

With respect to the basis for award, offerors were informed as follows:

> Award will be made to the responsible and technically acceptable Offeror(s) whose proposal (including information from the oral presentation) provides the greatest overall value to the Government, price and technical factors considered. Best value for the purpose of COMMITS, means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement. In making this evaluation, the Government is more concerned with obtaining superior management and technical skills than with making an award to the Offeror with the lowest labor prices.

RFP § M.2.b. The RFP also stated that:

> contract award decisions in each functional area's category will be determined based on the Government's evaluation of each Offeror's complete proposal submission and oral presentation with respect to the following:
>
> (1) Offerors not responding to any one or more of the factors or sub-factors identified in this solicitation shall be disqualified from futher consideration.
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> (2) The Government's evaluation of the first two selection factors (i.e., Past Performance and Team Composition) shall be accomplished separately from the evaluation of the Offeror's pricing.

RFP § M.2.a.

Although Commerce anticipated receiving only 40 to 60 proposals in response to the RFP, it actually received over 200 proposals, including those of Kathpal and CHM.[3] Agency Report, exh. 4A, Memorandum for Source Selection Authority (SSA) concerning Clarification and Streamlining of Proposal Evaluation Guide and Processes 1 (May 28, 1999) and exh. 8, Source Selection Report, ¶ 1.0. Because the agency believed that it would be impossible to invite all offerors to make oral presentations, it decided to limit oral presentations to only the "most competitive offerors." Agency Report at 4. The co-chairs of the source selection evaluation board (SSEB) then "screened" all proposals against the evaluation criteria to determine the "greatest number of proposals that [would] permit an efficient competition among the most highly rated proposals." Agency Report at 5; Declaration of SSEB Co-Chair, Oct. 21, 1999, at 4.

In performing this review, the SSEB chairs assigned letter ratings (from A+ to C-) under the two past performance subfactors and either a "+" or "-" under the team composition factor. Agency Report, exh. 4A, Memorandum for SSA concerning Clarification and Streamlining of Proposal Evaluation Guide and Processes 1 (May 28, 1999). No narrative explanations for these ratings were prepared, as was originally contemplated by the proposal evaluation guide. Id.; Agency's Post-Hearing Comments at 2.[4] An initial screening matrix was prepared for each functional area that ranked offerors according to their relative ratings under the QRC subfactor; this document also noted each offeror's rating under the PPM subfactor and team composition factor and each offeror's average loaded hourly labor rate.[5] Hearing exh. 1, Initial Screening Evaluation. The contracting officer reviewed the offerors' average loaded labor rates for realism and reasonableness; all of the offerors'

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[3] Kathpal submitted an offer only under the ISE functional area, while CHM submitted proposals under all three functional areas. Because of the similarity of the issues raised by Kathpal and CHM and given our disposition of the protests, we refer only to the agency report and exhibits submitted in the Kathpal protest, except as where otherwise noted.

[4] At the agency's request, an informal hearing was conducted to hear argument from counsel concerning the protest record. Testimony was also received from one of the SSEB chairs and the contracting officer.

[5] The agency originally redacted the pricing information from the Initial Screening Evaluation document provided to the protesters and the General Accounting Office. Agency Report, exh. 6, Initial Screening Evaluation (redacted). The agency believed the information was not relevant, because price was not considered in determining which offerors would be allowed to make an oral presentation. Agency's List of Documents to be Produced, Oct. 20, 1999, at 2; Hearing Testimony of SSEB Co-Chair. The unredacted copy of the document was provided, at our request, under the protective order at the hearing.

average rates were determined to be reasonable. Declaration of Contracting Officer, Oct. 25, 1999, at 7; Agency's Post-Hearing Comments at 5.

For each functional area, the SSEB chairs recommended, based only upon the offerors' QRC subfactor ratings, a cut-off that would provide for a "sufficient, high-quality competition."[6] Agency Report, exh. 8, Source Selection Report, ¶ 4.0. As an example, for the ISE functional area, the agency received 125 proposals and 25 proposals were rated as B+ or better under the QRC subfactor. Hearing exh. 1, Initial Screening Evaluation. The SSEB chairs briefed the two SSAs (who were acting jointly) concerning the results of the initial screening and recommended to the SSAs that only those offerors that received a B+ or higher under the QRC subfactor be permitted to make an oral presentation. Although the SSEB chairs informed the SSAs of the significance of the letter ratings, there was no discussion of the specifics underlying each firm's rating. Hearing Testimony of SSEB Co-Chair. The SSAs agreed with the SSEB's recommendations.[7] Id. No documentation was prepared memorializing the SSAs' consideration of, or decision to, limit the competition to those offers that were highest rated under the QRC subfactor. Id. Price was not considered in determining which offerors would be invited to make an oral presentation. Id.; Declaration of Contracting Officer, Oct. 25, 1999, at 5; Declaration of SSEB Co-Chair, Oct. 21, 1999, at 5.

Kathpal's and CHM's proposals under the ISE area received B ratings under the QRC subfactor, and, on that basis, the protesters were not invited to make oral presentations. The following chart shows the three lowest ranked offers (based upon the QRC subfactor ratings) that were within the group selected to make an oral presentation and Kathpal's and CHM's proposals under the ISE area:

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[6] For the ISE and SOM areas, the cut-off point was those offers that were rated B+ or higher under the QRC subfactor, and for the ISS area, it was those offers that were rated B+ or higher or that were found to contain at least two recognitions or certifications that each merited a B rating. Declaration of SSEB Co-Chair, Oct. 21, 1999, at 5.

[7] The agency states that, prior to the final determination to exclude an offeror from an opportunity to provide an oral presentation, the SSEB chairs reviewed the entire technical proposals of the offerors that were not selected to make oral presentations to ensure that the initial screening evaluation results were correct. The SSEB chairs concluded that the screening results for the QRC subfactor were correct, and this was reported to the SSAs. Hearing Testimony of SSEB Co-Chair; Source Selection Documentation for the ISE Functional Area at 2-3.

Offeror	QRC subfactor	PPM subfactor	Offeror composition	Average labor rate
Offeror A	B+	C	+	$[DELETED]
Offeror B	B+	C	+	$[DELETED]
Offeror C	B+	C	+	$[DELETED]
CHM	B	B	+	$[DELETED]
Kathpal	B	B	-	$[DELETED]

Hearing exh. 1, Initial Screening Evaluation, at 1.[8]

The proposals of those offerors that were selected to provide an oral presentation then received a de novo evaluation by the complete SSEB, which, as a group, did not have access to the earlier screening evaluation. Agency Report, exh. 8, Source Selection Report, ¶ 4.0. Upon completion of each oral presentation, the SSEB contacted the offeror's past performance references to confirm proposal claims concerning past performance management. Id. Evaluation worksheets were prepared that summarized the significant aspects of these proposals and identified any notable strengths or weaknesses.[9] Id. The SSEB prepared an evaluation report that was presented to the SSAs for their consideration.

In reviewing the evaluations of the respective proposals, the SSAs considered for award only those offerors whose proposals were considered highly competitive, that is, those offerors that were selected to make oral presentations. Source Selection Documentation for the ISE Functional Area at 12-13.[10] For example, in the ISE area, out of the 25 proposals considered for award, the SSAs selected for award 22 proposals as representing the "best value" to the government. Id. Price was not a discriminator in this source selection process. Specifically, the SSAs stated that:

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[8] CHM's proposals in the ISS and SOM areas similarly have higher ratings under the other technical factor and subfactor and lower pricing than those of many of the offerors that received the opportunity to make oral presentations. Hearing exh. 1, Initial Screening Evaluation, at 4-6.

[9] The agency destroyed these documents and other evaluation records around the time Kathpal's protest was filed. Letter from Agency to GAO (Nov. 1, 1999).

[10] This was also true for the other two functional areas. Source Selection Documentation for the ISS Functional Area at 6-7; Source Selection Documentation for the SOM Functional Area at 10.

> [o]fferors' prices were evaluated simultaneously with their technical proposals, for price reasonableness and realism. Even though all offerors' prices were evaluated, the SSA(s) considered only prices for the offerors that were deemed highly competitive (i.e., attended oral presentations). Prices with an average labor rate between $50-$100 range were generally considered equal and not a discriminator for this analysis. The prices of the contract awardees are within this range. The SSA believes that all of the plusses associated with the QRCs, performance metrics and team composition far outweigh the lower hourly average rates of other offerors.

Id. at 13.[11]

Award selections were announced, and agency-level protests were filed. After the agency-level protests were denied, these protests to our Office followed.

The crux of the protesters' objections to the agency's conduct of this procurement is that Commerce failed to consider the protesters' entire proposals in determining that Kathpal and CHM should be removed from the competition without making oral presentations, that is, Commerce did not consider the offerors' proposed pricing and complete technical proposals.

Commerce responds that the agency evaluated the offerors' complete proposals in determining which offerors were "highly competitive" and would be allowed to make oral presentations. Agency's Post-Hearing Comments at 3. The agency acknowledges, however, that only the offerors' ratings under the QRC subfactor were a factor in determining which offerors were "highly competitive" and that:

> [p]rice did not become a discriminator at the point at which the most highly rated offerors were determined. Consequently, at the initial screening phase, there was not the traditional price/technical trade-off.

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[11] A statement identical to this one appears in the source selection documentation for the other two functional areas. See Source Selection Documentation for the ISS Area at 6-7; Source Selection Documentation for the SOM Area at 10. Of the 33 proposals received in the ISS area, only 8 were considered "highly competitive" and all received awards; although labor rates ranged from about $50 to $96 per hour, the offered prices were considered equal. Source Selection Documentation for the ISS Area; Hearing exh. 1, Initial Screening Evaluation, at 4. Similarly, of the 78 proposals received in the SOM area, 18 were considered "highly competitive" and 17 were selected for awards; price again had no apparent impact in the best value determination. Source Selection Documentation for the SOM Area; Hearing exh. 1, Initial Screening Evaluation, at 5-6.

Id. The agency argues that it was not required to consider price in its initial screening of proposals because at this stage the agency was only establishing which offerors would make an oral presentation. Id. at 4. In this regard, the agency contends that because Kathpal's and CHM's proposals were not considered "highly competitive," the protesters could not have been prejudiced by the agency's failure to provide the protesters with an opportunity to make an oral presentation.

At the outset, we appreciate the difficulty faced by Commerce in needing to evaluate more than 200 proposals, particularly given the RFP requirement for oral presentations. The agency may well have believed that the way it conducted this procurement showed that it was implementing recent reforms in the procurement system. It is true that government-wide acquisition contracts, such as the COMMITS program, are largely the creatures of recent procurement reform. See Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5124, 110 Stat. 642, 684 (1996). It is also true that recent reforms have given contracting agencies greater discretion to more effectively and efficiently conduct procurements. For example (and of some relevance here, as discussed below), Congress has given agencies the authority to limit the number of offers included in a competitive range to the greatest number that would permit an efficient competition. See 41 U.S.C. § 253b(d)(2); FAR § 15.306(c). Our Office believes that the government procurement system can benefit substantially from the increased flexibility inherent in recent procurement reform. In this procurement, however, we are persuaded, as explained below, that the agency's conduct violated applicable law and regulations in several significant ways.

First, we disagree with the agency that it could ignore price in its initial screening evaluation. Cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals.[12] 41 U.S.C. § 253a(c)(1)(B) (1994); FAR § 15-304(c)(1); S.J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ __ at 3. This requirement means that an agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government. SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33 at 7.

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[12] Commerce apparently believes that the use of the term "competitive proposal" in FAR § 15.305(a), which implements 41 U.S.C. § 253b(a), means that the agency need only consider the price and technical evaluation rankings of "highly competitive" proposals. See Agency Report on CHM Protest at 7-8. However, the term was added by the Competition in Contracting Act of 1984 (CICA), in place of "negotiation" simply to "eliminate the . . . noncompetitive connotations associated . . . with past terminology." See 1984 U.S.C.C.A.N. 2109, 2110. Thus, in the context of these CICA and FAR provisions, we view the term "competitive proposals" to mean all proposals submitted in response to an RFP that provides for competition.

Here, despite the agency's attempts to portray the initial screening evaluation as only establishing which offerors would make oral presentations, the record shows that the initial screening resulted in technically acceptable offers, including those of Kathpal and CHM, being eliminated from any consideration for award. That is, the SSAs considered for award only those offerors that were deemed "highly competitive" as a result of the initial screening, which included only offerors that were allowed to make oral presentations. Source Selection Documentation for the ISE Area; Source Selection Documentation for the ISS Area; Source Selection Documentation for the SOM Area. Indeed, the agency acknowledges in its report on Kathpal's protest that "it was reasonable for the agency to eliminate protester from the competition" on the basis of its B rating under the QRC subfactor. Agency Report at 8; see also Agency Report on CHM Protest at 8 (CHM's proposal excluded from further consideration because the proposal was not evaluated as highly competitive). Accordingly, it is clear that the agency's determination in the initial screening evaluation that an offeror was not highly competitive and would not be invited to make an oral presentation actually meant that those proposals were eliminated from consideration for award.

It is also unrebutted, as described above, that, apart from assessing the realism and reasonableness of the offerors' loaded labor rates, the agency did not meaningfully consider price in its decision to eliminate the protesters and others from the competition. Rather, the only consideration in determining which offers were highly competitive was the rating that offers received under the QRC subfactor. Although agencies have considerable discretion in determining the appropriate method for evaluation of cost or price, they do not have the discretion to eliminate technically acceptable offers from competition without meaningful consideration of price. SCIENTECH, Inc, supra, at 7. In this regard, we have found that merely assessing the reasonableness of proposed pricing does not satisfy this obligation to consider price in evaluating proposals.[13] Id.

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[13] Not only did Commerce fail to consider price in its elimination of technically acceptable offers from the competition, but it also improperly did not consider price in its ultimate source selection decisions. Rather, the SSAs' consideration of price in their source selection decision was limited to merely noting that all offerors' proposed pricing was considered fair and reasonable. See, e.g., Source Selection Documentation for ISE Area at 2. The SSAs then determined, without supporting explanation, that "[p]rices with an average labor rate between $50-$100 range were generally . . . equal and not a discriminator [in the source selection] analysis." See id. at 13. We fail to see from our review of the record any reasonable basis upon which the SSAs could conclude that offerors' proposed rates were essentially equal and entitled to no further consideration given the huge variation in rates. In this regard, we note that the effect of the agency's decision to treat all the rates as essentially "equal," despite the fact that some rates were nearly twice as high as others, resulted in a source selection that so minimized the potential impact of price as to make it a

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Next, we find, consistent with the protesters' arguments, that Commerce failed to evaluate the protesters' technical proposals in accordance with all of the stated evaluation criteria. As described above, the RFP provided that technical proposals would be evaluated under two evaluation factors--past performance and team composition--and that the past performance factor consisted of two subfactors--QRC and PPM. RFP § M.3. Here, however, Commerce considered only the proposals' ratings under the QRC subfactor in determining which offers would be further considered for award. The failure to consider offerors' proposal ratings under all the stated evaluation criteria in eliminating technically acceptable proposals from the competition is not reasonable and violates the statutory requirement that proposals be evaluated under the factors stated in the solicitation. 41 U.S.C. § 253b(a); Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et. al., Dec. 20, 1993, 94-1 CPD ¶ 3 at 37, 41.

We recognize that Commerce believed that limiting competition to only those offers that were considered "highly competitive" was justified because "of the number of highly qualified proposals received" and because it "had sufficient competition in each of the functional areas." See Agency Report at 7. Given the large number of proposals received, limiting the burden of proposal evaluation was a sensible approach. Once it realized how many firms were interested in competing, the agency could have elected to amend the solicitation to eliminate the oral presentation (and perhaps even one of the evaluation factors or subfactors) from the initial evaluation. If Commerce had decided to conduct discussions, it could have (after evaluation of the proposals under all factors, including price) limited the competitive range for purposes of those discussions more strictly than in the past. Specifically, pursuant to 41 U.S.C. § 253b(d)(2), as implemented in FAR § 15.306(c), the agency could have limited the competitive range (otherwise comprised of all the most highly rated proposals) for purposes of efficiency, which could have been a sensible way to handle the large number of proposals received here.[14]

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nominal evaluation factor. This, too, violates the statutory requirement that agencies give significant consideration of cost or price in their evaluation and source selection decisions. 41 U.S.C. § 253a(c)(1)(B); Electronic Design, Inc., B-279662.2 et al., Aug. 31, 1998, 98-2 CPD ¶ 69 at 8.

[14] FAR §15.306(c)(2) provides that the limitation of the number of offers contained in the competitive range for purposes of efficiency is not permitted unless the solicitation advises offerors that this might be the case (which this RFP did not do).

Commerce could not, however, properly limit the competition as it did here. It could not eliminate proposals from consideration without evaluating them under all of the solicitation's evaluation criteria, including price. Moreover, since the agency did not establish a competitive range, it never had occasion to take advantage of the possibility of limiting the competitive range for the sake of efficiency. See Source Selection Documentation for the ISE Area at 13.

Another concern that we have with the agency's evaluation is that the agency did not document its evaluation results in detail sufficient to allow for review of the reasonableness of its decision. FAR § 15.305(a) requires the agency to document the relative strengths, deficiencies, significant weaknesses, and risks supporting the proposal evaluation. Here, however, Commerce in its initial screening evaluation did not document the relative strengths and weaknesses of proposals, but only assigned letter ratings and either a "+" or "-" rating without narrative explanation.[15] Where an agency fails to document or retain evaluation materials, it bears the risk that there will be inadequate supporting rationale in the record for the evaluation and source selection decision and that we will not conclude that the agency had a reasonable basis for the decision. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

The protesters also protest that the RFP effectively promised offerors that they would be permitted to make an oral presentation as part of their technical proposals. We agree. The RFP clearly contemplated that oral presentations would be an important part of the technical proposals.[16] Offerors were encouraged to address the

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[15] Commerce did have internal guidance for how evaluators were to assign these ratings. See Agency Report, exh. 4A, Memorandum for SSA concerning Clarification and Streamlining of Proposal Evaluation Guide and Processes, at 4-5.

[16] Commerce contends that, after proposals were submitted and prior to announcing its source selection decision, offerors were on notice (from the agency's computerized milestone schedule) that the agency would not be providing all offerors an opportunity to make oral presentations, so that the protests should be dismissed as untimely. Specifically, the agency sent the following notice to all offerors:

> It was our intent to allow each Offeror an opportunity to participate in oral presentations. In accordance with Section M.1, we have decided not to exercise the right to conduct a "voluntary down-select" based on such factors as the number of proposals submitted, the quality of those proposals, adherence to Sections L and M, and the likelihood that the Offeror's proposal has a reasonable chance for award. We also note that we may not award a contract to everyone who made an oral presentation. We anticipate that the Source Selection Authority will

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past performance subfactors in their oral presentations and limited the information that offerors could provide in their written proposal regarding the PPM subfactor. RFP § L.8. Offerors were also informed that the agency would make maximum use of oral presentations in the agency's evaluation of proposals, id., and that the agency's source selection decisions would be based upon offerors' complete proposals, including oral presentations. RFP § M.2. While the RFP provided for a "voluntary down-select" under which offerors would be encouraged not to make oral presentations, it left the final decision as to whether to make the oral presentation within the business judgment of the offerors.[17] The failure to allow offerors with technically acceptable proposals to make an oral presentation is significant because the RFP indicated that it was an important part of the technical proposal, the technical proposals of those offerors which made oral presentations were evaluated de novo to determine which would receive awards, and none of the offerors which did not give oral presentations was selected for award.

Despite its many errors in this procurement, Commerce contends that the protesters were not prejudiced because the protesters' offers were found not to be "highly competitive" and were thus, in Commerce's view, not in line for award. As explained

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> decide to begin the award process or continue with oral presentations by the end of May.

Agency Report, exh. 7, COMMITS Milestone Schedule. Contrary to Commerce's arguments, this notice did not provide the protesters with a basis for protest. The notice itself states that the agency may continue with oral presentations, and in fact the record establishes that additional oral presentations were scheduled after the date of the notice. Supplemental Declaration of SSEB Co-Chair, Nov. 18, 1999, at 8. We therefore conclude that the protesters did not have a basis to complain about the agency's actions until they learned that their proposals had been rejected without their having been given the opportunity to make oral presentations, which was the date they learned of the agency's source selection (which they did timely protest).

[17] Commerce effectively abandoned the voluntary down-select provision in the RFP, eliminating the proposals from consideration for award rather than allowing the offerors the option of continuing in the competition--essentially, the agency made the down-select involuntary. We note that a voluntary down-select procedure can be used in evaluating responses to a presolicitation notice in an advisory multi-step process; in that process, an agency advises a potential offeror, after evaluation of its response to a presoliticitation notice, that it is unlikely to be a viable competitor, but the offeror retains the right to participate in the resultant acquisition. FAR § 15.202.

above, however, the determination as to which offers were considered "highly competitive," was made without consideration of offerors' complete proposals, including oral presentations and price, and therefore the agency does not have a reasonable basis to conclude that Kathpal's or CHM's proposals would not be in line for award.[18] Moreover, we note that both protesters' proposed average loaded hourly labor rates were lower than those of most of the offers that were considered "highly competitive." We find that, but for the agency's actions, Kathpal and CHM would have had a substantial chance of receiving an award. See SCIENTECH, Inc., supra, at 8.

In sum, we find that Commerce, contrary to applicable statutes and regulations, eliminated the protesters' technically acceptable proposals from consideration for award without considering price and without considering the protesters' complete technical proposals.[19]

We recommend that Commerce either afford all technically acceptable offerors, including Kathpal and CHM, an opportunity to make an oral presentation or amend the RFP to properly inform offerors that oral presentations will not be considered as part of offerors' proposals. If Commerce so amends the RFP, revised proposals should be solicited from all offerors. In either event, Commerce should reevaluate all proposals against the solicitation criteria, adequately document the relative strengths and weaknesses of the proposals, and select awardees through written source selection decisions that meaningfully consider all of the evaluation criteria, including price. If as a result of this new evaluation and source selections, offerors that previously received contracts are not selected for award, those contracts should

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[18] Commerce also suggests that Kathpal's ratings under QRC should have been lower than evaluated. See Supplemental Declaration of SSEB Co-Chair, Nov. 18, 1999, at 2. We are unwilling to give much weight to this late reevaluation, which was prepared in the heat of the adversarial process. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In any event, the agency continues to ignore Kathpal's lower price and other technical evaluation ratings.

[19] Kathpal and CHM also contend that the agency unreasonably evaluated their proposals under the QRC subfactor. In addition, after the hearing in this protest and based upon documents first made available by Commerce after the hearing, the protesters complained that their proposals had been unequally evaluated by the agency, that is, that similarly situated offerors were treated more favorably under the QRC subfactor. Given our determination that the proposals were not evaluated in accordance with the evaluation criteria and our recommendation to re-open the competition, we do not consider these issues here. In performing a new evaluation, the agency should ensure that it creates and preserves documentation adequate to permit meaningful review of the evaluation.

be terminated. We also recommend that the protesters be reimbursed the reasonable costs of filing and pursuing the protests, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protesters certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Comptroller General
of the United States