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Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: OneSource Energy Services, Inc.

File: B-283445

Date: November 19, 1999

Kenneth D. Brody, Esq., David, Brody & Dondershine, for the protester.
J. Randolph MacPherson, Esq., Sullivan & Worcester, for Park Tower Management Ltd., the intervenor.
Scarlett D. Grose, Esq., General Services Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evaluation of protester's past performance is unreasonable where it is based upon inaccurate information and improperly considered the protester's legitimate exercise of rights under its contract to be evidence of negative past performance.

2. Agency unreasonably evaluated the protester's staffing as unacceptable based upon mechanical reliance on an undisclosed government minimum staffing estimate where the protester proposed [DELETED] fewer than the agency's estimate and supplemented this staffing level with [DELETED] positions, and where there is no evidence that the agency considered the protester's technical approach.

DECISION

OneSource Energy Services, Inc.[1] protests the award of a contract to Park Tower Management Ltd. under request for proposals (RFP) No. GS-02P-97-CTC-0207, issued by the General Services Administration (GSA), for mechanical operations and maintenance services at two buildings in New York, New York. OneSource contends that GSA improperly evaluated its past performance and proposed staffing, and that the agency failed to conduct meaningful discussions with the firm.

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[1]During this procurement, OneSource changed its name from ISS Energy Services, Inc. Protest at 1 n.2.

We sustain the protest.

As amended, the RFP, issued August 22, 1997, was to obtain mechanical operation and maintenance services at the United States Court House and the Silvio Mollo Federal Building in New York, New York. RFP amend. 4, § B, at 6-7. The contract contemplated a 36-month base period with two 36-month option periods.

The RFP provided for award on a best-value basis to the most advantageous proposal, considering the technical evaluation factors and price. See RFP § M, at ¶ 4. The technical evaluation factors listed in the RFP in descending order of importance were "Experience and Past Performance Providing Similar Mechanical Operation and Maintenance Services," worth 60 percent, and "Operation and Maintenance Approach," worth 40 percent. Price, which was to be evaluated for reasonableness, was said to be less important than the two technical factors. Id. at ¶ 2; Agency Report, exh. 2, Source Selection Plan, at 5.

Regarding the past performance factor, the RFP explained that "[e]xperience is considered to be similar if the offeror provided mechanical operation and maintenance services for a courthouse, office building or hospital of at least 15 stories with at least 400,000 gross square feet." RFP Part C, at ¶ 1. To evaluate past performance, GSA utilized a reference check form that required a building manager familiar with the offeror's performance at a referenced building to answer several specific questions regarding the offeror's past performance. For example the questions included "Was the firm able to handle irate and demanding tenants in a diplomatic fashion?" "Would you hire the firm again to provide the same services?" and "How would you rate the firms overall performance?" Agency Report, exhs. 5, 6.

With regard to the operations and maintenance approach factor, offerors were required to provide a detailed approach, including the approach for the operation of the building equipment and the handling and response to tenant service calls and complaints; a preventive maintenance schedule and methodologies to be used in meeting maintenance requirements; a description of the type and number of staff and supervision to carry out the offeror's maintenance plan, daily and periodic work, building operation, tenant service calls and complaints, and emergency responses; and a quality control program. RFP Part C, at ¶ 2.

On October 22, 1997, nine proposals were received in response to the RFP. On July 22, 1998, amendment No. 4 to the RFP added the Mollo building to the scope of work. Offerors submitted revised proposals by August 14. The source selection evaluation board (SSEB) evaluated the proposals and placed eight, including Park Tower's and OneSource's, in the competitive range. The SSEB rated Park Tower's proposal with the highest technical point score of 840 points, while OneSource's proposal was third highest ranked with a point score of 587 points. See Agency Report, exh. 9, Initial SSEB Report, at 4.

OneSource's past performance was downgraded because of certain negative comments from the building managers contacted at two of the four buildings considered in the evaluation of OneSource's past performance.[2] See id. at 14-15. OneSource's operations and maintenance approach was downgraded for a variety of reasons, most particularly OneSource's proposal of [DELETED] non-supervisory engineers/mechanics, which the SSEB deemed "insufficient to operate and maintain both buildings in a satisfactory manner" because "[i]n order to satisfactorily meet the demands of the building, a minimum staffing of eleven (11) non-supervisory engineers/mechanics are considered to be necessary." Id., exh. 12, SSEB Evaluation of Response to Amendment No. 4, at 2.

Discussions were held with the competitive range offerors in September 1998. During the discussions with OneSource, GSA noted OneSource's proposed staffing level and advised OneSource that "[t]his appears to be insufficient to operate and maintain both buildings in a satisfactory manner." Id., exh.13, Discussion Letter from Contracting Officer to OneSource 4 (Sept. 17, 1998). GSA also identified certain of the negative comments regarding OneSource's past performance at two of its buildings. Specifically, GSA advised OneSource that at the JFK building it had "some problems handling irate and demanding tenants in a diplomatic fashion," "[t]here were conflicts that existed between GSA and [OneSource] . . . regarding whether certain architectural repairs were above or below the reimbursable threshold of $2,000," and "GSA felt [OneSource] often stretched or inflated its estimate of architectural repairs to exceed the $2,000 threshold, at which point the Government becomes responsible."[3] Id. at 2. GSA also advised that at the 312

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[2]OneSource's past performance history included the James M. Hanley Courthouse, Syracuse, New York; the Peter Rodino Building, Newark, New Jersey; the John F. Kennedy Federal Building, Boston, Massachusetts (JFK building); and the United States Courthouse, 312 North Spring Street, Los Angeles California (312 building). Id. at 14. GSA was the agency responsible for all of these buildings. One-Source's past performance at the Rodino and Hanley buildings was considered "very good"; the negative comments at issue here were related to the JFK and 312 buildings.

[3]Regarding the JFK building, the reference check form indicates that GSA spoke with a building management technical specialist on February 9, 1998. Agency Report, exh. 5, JFK Building Reference Check Form. He worked at the JFK building for the entire 3-year term of the OneSource contract at that building. Id., exh. 22, JFK Building Reference Check Form, at 3. In addition to the above, the reference check form indicates that he answered "no" to the question about whether he would hire the firm again to provide the same services, but rated OneSource's overall performance as "good." Id., exh. 5, JFK Building Reference Check Form.

building OneSource "had some difficulties at the beginning of its contract with the timely performance of preventive maintenance."[4] Id.

Best and final offers (BAFO) were received from the competitive range offerors on October 22, 1998. In response to the past performance discussions, OneSource expressed "great surprise that GSA made the noted comments" regarding OneSource's past performance at the JFK building, and stated that the work outside the $2,000 threshold "was clearly outside the scope of [OneSource's] base contract," and that while there may have been a number of discussions about the $2,000 threshold, GSA was not obligated to accept One-Source's pricing, and "[i]n each and every case, the discussion was concluded and the proposal approved within terms acceptable to GSA." Id., exh. 15, OneSource BAFO, at 5. OneSource requested GSA to contact the building manager under OneSource's contract to confirm its positive past performance at the JFK building. Regarding the 312 building, OneSource acknowledged having some problems at the onset of this contract, but explained that it had made "great strides" to resolve the issues. Id. In response to the staffing discussions, OneSource proposed to supplement its staff of [DELETED] full-time engineers/mechanics by adding [DELETED] at the United States Courthouse building and an [DELETED] at the Mollo building during the cooling season. Id. at 4, 10.

In light of OneSource's responses, the Chairman of the SSEB contacted the building management technical specialist of the JFK building, who had provided the previous reference, a second time on October 29, 1998. The memorandum documenting this contact reflects that this individual reported as follows:

> [H]e had problems with [OneSource] regarding inflated estimates, yet he rated their overall performance as 'good' . . . . [OneSource's] building mechanics/engineers performed good, they did their job as expected. However, the company was out to take advantage of GSA. [OneSource] made GSA responsible for the cost of repairs by inflating and stretching estimated cost of repairs, thereby exceeding the $2,000 threshold. They would claim that equipment were deficient and made GSA replace them. They charged GSA for everything. [OneSource] management was difficult to work with. GSA . . . was elated when [OneSource's] contract expired. . . . [OneSource] has a bad reputation in the [DELETED] area. They had several private sector and

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[4]For the 312 building, the form reflects that GSA contacted the building manager, on February 2, 1998. Id., exh. 5, 312 North Spring Street Building Reference Check Form. His initial reference check form, which contained the above mentioned negative comment, rated OneSource's overall performance on this building as "very good."

> government contracts in the past, but no one would use them and they are no longer in the [DELETED] area.

Id., exh. 17, Contact Record (Oct. 29, 1998).

GSA contacted the building manager on the OneSource contract for the JFK building on February 8, 1999.[5] The reference check form for this contact indicates that this individual provided a more favorable evaluation of OneSource's performance at the JFK building than did the building management technical specialist.[6] The building manager for the first part of OneSource's contract for the JFK building also specifically responded to the building management technical specialist's specific negative comments regarding OneSource's performance at the JFK building by indicating that, while there was "some 'head butting'" and that OneSource did have "a little more combative negotiation style," he regarded OneSource's actions to be what would generally be expected of a contractor. This building manager attributed his differences in perception from the building management technical specialist's perception of the same events to be a matter of age and personality. See id., exh. 22, JFK Building Reference Check Form and Attachment.

On November 9, 1998, the Chairman of the SSEB contacted the building manager of the 312 building again. The memorandum documenting the contact reflects that the building manager advised that OneSource in the first one and a half year of the contract went through four project managers, that the first three were found to be unqualified, but that the fourth was qualified and services improved. The building manager also advised that similar circumstances occurred regarding the hiring of heating ventilation and air conditioning (HVAC) mechanics.[7] Id., exh. 19, Contact

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[5]This individual was the principal building manager at the JFK building during the first year and a half of the contract.

[6]For example, the building manager on the OneSource contract for the JFK building answered "yes" to the question regarding whether he would hire the firm again to provide the same services and rated OneSource's overall performance under the contract as "very good." Id., exh. 22, JFK Building Reference Check Form.

[7]The record also contains a revised reference check form completed on the 312 building, dated November 5, where the responses from the building manager changed for several questions. For example, he changed his overall rating of OneSource's performance from "very good" to "fair." Compare id., exh. 5 at 312 Building Reference Check Form with id., exh. 18, 312 North Spring Street Building Revised Reference Check Form.

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Record (Nov. 9, 1998). OneSource was afforded the opportunity to respond to these concerns, id., exh. 20, Letter from GSA to OneSource (November 19, 1998), and OneSource responded that it did not disagree with GSA that this contract "has been less than a model account for our corporation," but explained that "its contract performance has not been all negative" and elaborated on some of the particular mitigating factors regarding its performance of the 312 building contract. Id., exh. 21, Letter from OneSource to GSA 1 (Nov. 28, 1998).

Park Tower's BAFO at an evaluated price of $20,227,801.50 again received the highest technical score of 820 points. OneSource's BAFO at an evaluated price of [DELETED] was scored at 500 points, again making it the third highest-ranked proposal.[8] See id., exh. 27, SSEB Final Source Selection Evaluation Report, July 8, 1999, at 4. The SSEB considered and documented Park Tower's past performance to be "very good" and its operations and maintenance approach to be "good." Id. at 32-35.

The SSEB reported that, while OneSource's past performance was considered "very good" on one evaluated building, its performance on two other buildings was considered to be "poor," such that its past performance warranted a marginal rating.[9] Id. at 10-13, 36. The SSEB then detailed most of its reported conversations and reference checks regarding the negative aspects of OneSource's past performance, and gave greater weight to the building management technical specialist's views over the more positive comments of the building manager on the OneSource contract for the JFK building because of the building management technical specialist's greater familiarity with OneSource's past performance. The SSEB also noted that OneSource "did not specifically address [during discussions] the charges of inflated estimates."[10] Id. at 10. The SSEB found OneSource's past performance history "to be

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[8]The second highest scored BAFO with a point score of 747 points was higher priced than both OneSource's and Park Tower's BAFOs.

[9]In evaluating OneSource's BAFO, the SSEB excluded the Hanley building because at 14 stories with 387,000 square feet of space it failed to meet the RFP's minimum 15-story, 400,000 square-foot criteria for consideration. Although OneSource argues that the SSEB should not have excluded this building from consideration because it essentially met the criteria, the SSEB could properly exclude the building from consideration on this basis.

[10]The record contains no examples of the alleged inflated estimates.

troubling," such that "[t]here is a lack of confidence" that OneSource "can perform well under this RFP." Id. at 36.

The SSEB also reported that it used the "Craft Package" analytical tool and historical data to determine that a minimum of 11 non-supervisory engineers/mechanics were required to perform this contract and that "[a]n offeror proposing a contract staff less than the aforementioned, is considered to be inadequate for the proper operation and maintenance of both buildings." Id. at 6-7. The SSEB considered OneSource's operations and maintenance approach marginal because its staffing level was "insufficient," inasmuch as OneSource proposed only [DELETED] full-time engineers/mechanics with [DELETED], which is fewer than the required 11 full-time non-supervisory engineers/mechanics. Id. at 14-15, 37. The SSEB also stated that it "believes the use of [DELETED] is not conducive to providing the highest possible level of quality services" because they "do not have a sense of attachment and ownership to the facility" and because "they have to spend time adjusting and learning about the building and the equipment." Id. at 14.

The SSEB thus found OneSource's proposal to be marginal under the two technical evaluation factors. The SSEB report then performed a cost/technical tradeoff between Park Tower's highest-rated proposal and OneSource's lower priced proposal, and determined that given Park Tower's strengths and OneSource's marginal ratings under the two technical evaluation criteria, the significant "technical difference warrants the expenditure of additional funds due to the additional benefits the Government will receive from Park Tower." Id. at 36.

On July 13, the source selection official concurred with the SSEB report. In so doing, he read only the SSEB reports and source selection plan, and did not read the proposals or the reference checks. Hearing Transcript (Tr.) at 191, 199-207, 222. On July 30, award was made to Park Tower. This protest followed.

OneSource contends that GSA's evaluation of its proposal under the past performance and operations and management approach technical factors was unreasonable. In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP's stated evaluation criteria. Mechanical Contractors, S.A., B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121 at 3. Based upon our detailed review of the record, including the transcript of the hearing, we conclude that GSA unreasonably evaluated OneSource's proposal under both technical evaluation factors.

As previously noted, GSA downgraded OneSource's proposal for its past performance at the JFK building based upon the evaluation by the building management technical specialist that indicated that OneSource lacked the ability to handle irate and demanding tenants and that OneSource allegedly inflated estimates to exceed the $2,000 threshold for repairs under its contract. However, the

testimony provided by the building management technical specialist at a hearing conducted by our Office did not support the SSEB's evaluation in this regard.

For example, the building management technical specialist testified that he did not recall advising the SSEB that OneSource systematically inflated estimates and he believes the SSEB misinterpreted his remarks about the nature of the disputes with OneSource regarding the $2,000 threshold.[11] Tr. at 251-52, 266-68. The building management technical specialist further testified that he informed the SSEB that, while OneSource and the government disagreed frequently on the cost of repairs and he considered OneSource to be "combative," most of the time there were acceptable resolutions. See Tr. at 252-54, 268-70. Also, the building management technical specialist testified that there were other statements in the evaluation record attributed to him that were inaccurate, such as that he said that he was elated when the OneSource contract expired and that he said that OneSource had a bad reputation in the [DELETED] area. See Tr. at 265-66, 306-08. Further, the building management technical specialist testified that the reference check form mischaracterized his answer to the question as to whether he would contract with OneSource again; that this statement pertained to the contracting instrument, which at the JFK building was flawed because of poorly drafted specifications that led to the disputes between OneSource and GSA; and that under appropriate terms he would contract with the company again for similar services because their actual contract performance was good.[12] Tr. 298-308. We find the testimony of the building management technical specialist is credible.

Finally, while the SSEB report concludes that OneSource's past performance at the JFK building was "poor," the fact is (as noted by the SSEB report) that the building management technical specialist and the building manager on the OneSource contract for the JFK building concluded that OneSource's overall contract performance at the JFK building was "good" or "very good." Id., exhs. 5, 22, 27 (at 11); see Tr. at 272.

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[11]Under the circumstances, the comment in the final SSEB report that OneSource "did not specifically address the charges of inflated estimates" cannot be considered to be a fair comment, given that OneSource denied any basis for this charge during discussions. Agency Report, exh. 27, SSEB's Final Source Selection Evaluation Report, at 10.

[12]The building management technical specialist's testimony is consistent with the statement on his reference check that there were "numerous" contract disputes with OneSource because the "specs were at fault." Agency Report, exh. 5. The statement regarding the specifications being at fault was not reported in the final SSEB report.

The record also evidences that the SSEB report statement that the building management technical specialist reported that OneSource "has had some problems handling irate and demanding tenants in a diplomatic fashion at the [JFK] building," Agency Report, exh. 27, Final Source Selection Evaluation Report, at 10-11, may have exaggerated the building management technical specialist's actual concerns. In this regard, the reference check form reports with regard to OneSource's ability to handle irate and demanding tenants in a diplomatic fashion that the building management technical specialist stated "yes to most tenants; difficult to some." Id., exh. 5. The building management technical specialist testified that "a large portion of the time . . . what [OneSource] had to do in dealing with tenants was fine." Tr. at 296-97. The building management technical specialist further explained that the OneSource contract was undertaken during an $80 million project that made dealing with tenants more complicated, that certain tenants were difficult to please in this context, and that there were some union considerations in interacting with the OneSource's employees. Tr. at 280-82, 293-98. Here too, we find the testimony of the building management technical specialist is credible.

Thus, it appears that the primary problem that GSA had with OneSource's past performance at the JFK building was that firm's exercise of rights under the $2,000 threshold provision of its contract. While it is appropriate, in evaluating past performance, to consider a contractor's "combative" attitude, we have recognized that absent some evidence of abuse of the contract disputes process, contracting agencies should not lower an offeror's past performance evaluation based solely on it having filed claims; firms should not be prejudiced in competing for other contracts because of their reasonable pursuit of such remedies in the past. See Nova Group, Inc., B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56. Here, there is no persuasive evidence of record that OneSource's interpretation and use of the $2,000 threshold provision of the contract lacked merit or that they adversely affected the performance of the contract, which was otherwise considered good or very good.[13] The protester and the building management technical specialist agree that there were contract disputes because of the way the contract specifications were written. The building management technical specialist also testified that the disputes involving the responsibility for repair costs usually were resolved at terms acceptable to the government. Tr. at 269-72. GSA has not presented any further evidence that would show that OneSource's position with regard to the $2,000 threshold provision was frivolous or that OneSource abused or unfairly manipulated the contract.

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[13]The only other noted problem concerned OneSource's ability to diplomatically handle irate and demanding tenants, which is of course an appropriate area of past performance concern by the agency, so long as it is reasonably evaluated.

As indicated, while the source selection official relied upon the SSEB final report to make his award decision, the record evidences that that report did not fairly or accurately portray OneSource's past performance at the JFK Building. Instead, the record suggests that OneSource's past performance at that building was at least "good" and that the primary agency concern was OneSource's legitimate exercise of its rights under the contract, which is not an appropriate reason to downgrade OneSource's past performance. While we believe the SSEB appropriately portrayed and rated OneSource's performance on the 312 building,[14] the record demonstrates that the evaluation of OneSource's JFK Building performance played a significant role in the SSEB's conclusion that OneSource's past performance was marginal, and that this rating, with its supporting discussion, was part of the cost/technical tradeoff justifying the selection of Park Tower's significantly higher priced proposal.[15]

We also conclude that the agency's evaluation of OneSource's proposal as marginal under the operations and maintenance approach factor solely for not proposing 11 full-time, non-supervisory engineers/mechanics was unreasonable.

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[14]While we do not take issue with the SSEB's evaluation and consideration of the building manager's comments on OneSource's contract performance at the 312 building, we note that the building manager gave inconsistent evaluations regarding his experience with OneSource's performance, Agency Report, exhs. 5, 18, 19, and now regards OneSource as doing a "great job." See Tr. at 335. Since we otherwise sustain the protest and recommend that OneSource's past performance rating be reconsidered, the agency should ensure that OneSource's performance at the 312 building is accurately and properly evaluated.

[15]With its post-hearing comments, GSA has provided a brief declaration from the source selection official, in which he states that his award selection would have been the same, even if he had been aware of the building management technical specialist's further explanations, elicited during the hearing before our Office, of OneSource's performance at the JFK building. Agency Post-Hearing Comments attach. 1. We accord little weight to such post-protest judgments, which are prepared in the heat of the adversarial process, because they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Intellectual Properties, Inc., B-280803, Nov. 19, 1998, 98-2 CPD ¶ 115 at 7-8; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Here, the record shows that the agency had developed, but did not disclose to offerors, a minimum staffing estimate of 11 full-time non-supervisory engineers/mechanics necessary to perform this contract. While GSA advised OneSource during discussions that [DELETED] non-supervisory engineers/mechanics "appear[ed] to be insufficient," it did not state that 11 full-time non-supervisory engineers/mechanics was actually a minimum staffing requirement, and in response to GSA's generally expressed staffing concern, OneSource proposed to supplement its staff with [DELETED]. The agency then used the 11 staff minimum to determine that OneSource's staffing proposal of [DELETED] full-time non-supervisory engineers/mechanics plus [DELETED] was unacceptable, and did not otherwise consider OneSource's particular technical approach, except to state why the use of [DELETED] was not considered desirable. See Agency Report, exh. 12, SSEB Evaluation of Responses to Amendment No. 4, at 2 and exh. 27, SSEB Final Source Selection Evaluation Report at 6-7, 14, 37;
Tr. at 157-59, 178-81.

While an agency may rely on its own estimates of the staffing levels necessary for satisfactory performance when negotiating a fixed-price contract (such as to determine an offeror's understanding of requirements), absolute reliance on estimates can have the effect of arbitrarily and unfairly penalizing an innovative or unusually efficient offeror. Therefore, we have found that it is inappropriate to determine the acceptability of proposals by the mechanical application of an undisclosed estimate. Such an approach fails to assess whether a firm's proposed workforce is particularly skilled and efficient, or whether because of a unique approach, a firm could satisfactorily perform the work with different staffing than estimated by the agency. KCA Corp., B-255115, Feb. 9, 1994, 94-1 CPD ¶ 94 at 6-7.

Here, the record shows that the agency unequivocally determined, but did not disclose, that a minimum of 11 full-time, non-supervisory engineers/mechanics were required and that the staffing levels of offerors who proposed less than this number would be considered unacceptable. Indeed, OneSource's staffing was determined unacceptable and its operations and maintenance approach was therefore downgraded to the marginal level for failing to meet this minimum, even though OneSource's proposed staffing fell just short of this minimum and the record evidences that there were no other concerns with OneSource's approach. Since there is no indication that OneSource's particular technical approach was evaluated in making this determination, we do not find this evaluation reasonable.[16] In the

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[16]While we cannot find the agency's concerns about the use of [DELETED] unreasonable, this does not constitute an evaluation of OneSource's particular maintenance plan and how it would be staffed. There is no evidence that the SSEB evaluated these aspects of OneSource's operations and maintenance approach in assessing the acceptability of its proposed staffing level.

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alternative, if the 11-person staffing estimate was a minimum agency requirement irrespective of the technical approach of the offerors, it should have been specifically disclosed to OneSource during discussions. See Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101.

Thus, the record does not reasonably support OneSource's marginal past performance rating, and shows that OneSource's marginal rating for its operations and maintenance approach was unreasonably evaluated.

The protest is sustained.

We recommend that, consistent with this decision, the agency reevaluate proposals, reopen discussions if necessary, and make a new best-value determination.[17] We also recommend that OneSource be reimbursed for the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

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[17]In light of our recommendation, we need not address the protester's arguments concerning the propriety of the agency's best-value decision.