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Decision

Matter of: The Community Partnership LLC

File: B-286844

Date: February 13, 2001

Charles H. Carpenter, Esq., and Scott E. Fireison, Esq., Pepper Hamilton, for the protester.
Robert M. Anderson, Esq., and Matthew R. Keiser, Esq., U.S. Army Corps of Engineers, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly excluded submission from the competitive range in a procurement to select a developer to improve military housing pursuant to the Military Housing Privatization Initiative is denied where the record shows the evaluation was reasonable and consistent with the evaluation factors save for two challenged weaknesses, and where any agency error in these two areas did not prejudice the protester.

DECISION

The Community Partnership LLC (CP) protests the exclusion of its submission from the competitive range under request for qualifications (RFQ) No. DACA02-00-R-0002, issued by the Department of the Army, Corps of Engineers, to select a developer to improve the military housing at Fort George G. Meade, Maryland, pursuant to the Military Housing Privatization Initiative. CP primarily contends that the Army improperly evaluated its submission.

We deny the protest.

BACKGROUND

The Department of Defense (DOD) owns approximately 200,000 family housing units that require renovation or replacement. See Military Housing Privatization Web Site, <http://www.acq.osd.mil/installation/hrso/about.htm>. To improve housing more economically and more quickly than if only the traditional military construction approach were used, in 1996 Congress enacted legislation authorizing a 5-year pilot

program, the Military Housing Privatization Initiative, to allow private sector financing, ownership, operation, and maintenance of military housing.[1] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-06, § 2801 et seq., 110 Stat. 186 et seq., codified at 10 U.S.C. §§ 2871-2885 (Supp. IV 1998). In 1999, Congress expanded the definition of the types of entities eligible to participate in this program to include state or local governments and housing authorities of state or local governments. Pub. L. No. 106-65, § 2803, 113 Stat. 848 (1999).

The Army's pilot program under this initiative is the Residential Communities Initiative. The Army has assigned the procurement responsibility for each pilot installation, including Fort Meade, to the Corps of Engineers. The Corps issued this RFQ in May 2000 to select a developer to improve Fort Meade's military housing community.

Over the course of this long-term project, the developer is expected to upgrade existing housing and build new housing; transform existing housing areas into planned and integrated residential communities; provide ancillary supporting facilities; maintain positive relations with surrounding communities; and provide for the effective long-term, high-quality management and operation of the family housing inventory and ancillary supporting facilities. The developer will be expected to assume ownership of Fort Meade's family housing units and will be provided a long-term interest in the underlying land. The developer's return on the project is expected to come from developing, operating, and managing these housing units, and its main source of revenue will be rents paid by service members from their housing allowances. The developer will be responsible for all costs of the project and may be allowed to construct, maintain, and/or manage ancillary supporting facilities with the agreement of the installation. RFQ ¶ 1.1.

The Fort Meade project will be organized in two phases. During Phase 1, Project Planning, the developer will work with the Army to craft a Community Development and Management Plan (CDMP) that sets forth the terms of the developer's long-term relationship with the Army. The developer will be paid a fixed fee of $350,000 at the completion of Phase I. During Phase 2, Project Implementation, the developer will implement the CDMP. This solicitation concerns only the Phase I procurement.

Prospective developers were required to submit a two-part statement of qualifications. Part 1 was to contain information addressing the RFQ's minimum experience requirements, and Part 2 was to contain information addressing the RFQ's qualifications requirements. While the statement of qualifications was to contain sufficient detail to permit the agency to reach a reasoned judgment regarding

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[1] These authorities were extended from February 2001 to December 2004 by the National Defense Authorization Act for Fiscal Year 2001, Pub L. No. 106-398, § 2806.

the developer's minimum experience requirements and qualifications, submissions were limited to 50 single-spaced pages.[2] RFQ ¶ 4.1.

An evaluation team (ET) was to evaluate the submissions in two stages. During the first stage, all submissions were to be evaluated on the information provided regarding the minimum experience requirements. Only submissions that met these requirements were to be reviewed during the second stage of the process. RFQ ¶ 4.4. During that second stage, the ET was to evaluate the remaining submissions on the information provided regarding the qualifications requirements. The ET was to consider the following evaluation factors, listed in descending order of importance: experience; preliminary project concept; financial capabilities; organizational capabilities; financial return; past performance; and small business concerns as subcontractors. Each factor contained various elements and questions that were to be evaluated comprehensively to determine an overall factor rating. These overall factor ratings were to be used to analyze the developer's ability to plan and implement the project as a whole. The Army was to select the firm whose submission was most advantageous to the government and best demonstrated an ability to plan and implement the project. RFQ ¶ 4.0.

The Army planned to make award based on initial submissions, without providing prospective developers the opportunity to revise their submissions. RFQ ¶ 4.4.1. As a result, initial submissions were to contain all of the information developers thought the Army would need to make a selection decision. The Army might, however, contact developers to clarify certain aspects of their submissions or to correct clerical errors. Id. The Army also reserved the right to decide that discussions were necessary in order to allow the selected developers the opportunity to revise their submissions. In that event, the Army planned to establish a competitive range. RFQ ¶ 4.4.2 and app. at E-2, as amended by amendment No. 1. If the contracting officer determined that the number of proposals that would otherwise be in the competitive range exceeded the number at which an efficient competition could be conducted, the contracting officer might limit the number of proposals in the competitive range

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[2] In its comments, CP cites this page limitation as a basis for complaining that its submission should not have been downgraded under various alleged weaknesses for its failure to provide detail. Since CP was given a list of its alleged weaknesses as part of its debriefing, its failure to raise these allegations in its initial protest renders them untimely. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed no later than 10 days after the protester knew or should have known their bases. 4 C.F.R. § 21.2(a)(2) (2000). These regulations do not contemplate the piecemeal presentation or development of protest issues. Global Eng'g & Constr. Joint Venture, B-275999.4, B-275999.5, Oct. 6, 1997, 97-2 CPD ¶ 125 at 4. To the extent that the allegations are leveled at the page limitation itself, they would be timely only if filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

to the greatest number that would permit an efficient competition among the most highly rated proposals. Id.

The agency received [DELETED] submissions by the July 31 closing date. Based upon the first stage of the evaluation, the ET concluded that [DELETED] of the [DELETED] developers, including CP, satisfied the minimum experience requirements. The selection official agreed with this conclusion and the ET began the second stage of the evaluation process.[3] For each submission, the individual evaluators assigned each factor a rating of exceptional, acceptable, or unacceptable based upon findings of strengths and weaknesses. The evaluators then met to establish consensus ratings and overall adjectival and risk ratings.

[DELETED] submissions received consensus ratings of exceptional/low risk; [DELETED] was rated acceptable/low risk; [DELETED], including the submission from CP, were rated acceptable/medium risk; and [DELETED] were rated acceptable/high risk. The ET advised the contracting officer that discussions with the [DELETED] firms whose submissions were rated exceptional/low risk should enable the Army to distinguish additional significant strengths and weaknesses necessary to select the best-qualified developer, and recommended that the contracting officer establish a competitive range comprised of these three submissions. The ET recommended that the remaining [DELETED] firms be eliminated from the competition in order to increase efficiency pursuant to RFQ ¶ 4.4.2.[4]

After CP was notified of its exclusion from the competitive range, it requested and received a debriefing. As part of its debriefing, CP was given a list of the firm's consensus ratings and each of its assessed strengths and weaknesses. In its protest, CP primarily contends that the Army improperly evaluated its submission as to some of these alleged weaknesses. CP also contends that the Army improperly failed to engage in communications with the firm regarding its submission prior to establishing the competitive range.

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[3] One firm that was initially determined to have failed to meet the minimum experience requirements was subsequently reinstated into the competitive range for reasons not relevant here.

[4] Although a competitive range determination normally requires a consideration of price, see Meridian Management Corp., B-285127, July 19, 2000, 2000 CPD ¶ 121 at 4, any developer selected here was to be paid a fixed-fee of $350,000 at the completion of Phase I, so that price was not a discriminator at this stage.

DISCUSSION

In reviewing an agency's evaluation of proposals and subsequent competitive range determination, we will not reevaluate the proposals, but will examine the record to determine whether the documented evaluation was fair and reasonable and consistent with the evaluation criteria. Matrix Gen., Inc., B-282192, June 10, 1999, 99-1 CPD ¶ 108 at 3. Federal Acquisition Regulation (FAR) § 15.306(c)(1) states that, "[b]ased on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency . . . ." Agencies are not required to retain in the competitive range a proposal that is not among the most highly rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5. Here, the record leads us to conclude that while CP provided an acceptable submission, it was not included in the competitive range because its submission did not address the qualifications factors as well as the [DELETED] competitive range submissions and, as a result, was not among the most highly rated proposals. Matrix Gen., Inc., supra.

As a preliminary matter, in response to CP's document production requests, agency counsel advised that each individual evaluator updated his or her individual evaluation worksheet to reflect consensus discussions and discarded the draft or prior generation of the worksheet. CP complains that the destruction of these interim worksheets has had a material impact on the record.

Since a procuring agency has the responsibility to adequately document its source selection decision in order to demonstrate that it is not arbitrary, it is premature for an agency to destroy source selection documents prior to the award. Mar, Inc. et al., B-278929.2 et al., Sept. 28, 1998, 98-2 CPD ¶ 92 at 5 n.8. We recognize, however, that evaluators' individual notes and worksheets may or may not be necessary to determine the reasonableness of the agency's evaluation. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10. Our review of the surviving record shows that it affords ample basis upon which to determine the reasonableness of the agency's evaluation. The record contains a set of worksheets from each evaluator showing detailed and individualized analyses of the strengths and weaknesses of CP's submission; a detailed presentation made by the agency's real estate and financial consultants; the roll-up of CP's consensus strengths, weaknesses, and risks; and the ET's recommendations to the contracting officer regarding the competitive range determination. Moreover, during the course of the protest the agency submitted statements from agency personnel providing additional detail regarding the agency's contemporaneous conclusions. Such statements simply fill in previously unrecorded details and will generally be considered in our review of the rationality of selection decisions, so long as they are, as here, credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

CP is a development team comprised of three principal members: Archstone Communities, Keating Development Company, and the Housing Commission of Anne Arundel County (HCAAC). Archstone was to be responsible for leasing, management, operations, and real estate development; Keating was to provide development and construction services; and HCAAC was to provide overall leadership and funding mechanisms.[5] In the consensus evaluation, CP's submission was rated acceptable under each qualifications factor. CP contends that several of the numerous weaknesses assigned to its submission under four factors have no reasonable basis.[6] The record shows that CP is correct as to two challenged weaknesses but that the remaining challenged weaknesses are reasonably based.

Under the most important factor, experience, developers were required to provide a list of major development projects they and/or their principal members had undertaken, and to provide substantial additional detail for the five most recent projects relevant to the Fort Meade initiative. RFQ ¶ 4.3.1. The ET was to evaluate the extent to which the developer had demonstrated its experience with various aspects of the project.

CP's submission was downgraded because its experience with historic renovation was not residential, but commercial and administrative in nature. The RFQ specifically required the ET to evaluate the developer's experience with historic property treatment issues. RFQ ¶ 4.5.1. The record shows that the agency was concerned that the majority of CP's work with historic properties did not relate directly to the work required at Fort Meade, single-family detached homes. The agency found that only Keating had any depth of experience with historic properties, and that those properties were primarily commercially-oriented or high-rise residential properties, not single-family detached homes or townhouses.

In its protest, CP argued that one of its projects showed Keating had experience with historic residential units. As the agency notes, the project was a mixed-use, high-rise historic structure that included 283 luxury units. The Army states that it did not believe this project demonstrated recent experience relevant to the Fort Meade

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[5] The RFQ permitted submissions by development teams provided they committed to work with the Army as a single business entity and provided information on the team itself as a single business entity and on the team's principal members. RFQ ¶ 4.1.

[6] CP's protest did not challenge the reasonableness of the weaknesses assigned to its submission under the past performance, small business, or organizational capabilities factors. In addition, the agency report responded to CP's challenges to several other weaknesses and CP, in its comments, failed to rebut the agency's responses. We deem these challenges to have been abandoned. TMI Servs., Inc., B-276624.2, July 9, 1997, 97-2 CPD ¶ 24 at 4 n.3.

project, under which the developer was to renovate historic detached and low-rise units. CP's comments do not specifically rebut the Army's position, which we find reasonable. CP also argues that the Army failed to consider the historic renovation experience of an individual whose resume was included in its submission. As the Army explains, however, nothing in CP's submission, including either the cited resume or the information about this individual's firm, shows any experience with residential historic preservation. Contrary to CP's assertion, the agency is not required to make assumptions about the experience of a firm or an individual; it was CP's responsibility to ensure that it demonstrated the relevant experience.

CP's submission was also downgraded because Keating's experience seemed to be more of a commercial nature than a residential one, and its residential experience appeared to be mid-rise to high-rise condominiums, and not the low-rise single-family detached homes or townhouses at issue in this project. The RFQ required the ET to evaluate the developer's experience with large-scale residential development projects. RFQ ¶ 4.5.1.

In its protest, CP cites two projects as demonstrating Keating's experience with low-rise residential units. As the Army explains, both projects combined have only [DELETED] units; we are not persuaded they demonstrate the required experience with "large-scale" development projects. The record also confirms that one of the projects is not even clearly--from the small photograph in the submission--a low-rise project. CP's comments do not rebut the Army's contention, which we find reasonable.[7] The record shows that CP has failed to show that any of the challenged weaknesses under the experience factor are unreasonable, and CP did not even challenge the agency's conclusion that it failed to demonstrate experience partnering on long-term real estate projects, which the RFQ required. As a result, we have no basis to question CP's acceptable rating under the experience factor.

Under the preliminary project concept statement factor, developers were required to give the Army illustrative information about their overall vision, strategy, and approach to improving and maintaining the state of the military family housing

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[7] CP complained for the first time in its comments that the Army should not have downgraded its submission because Keating lacked experience other team members possessed. Since CP was on notice of its weaknesses at its debriefing, its failure to voice this complaint in its initial protest renders it untimely. CP's failure to fully utilize the specific information provided in the debriefing in drafting its initial protest renders several other later-raised allegations untimely as well. An offeror who receives specific information in its debriefing but ignores it when drafting its initial protest does so at its peril. Global Eng'g & Constr. Joint Venture, supra, at 4 n.2. In any event, since Keating was proposed to provide development and construction services for this project it was entirely appropriate for the Army to consider whether it demonstrated relevant experience.

community at Fort Meade. RFQ ¶ 4.3.2. The RFQ listed four specific areas to be evaluated. RFQ ¶ 4.5.2.

CP's submission was downgraded because, while the text of its submission indicated that the firm would make annual deposits to the [DELETED] through the development period, the firm's financial pro-forma--a financial statement covering expected income and expenses over the life of the project--did not show these deposits. In its protest, CP stated that Exhibit A of its pro-forma did show these annual contributions. The Army concedes that this is true, but points out that Exhibit C of the pro-forma shows a "0" on the line reserved for deposits into the [DELETED]. As a result, the Army appears to take the position that the submission was ambiguous in this regard. CP does not now dispute the existence of this ambiguity, and we have no basis to conclude that the agency's evaluation was unreasonable.[8]

CP's submission also was downgraded because the agency thought the firm was unclear in what it meant by the phrase, "front on its own 'close.'" We agree with CP that, in context, the agency should have been able to ascertain what the phrase meant. In discussing the types of housing it proposed for the project, CP's submission stated, "[DELETED]." Submission § 4.3.2 at 5. Several related definitions of the word "close" could have informed the agency's evaluation: "a narrow passage leading from a street to a court and the houses within or to the common stairway of tenements"; "a road closed at one end"; and "an enclosed area." Webster's Ninth New Collegiate Dictionary (1989) at 250. In view of the ready availability of these definitions, and in view of the context in which the phrase arises, we think the Army unreasonably downgraded CP's submission in this regard.

CP's submission was downgraded because the Army believed it was unclear what the $[DELETED] million of cost of issuance/reimbursement was in its submission. In its protest, CP argued that its submission plainly indicated that it proposed to finance the program with [DELETED] with estimated costs of issuance, and that it included those costs in its pro-forma along with the costs of reimbursing some predevelopment expenses. The agency explains that its underlying concern was not the derivation of the figures, but the benefit to the agency from these expenditures. The agency did not believe, for example, that the immediate expenditure of funds for development reimbursement was satisfactorily explained to show that it provided a benefit to Fort Meade. CP's comments provide no specific response to the Army's position, which we find reasonable.

Finally, CP's submission was downgraded because it considered some [DELETED] to be required to assure the success of its concept. The agency thought this might

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[8] CP does assert that the Army should have communicated with the firm to clarify the matter prior to establishing the competitive range, as discussed below.

not be possible with the realities of Fort Meade tenants. The ET was required to consider the extent to which proposed ancillary supporting facilities were incorporated into an overall development vision that sought to complement, and not compete with, business operations in the local community or on-post operations such as those run by the Army and Air Force Exchange Services (AAFES) or Defense Commissary Agency (DeCA.) RFQ ¶ 4.5.2.

CP argues that the Army misunderstood its submission to suggest that income from [DELETED] were a key to the financial success of the project, when the submission merely stated that the presence of these [DELETED] were key to the community ambiance that CP proposed to foster. We do not read the agency's concerns as associated with the financial success of the project. The RFQ advised developers that ancillary supporting facilities that competed with existing AAFES or DeCA facilities would not be allowed unless the appropriate body approved the plans. RFQ amend. 2, question and answer No. 30, and RFQ ¶ 2.1.1. Since CP stated that these [DELETED] were central to the success of its approach, and since the ability to include them was uncertain, we cannot conclude that the agency's concerns were unreasonable.

While CP has shown that one of the challenged weaknesses under the preliminary project concept factor was unreasonable--that concerning the phrase "front on its own close"--CP has not shown that any of the other challenged weaknesses were unreasonable. Moreover, CP did not challenge the reasonableness of the agency's conclusions regarding its failure to outline specifically how the Army was to share in the profits from the project or its failure to identify its approach beyond the procedural/administrative aspects. The agency has explained that these omissions of detail weighed heavily in evaluating this factor and CP has given us no basis to think its submission would have been rated exceptional absent this one weakness.

Under the financial capabilities factor, developers were required to submit audited financial statements, documentation demonstrating their capability to obtain financing and capacity to secure payment and performance bonds for a project of this size, and a written statement articulating the firm's strategy for financing the project on a long-term basis. RFQ ¶ 4.3.3. The RFQ listed two elements to be evaluated: whether the developer possessed the financial capability and institutional relationships necessary to weather temporary or near-term cash flow shortfalls, and whether the developer had a viable strategy for financing the project on a long-term basis which was supported by its capabilities. RFQ ¶ 4.5.3.

CP's proposal was downgraded because its submission provided no evidence of out-of-pocket equity from any of the three principal members; this lack of equity contribution by the principal members raised questions regarding the team's intent to stay in for the long term of the project. CP's submission proposed that the Army lease the land and transfer the housing units to it for a 50-year period. Submission § 4.3.3 at 1. The Army explains that one of the goals of this RFQ was to provide for

the effective long-term management and operation of the family housing inventory and ancillary supporting facilities. RFQ ¶¶ 1.1, 4.3.3, 4.5.3. The Army states that it viewed equity investment as an indication of the offeror's long-term commitment to the project since, when a real property owner contributes equity to a project, that owner is less likely to abandon the project should it become financially unattractive.

CP contends that the Army used its failure to provide any equity in this project as an unstated evaluation factor. We do not agree. First, the Army's underlying concern was not equity per se but the developer's long-term commitment to this long-term project. In addition to the RFQ's underlying goal of obtaining effective long-term management and operation of the housing inventory, the RFQ expressly requires the ET to evaluate whether a prospective developer can "structure, arrange, and manage the financing required for a large, complex, long-term development and operating project" under this evaluation factor. RFQ ¶ 4.5.3. There is no question but that the RFQ permitted the consideration of long-term commitment to the project, and CP has given us no basis to conclude that equity contributions are an unreasonable measure of this commitment. Moreover, even if the ET were evaluating equity contributions per se, the RFQ defined a principal member as "a team member with an identified ownership interest in the team's operation and related management responsibilities," RFQ ¶ 4.1, and defined ownership interest as, "[d]eveloper has contributed cash or other equity directly to the entity that controls the project and the risk of return of that amount contributed is directly affected by the success of the project." RFQ app. F. In our view, the ET was permitted to consider equity contributions in evaluating submissions.

CP does not dispute that none of its principal members proposed to contribute any equity for this project. Instead, CP cites the benefits its submission brings to the project as a result of partnering with HCAAC, a local state government housing entity, and asserts that HCAAC's long-term commitment to this project is beyond question.

The Army agrees that HCAAC might be committed to this project for the long term, but states that neither of the other two principal members, the "development arm" of the project, evidenced any such commitment. As the Army explains, HCAAC only provides "one leg to the three-legged stool." The Army states it was concerned that if the project became a financial failure, the local government entity incentive to remain in for the long term would not hold true for Archstone and Keating. While CP asserts that "there can be no doubt" that there are great benefits to be had from commitment to this project, and that there is no reasonable basis to conclude that any of the principal members is not fully committed to the project, we cannot conclude that the agency's concerns were unreasonable.

CP's submission was also downgraded because the agency believed its principal members did not appear to be able to weather temporary cashflow shortfalls. The agency also downgraded CP's submission due to concerns with Keating's financial

status, and thought it was unclear whether Keating's parent company would assume financial responsibility in the event Keating had cashflow shortfalls.

In its protest, CP argued that the agency had no basis to conclude that Archstone did not have the ability to weather a temporary cashflow shortfall. The agency responded by pointing out that the total cash on hand of all three principal members was insufficient given the magnitude of this project. CP has provided no specific rebuttal to the agency's position, which we find reasonable. CP also argues that the Army ignored what it had learned about the willingness of Keating's parent company to provide full credit support to its subsidiary. As evidence, CP provided an e-mail from a Keating employee to the Army which states that the parent company would provide this support. The record confirms, however, that while CP's submission contained financial statements from the parent company, it did not contain any affirmative statement from the parent company indicating its willingness to assume this support; there was no basis for the agency to infer that willingness.

Finally, CP's submission was downgraded because the interest rate proposed on its bonds appeared to be high given the fact that it intended to use bond insurance. In response to CP's argument that it was merely making a conservative projection about the bond rates for which it should not be penalized, the agency explains that it had no way to know that this was a conservative projection since the submission was silent on the matter. The Army states that, in the absence of an explanation, it assumed that this was CP's most likely scenario for the bond financing cost. CP asserts that it did not identify this as the most likely scenario, and complains that the agency was "significantly troubled by CP's projection of a conservative cost of financing." Supplemental Comments at 3. The record shows, however, that what actually troubled the agency was the fact that CP's proposed rates were high given the fact that CP intended to use bond insurance; the parties agree that bond insurance should lower the cost of interest. CP has provided us no basis to question the actual basis for the agency's concern.

Our review of the record shows that CP has failed to show that any of the challenged weaknesses under the financial capabilities factor are unreasonable. As a result, we have no basis to question CP's acceptable rating under this factor.

Under the financial return factor, developers were required to provide a written statement addressing the firm's range of expected rates of return, anticipated sources of capital, intent concerning the use of Army assets and resources, anticipated relationships between the firm's approach to reinvestment and its expected financial return for the project, and anticipated relationships between the firm's expected financial return and its approach for ensuring that service and maintenance standards are met over the life of the project. RFQ ¶ 4.3.5.
CP's submission was downgraded because the agency believed its funding for capital reserves during the construction period was extremely low. During the course of the

protest, the agency conceded that its conclusion was incorrect and that it unreasonably assigned this weakness to CP's submission.

However, CP's submission was also downgraded because its proposal to receive a fee of $[DELETED] annually for 10 years made it appear as if it would be receiving fees for providing no services, and because its submission showed that it expected an unexplained reimbursement of $[DELETED] in predevelopment costs. In its protest, CP argued that there was no basis to conclude that it would receive fees for no services provided. As to the annual fee, the agency states that it could ascertain a line item to [DELETED] for administrative fees but expected that, if [DELETED] were performing a management role, this fee would be included in operating expenses and not broken out separately. The agency found no explanation of the reason for this fee or how it would benefit family housing on Fort Meade. As to the predevelopment fees, the agency states that it understood the existence of the expenses but did not understand how they would benefit the project. CP has provided us with no basis to question the agency's judgment.

While CP has shown that one of the challenged weaknesses under the financial returns factor was unreasonable--that concerning the capital reserves issue--CP has not shown that any of the other challenged weaknesses were unreasonable. CP has given us no basis to conclude that the remaining weaknesses were so minor that its rating under this factor would have been exceptional in the absence of this one weakness.

In conclusion, while CP has shown that two of its 37 weaknesses were unreasonably based, it has not demonstrated a reasonable possibility that its submission would have been rated higher absent these two weaknesses. Submissions were to be rated exceptional overall if the developer demonstrated, based on an assessment of significant strengths and "minimal, if any" weaknesses across all evaluation factors, that it could exceed the requirements of the project, Developer Selection Plan at 31, and the Army states that CP's submission would have to have been rated exceptional for at least three of the four most heavily weighted factors in order to be considered for the competitive range. As a result, we conclude that CP was not prejudiced by the agency's errors. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

In its protest, CP contended that the agency improperly failed to exercise its discretion under FAR § 15.306(b) to communicate with the firm regarding its

submission prior to establishment of the competitive range, citing two weaknesses as examples.[9]

Under FAR § 15.306(b), an agency may communicate with offerors, after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications shall be limited to two categories of offerors: (1) those whose past performance information is the determining factor preventing them from being placed within the competitive range and (2) those whose exclusion from, or inclusion in, the competitive range is uncertain. FAR § 15.306(b)(1). These communications are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. FAR § 15.306(b)(3).

Nothing in the record shows that CP's past performance information was the determining factor preventing its submission from being placed in the competitive range, and nothing in the record shows that its exclusion from the competitive range was uncertain. The RFQ specifically permitted the agency to limit the number of submissions in the competitive range to the greatest number that would permit an efficient competition among the most highly rated submissions, and the agency did so, selecting only those submissions with the highest possible overall rating of exceptional/low risk. CP's submission was not among the most highly rated; indeed, a [DELETED] developer whose submission was rated higher than CP's was not included in the competitive range.[10]

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

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[9] CP's extension of this argument, in its supplemental comments, to numerous additional weaknesses is untimely for the reasons noted above. CP cannot rely on its citation to "examples" to circumvent our timeliness requirements. Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215 at 3 n.3.

[10] Although the competitive range determination was based on efficiency, we note that CP's submission could have been excluded from the competitive range even if it had been among the most highly rated. FAR § 15.306(c)(2).