Office of the Public Auditor
Commonwealth of the Northern Mariana Islands
World Wide Web Address: http://opacnmi.com
2nd Floor J. E. Tenorio Building, Middle Road
Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 1399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 234-6481
Fax: (670) 234-7812

IN RE REQUEST FOR RECONSIDERATION OF OPA APPEAL DECISION FILED BY THE COMMONWEALTH UTILITIES CORPORATION	)	CUC RFP 97-0025 DECISION ON REQUEST FOR RECONSIDERATION No. BP-A016.1

BACKGROUND

The Commonwealth Utilities Corporation (CUC), represented by its legal counsel, William J. Ohle, filed with this office on June 26, 1998 a timely request for reconsideration of the June 18, 1998 decision of the Office of the Public Auditor (OPA) referenced as Appeal Decision No. BP-A016. OPA has jurisdiction of this reconsideration request as provided in Section 5-102(9)[1] of the CUC Procurement Regulations (CUCPR).

OPA's June 18, 1998 decision granted in part the appeal filed by Pacific Marine and Industrial Corporation & Ogden Energy Inc. (PMIC/Ogden) from the CUC Executive Director's earlier denial of PMIC/Ogden's November 24, 1997 protest on CUC's Request for Proposal (RFP) No. 97-0025. This RFP was a solicitation of proposals from Independent Power Producers (IPP) to provide an additional 80 Megawatt (MW) power generation facility for the island of Saipan. PMIC/Ogden filed its protest after notification from CUC that it was not among those "selected for further participation on this procurement" (not one of the competitive range offerors).

OPA's Appeal Decision

On June 18, 1998, OPA granted in part the appeal filed by PMIC/Ogden because its review showed that CUC's determination of competitive range offers was not in compliance with the CUCPR. The appeal decision stated that "(1) CUC merely narrowed the number of competitive range offerors from 13 to 6 based on a cut-off number of 57 points, and concluded that the 6 proposers whose scores were above the cut-off number were the only ones reasonably susceptible of award; (2) the 57-point cut-off score was flawed as it was based on erroneous scores; and (3) one of the committee members stated that twelve out of the thirteen

[1] CUC's Procurement Regulations that were published in the Commonwealth Register on June 15, 1990 refer to "Appeals of Director's Decision to the Public Auditor" as Section 54-192; however, this section should have been numbered 5-102 based on the sequence of section numbers.

proposals were reasonably susceptible of selection for award." OPA expressed its belief that CUC's methodology does not represent a rational approach to measure whether a proposal is reasonably susceptible of award.

OPA concluded that CUC's competitive range determination was not properly made even if it were to consider allowable reasons for excluding proposals from the competitive range provided in the U.S. General Accounting Office's (GAO) bid protest decisions. First, a proposal can be excluded from the competitive range if it is clear that the proposal is unacceptable. Records for this RFP do not show that the exclusions from competitive range were made on such a basis. The decision also stated that OPA does not have evidence that the appellant's proposal was unacceptable. Secondly, a proposal may be excluded from competitive range if, in comparison with other proposals, such proposal clearly has no chance of being selected for award. OPA stated that it found nothing in the record to indicate that the strengths and weaknesses of the thirteen proposals were compared. OPA held that in order to determine whether a proposal has a clear chance of being selected for award, a comparison of the proposals' strengths and weaknesses is necessary, not just individual scoring of each proposal.

Accordingly, OPA recommended that CUC make a redetermination of the competitive range offerors in which all proposals that are reasonably susceptible of award should be included in the range. Those which qualify under this standard but were originally excluded from the competitive range should be reinstated in the competition by asking the proposers to submit best and final offers.

CUC's Reconsideration Request

CUC filed a timely reconsideration request with OPA on June 26, 1998. In its reconsideration request, CUC asks that OPA reconsider its decision based on the following grounds: (1) CUC's competitive range determination was in full compliance with law; (2) CUC has corrected the mathematical errors; and (3) the Selection Committee members have never considered a competitive range of "twelve" as reasonable. The details of these grounds are presented below:

CUC's Competitive Range Determination Was Allegedly in Full Compliance with Law

CUC's discussion of this ground showed that arguments pertaining to a particular issue were not grouped together. For discussion purposes, we have arranged the details of CUC's arguments under the following four main issues:

CUC argues that: (1) it considered the strengths and weaknesses of the proposals, (2) its competitive range determination was not arbitrary; (3) there was no violation of law or regulation; and (4) OPA acted beyond its authority.

Argument That CUC Considered The Proposals' Strengths and Weaknesses

CUC disagrees with OPA's statement that the records do not indicate that the strengths and weaknesses of the proposals were compared during the competitive range selection process. CUC states that the Selection Committee determined the strengths and weaknesses and then determined the competitive range by comparing the numerical scores.

Argument that CUC's Competitive Range Determination was Not Arbitrary

CUC stresses that its decision to limit the competitive range to the top seven ranking firms, as revised, is not arbitrary (based on a definition of the term "arbitrary and capricious" by the Commonwealth Supreme Court). CUC states that factually the selection was not based on an arbitrary numerical score, but on a comparison of the scores received by all thirteen proposals and how the individual scores of each offeror related to such offeror's chance of being selected for award, that is, each offeror's relative chance of receiving the highest score.

As for the original six competitive range offerors, CUC explains that while the numerical scores were used as a basis of comparison, the score of 57 points was not arbitrarily chosen but was simply the score actually received by the sixth highest offeror. CUC claims that OPA's decision cited no authority to support its position that the determination of competitive range was arbitrary. To support this argument, CUC presents a GAO bid protest decision [Cotton & Company, B-210849, October 12, 1993] which it claims to be instructive as to the proper degree of discretion an agency is afforded when making a competitive range determination. Another GAO decision [The Cadmus Group, Inc., B-241372.3, September 25, 1991] is cited by CUC as upholding a competitive range selection composed of only one offeror, since continuing negotiations with another offeror who has no reasonable chance for award is unfair to that offeror and undermines the integrity of the procurement process.

CUC also alleges that OPA failed to take into account the accepted standards for determining a competitive range, and adopted a standard which is both illogical and contrary to authority. According to CUC, the proper standard is how each proposal, as it is evaluated through numerical scoring or some other accepted practice, compares in its chances for award, not the incremental differences between individual proposals in the middle of the evaluation range. CUC claims that based on GAO decisions, its use of a numerical scoring system to make a relative determination of the competitive range is neither "plainly erroneous" nor inconsistent with the CUCPR. CUC asserts that the Selection Committee evaluated each of the proposals and assigned a weighted score in each category, and contends that the concept of evaluating and determining competitive range based upon a scoring system is not new.

In addition, CUC asks whether its elimination of an offeror with a score of 30 points less than the highest ranking offeror was unreasonable, improper or arbitrary. CUC adds that even if the eighth ranked offeror were to receive a perfect score for price, it would still fall short of the first ranked offeror. According to CUC, this by itself is ample "record" to support the reasonableness of CUC's competitive range determination.

Argument That There Was No Violation of Law or Regulation

CUC alleges that OPA's decision misinterpreted both fact and law in finding that CUC's selection of the competitive range was in violation of CUC's Procurement Regulations. In addition, CUC asserts that OPA did the opposite of a proper analysis when it stated in its decision that the process of selecting a competitive range through reducing the number of proposals by half, or setting a cut-off score, is not sanctioned by the CUCPR. CUC believes that the proper analysis should be to determine what procedure is in violation of the CUCPR, and claims that OPA's decision makes no finding that any of the evaluation scores were in violation of law or regulation. CUC adds that OPA's decision cited*no authority* to support its "belief" that reliance on numerical scoring is a violation of law or regulation in the competitive range selection process.

With regard to Harris Data Communications v. United States, 2 Cl. Ct. 229 (1983), a case cited in the OPA decision about allowable reasons for excluding proposals from the competitive range, CUC states that this case is irrelevant as it involved a challenge to the award of a contract and not the selection of a competitive range. CUC also alleges that OPA cited no authority to support its belief that reliance on a numerical scoring system is a violation of law or regulation in the competitive range selection process.

Allegation That OPA Acted Beyond its Authority

CUC argues that OPA's decision is limited to finding "a violation of law or regulation." It states that OPA's decision goes beyond a finding of a legal or regulatory violation and usurps the agency's discretion in making specific determinations of competitiveness and reasonable chances of receiving award.

In its reconsideration request, CUC presents several GAO bid protest decisions to support the various arguments presented above.

CUC Claims That It Has Corrected The Mathematical Errors

According to CUC, only the change in the ranking of the 3rd ranked proposal (as corrected) made a difference in the Selection Committee's competitive range determination. As for the change in the appellant's score from 49 to 52, or 3% of the overall points available, CUC determined that it was sufficiently "de minimis" as to not require its inclusion in the competitive range. Offerors ranked 8th through 13th were also excluded from the competitive range because CUC determined that they were not reasonably susceptible of award.

CUC Claims That The Selection Committee Members have Never Considered a Competitive Range of "Twelve" To Be Reasonable

CUC alleges that OPA's finding that one of the committee members stated that twelve out of the thirteen proposals were reasonably susceptible of selection for award is hearsay and was not attributed to a specific individual, was not in quotations, and had no supporting evidence.

CUC states that, while it recognizes the relaxed rules for considering evidence in administrative proceedings, it believes that the more critical the finding is, the greater is the degree of reliability required.

In addition, CUC states that the reliability of the statement can easily be verified by the use of an affidavit. CUC provided OPA with copies of a sworn affidavit by each member of the Selection Committee disclaiming the statement that "twelve of the thirteen proposals were reasonably susceptible for award."

ANALYSIS

After reviewing each argument in CUC's reconsideration request, we conclude that there is no basis to reconsider our earlier decision on PMIC's appeal. CUC's arguments (1) have not persuaded us that our appeal decision contained errors of fact or law, or (2) were either incorrect, inconsistent, irrelevant, or lacking in merit, and therefore would not warrant reversal or modification of our decision. The following discussion sets forth detailed comments on the issues and arguments in this reconsideration request.

CUC's Competitive Range Determination Was Allegedly in Full Compliance with Law

CUC presents four issues to support its claim that its competitive range determination was in full compliance with law or regulation. Of the four issues, the assertion that CUC reviewed the strengths and weaknesses of the proposals needs to be addressed first because this argument bears on the three other issues and directly contradicts OPA's findings of fact on the appeal. Accordingly, we will first discuss this argument, followed by the remaining three issues in the order presented in the "Background" section of this decision.

A. Argument that CUC Considered the Proposals' Strengths and Weaknesses

In its reconsideration request, CUC contradicts OPA's finding that the records do not indicate that the strengths and weaknesses of the proposals were compared during the competitive range selection process. CUC asserts that the Selection Committee determined the proposals' strengths and weaknesses and then determined the competitive range by comparing the numerical scores. To resolve CUC's claim that the relative strengths and deficiencies have been considered in its competitive range decision, we went back to CUC and reviewed the records on this procurement. As represented to us in our interview of the members of the Selection Committee, there was no record of any evaluation of strengths and weaknesses of the proposals. The only records prepared by the Committee were the breakdown of the scores given by each member of the Committee, unintelligible notations on a scoring sheet made by one member of the Committee, and a summary of the information provided in the proposals. There was nothing in the record that gives any rationale for the technical scores given to the thirteen proposals. As for the selection of the cut-off point for competitive range offerors, the records on this appeal, including our interviews with all members of the Selection Committee, showed neither specific explanation for including only the top six offerors nor specific

justification for eliminating lower ranked offerors. CUC made only a general statement that this selection was based on the Selection Committee's judgment of each offeror's chance of displacing the highest ranked offeror. When the cut-off point was changed to the top seven offerors, there was again no record of specific reasons why only the top seven offerors were determined "reasonably susceptible" of award, and why all lower ranked offerors should be eliminated from further competition in this procurement.

We would like to reiterate that the CUCPR provides only a general direction for determining competitive range, and do not have specific guidelines for including or excluding proposals in the competitive range. Because of the absence of specific guidelines, we find it appropriate to look at how the Federal Government determines competitive range offerors. The Federal Acquisition Regulations (FAR) are the primary set of regulations for use by all federal executive agencies in their acquisition of supplies and services with appropriated funds. The FAR can be used in this instance because they contain the same general requirements as are in the CUCPR about considering proposals that are deemed "reasonably susceptible of being selected for award." It is also useful to examine the General Accounting Office's (GAO) Bid Protest Decisions (also referred to as Comptroller General Decisions) since these contain rulings on issues affecting FAR requirements. Even CUC, at page 11 of its reconsideration request, acknowledges the importance of these decisions when it states: "Because of the similarity in the language, CUC finds the authorities interpreting the FAR [i.e. Comptroller General Decisions] very helpful while interpreting CUC's own procurement regulations."

The absence of an assessment of the strengths, deficiencies and weaknesses of each proposal does not meet the standards set forth in the FAR. Specifically, the 1996 revision of the FAR, the one in effect at the time the initial evaluation was made in September 1997, requires that "the supporting documentation prepared for the selection decision shall show the relative differences among proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The documentation shall include the basis and reasons for the decisions." [FAR 15.612(d)(2)]. Additionally, FAR 15.608(a)(3), also from the 1996 revision, provides that in documenting technical evaluations, the technical official shall include "...(i) the basis for evaluation; (ii) an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements; (iii) a summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and (iv) a summary of findings." The 1997 revision of the FAR, which became effective for solicitations issued on or after October 10, 1997, provides a similar documentation requirement in FAR 15.305(a) which requires that "the relative strengths, deficiencies, significant weaknesses, and risk supporting proposal evaluations shall be documented in the contract file."

The absence of supporting documentation for the evaluation of proposals and selection of winning offerors has also been the subject of protests before GAO. In these cases, GAO sustained protests where there were no supporting documents, or where the reasons were inadequate to show the proposals' strengths and weaknesses and the rationale for the agency's proposal evaluation and selection decision. In a decision sustained by GAO, [Northwest EnviroService, Inc., B-247380.2, July 22, 1992], the Comptroller General found the evaluation

documents of the procuring agency *too limited to explain the proposals' relative strengths and weaknesses*, and *equally unclear to support the conclusion* that the selected offerors had complied with the RFP requirements. Some of the evaluation documents for the awardee's past performance simply contained a conclusory "highly recommended" notation, an occasional "recommended for future award" notation, or a cursory "no problems" notation, without describing any relative strengths, risks, or weaknesses in the awardee's performance in support of those comments. Except for briefly describing a project for which a rating of "good" was also assigned, another evaluation document on the awardee's past performance was blank in its entirety. GAO added that the record lacked adequate documentation to show that the agency's source selection decision was reasonably based on the announced evaluation criteria.

In another case, GAO sustained a protest in holding that the agency merely listed the offerors' technical scores, proposed prices, and a brief general discussion of the agency's basis for its award recommendation. GAO found nothing in the record which showed that the agency ever was made aware of or otherwise *assessed the strengths and weaknesses of the protester's revised proposal*. [Arco Management of Washington, D.C., Inc., B-248653, September 11, 1992]. Also, in Engineering and Computation, Inc., B-261658, October 16, 1995, GAO concluded that it could not determine that the selection decision was reasonable, where in essence such decision was based on unsupported and undocumented evaluation conclusions. GAO found the agency's evaluation records not adequate where they *contained no explanation of the agency's concern about the risk associated with the appellant's proposal*, and where records consisted only of summary scores and adjectival ratings (e.g., "excellent", "very good", "good"), the conclusory evaluation report, and the source selection document.

GAO's decision in JW Associates, Inc., B-275209, January 30, 1997, is instructive as it emphasized the greater significance of the supporting documentation of the relative differences between proposals compared to adjectival ratings and point scores. In this decision, GAO held that while both adjectival rating and point scores are useful as guides to decision making, they generally are *not controlling*, but rather, *must be supported by documentation of the relative differences between the proposals, their weaknesses and risks*, and the basis and reasons for the selection decision.

Although the above cases involve final selection of winning offerors, the principles cited in these GAO decisions, specifically the requirement to have adequate supporting documentation of the proposals' relative strengths and weaknesses, would also logically apply to determination of competitive range offerors. The latter similarly involves a selection decision, differing only in that further negotiation takes place before a final selection is made.

A current textbook on government procurement (Formation of Government Contracts, Cibinic & Nash, 3rd Ed. 1998) discusses documentation of proposal evaluation. This textbook, published by the George Washington University Law School Government Contract Programs, states that a fully documented evaluation will contain narratives for each score - generally at the lowest level of scoring in the evaluation scheme. "This documentation is generally prepared in narrative form simultaneously with the scoring, and describes the reasons that the evaluators have assigned the scores to each proposal. Thus, these narratives identify the

'strengths, weaknesses, and risks' of each proposal." [Page 840]. "...The other part of the narratives is the statement of the 'relative qualities of the proposals'...In many ways, this is the most important part of the narratives because it summarizes the information needed by the source selection official to make the selection decision." [Page 842]. "This comparison of proposals should be prepared in sufficient detail to identify each area where there is a significant difference between proposals...such narratives provide the source selection official clear information concerning the relative advantages or disadvantages of proposals in a way that scores, such as numbers, colors or adjectives, obviously cannot...." [Pages 842-843].

It is clear from the above discussion that CUC's initial evaluation which consisted of unsupported technical scores cannot be an objective basis for selection of competitive range offerors. Neither was CUC's reliance on the top six, and later on the top seven, offerors as the cut-off point for proposals "reasonably susceptible for award" adequately supported or justified in the records. As previously mentioned, we reviewed CUC's records on this procurement and found no supporting documentation for the scores given by the evaluators, no record of comparison of the proposals' relative strengths and weaknesses, and no adequate support for CUC's cut-off point in eliminating proposals in the competitive range.

Aside from the absence of the above documentation, CUC's records produced more questions than answers about whether there had been a proper evaluation of the proposals. In the course of our review, we found correspondence and inter-office memorandum showing that a member of the Selection Committee admitted that he was not qualified to evaluate the proposals related to this project. In a memorandum, the Acting Power Division Manager, one of the members of the Selection Committee[2], admitted that his expertise in handling this type of project was limited. In addition, this evaluator stated that "...I still feel spending a few hundred thousand dollars on *technical* and *legal* expertise will save millions of dollars in the long run...." [Emphasis added]. Questions about the technical expertise of the evaluators and CUC's non-responsiveness to this concern raise doubt as to the propriety and objectivity of the evaluation of the proposals which, although not controlling in this case, strengthens our conclusion that the evaluation was flawed.

B. Argument that CUC's Competitive Range Determination was Not Arbitrary

In its reconsideration request, CUC argues that its decision to limit the competitive range to the top seven ranking firms, as revised, was not arbitrary as defined by the Commonwealth Supreme Court. In resolving an arbitrary action issue, we determine whether there is sufficient evidence to support the reasonableness of an agency action. This approach is identical to CUC's statement that a court will review an action or decision alleged to be arbitrary and capricious to determine whether the action was reasonable and based on information sufficient to support the decision at the time it was made. The Wisconsin Supreme Court has held in Olson v. Rothwell, 137 NW2d 86, 89 (1965), that an arbitrary action occurs when such action lacks rational basis. This definition is consistent with GAO's stated criteria that *"in reviewing*

[2] The other members consisted of the CUC Executive Director, Legal Counsel, and Comptroller.

an agency's decision to exclude a proposal from the competitive range, we look first to the agency's evaluation of proposals to determine whether the evaluation*had a reasonable basis*." [Safeguard Maintenance Corporation, B-260983.3, October 13, 1995] (Emphasis Added).

CUC's competitive range determination was essentially based on twoprocedures: First, the scoring of the thirteen proposals, along with the summarization and comparison of the scores; and, second, the selection of offerors in the competitive range based on the summarized scores. Our analysis will focus on these two related agency actions.

Scoring of the Proposals, Summarization and Comparison of the Scores

Because the records showed that CUC's competitive range determination was based mainly on the evaluation scores, we first discuss the reasonableness of the agency's action in coming up with the evaluation scores. This is similar to GAO's approach in Safeguard Maintenance Corporation, cited above, in which GAO first looked at the agency's evaluation of proposals to determine whether the evaluation had a reasonable basis.

As discussed in the previous section, the only records prepared by the Selection Committee were the breakdown of the scores given by each member of the Committee, unintelligible notations on a scoring sheet made by a member of the Committee and a summary of the information provided in the proposals. There was nothing in the record that gives any rationale for the proposals' technical scores which accounted for 70 percent of the total available scores. Also, there was no record of any evaluation of strengths and weaknesses of the proposals, which is not surprising in this case because the basis of the scores themselves was not documented.

In several bid protest decisions, GAO has held that where an agency fails to document or retain evaluation materials, it bears the risk of an inadequate supporting rationale in the record for the source selection decision, and that GAO will not conclude that the agency has a reasonable basis for the decision. [Southwest Marine, Inc.; American Sys. Eng'g. Corp., B-265865.3, January 23, 1996]. Where the agency merely lists the offerors' technical scores, proposed prices and a brief general discussion of the agency's basis for its award recommendation without assessing strengths and weaknesses, GAO is still unable to conclude that the agency had a reasonable basis for its selection [Arco Management of Washington, D.C., Inc., cited earlier]. Without adequate support for a technical evaluation, a proper award determination could not be made.[Engineering and Computation, Inc., cited earlier]. In American President Lines, Ltd. B-236834.3, July 20, 1990, GAO affirmed that an agency's evaluation judgments must be documented in sufficient detail to show that they are not arbitrary, and where the record contained no adequate supporting rationale for the decision, GAO could not conclude that the agency had a reasonable basis for its decision.

Because CUC had no supporting rationale for the technical scores, we also cannot conclude that there was a reasonable basis for its evaluation scores, and similar to the GAO decisions we have cited, the appropriate decision is for us to sustain the protest.

Selection of Competitive Range Offerors

In order for us to review an agency's competitive range determination, the agency must have adequate documentation to support its selection decision. In its earlier protest decision, CUC stated that it determined that only those six offerors having received scores 57 points or above were within the competitive range. This can be reasonably interpreted to mean that the cut-off level of 57 points was the controlling factor for proposals to be included in the competitive range. However, in its reconsideration request, CUC states that while the numerical scores were used as a basis of comparison, the score of 57 points was not arbitrarily chosen but was the score actually received by the sixth highest offeror. Additionally, the reconsideration request contends that the appropriate element for consideration is the interval between individual scores and the number one ranking. It appears that CUC has now changed its position to assert that the determining factor in its initial competitive range determination was its selection of the top six proposers based on comparison of each offeror's score with the top ranked offeror, and the 57-point cut-off point resulted only because it was the score of the 6th ranked offeror. In the same reconsideration request, however, CUC also stated that "...PMIC/Ogden was excluded from the competitive range because, *compared to the other proposals submitted*, PMIC/Ogden's proposal was not reasonably susceptible of award...." [Emphasis added].

Regardless of the true controlling factor in its competitive range determination, CUC should have shown that such basis was rational and documented in the records. Granting that the original 57-point cut-off resulted from CUC's selection of the top six proposers, the records and our interview with all the evaluators still do not explain the rationale for CUC's selection of only the top six offerors. The unsupported technical scores do not show specific reasons why only the top six offerors were deemed reasonably susceptible of award. Even when the cut-off point was changed to the top seven offerors, CUC again did not establish why only the top seven offerors were adjudged reasonably susceptible of award, except for stating that CUC considered each proposal's chance for award when compared with the highest ranked offeror. Even assuming that such comparison was made, again, the unsupported technical scores do not explain why the seventh ranked offeror qualified in the competitive range while the 8th ranked offeror (and those ranked lower) did not.

CUC justified its elimination of PMIC/Ogden, the 8th ranked offeror, by asking whether its elimination of an offeror with a score of 30 points less than the highest ranking offeror was unreasonable, improper or arbitrary. CUC added that even if the 8th ranked offeror were to receive a perfect score for price, it would still fall short of the first ranked offeror. As for the 30-point difference, CUC has not provided specific reasons why such a difference would not enable PMIC to compete and improve its ranking to first place in the negotiation stage which CUC determined was only possible for the 2nd through the 7th ranked offerors. The records do not reflect why the 23.25-point difference between the 1st and 7th ranked offeror qualifies the latter for the competitive range while a 30-point differential excludes PMIC/Ogden from such consideration.

We emphasize that any scoring system may be used as long as it provides reasonable differentiation of the relative strengths and weaknesses of each proposal as discussed in the previous section. Scoring systems are notational devices which provide a rough means of measuring differences between proposals. However, it is clear that, in almost all cases, the scores alone will not support a source selection decision. [Formation of Government Contracts, cited earlier, page 843].

Whatever system is used, the end result of the evaluation process should be a comparative assessment of the relative merits of the proposals because that must be the basis for the ultimate source selection decision. [FAR 15.308]. Even a GAO decision presented by CUC in its reconsideration request, The Cadmus Group, Inc., cited earlier, states that "the overriding concern in the evaluation process should be that the final scores assigned accurately reflect the actual merits of the proposals submitted - not that the final scores may be mechanically traced back through some arithmetic calculation to the scores initially given by the individual evaluators."

To support the argument that its decision to exclude PMIC was not arbitrary, CUC cited a GAO bid protest decision (Cotton & Company, cited earlier) pertaining to an evaluation in which only the highest ranked offeror was included in the competitive range because it was far superior to lower ranked offerors. CUC presented another GAO decision (The Cadmus Group, Inc., cited earlier) as upholding a competitive range selection of only one offeror because continuing to negotiate with an offeror having no reasonable chance for award is unfair to the offeror and undermines the integrity of the procurement process. However, the reasons for excluding the proposals in those cases were based on specific weaknesses identified in the proposals, and the scores were not the only basis used.

It appears that CUC missed the point in the Cotton and Cadmus cases. In Cotton, the Comptroller General upheld the decision of an agency to exclude the protester from the competitive range and thereby left only one offeror in the range, where it was determined that among other specific reasons, the protester's lesser experience likely could not be improved in its best and final offer. In Cadmus, the protester's proposal was found not reasonably susceptible of award, mainly because it was determined that the highest ranking proposal in the competitive range was substantially superior to the protester's under each of the technical evaluation factors. GAO ruled that continued negotiations with the protester would have been unfair because of the technical disparity between the two proposals, relating mostly to corporate and technical experience, and considering the protester's higher cost.

CUC's argument that PMIC/Ogden would not qualify even if it were to receive a perfect score on price is misguided. Following CUC's logic, it would also mean that the 3^{d}, 4th, 5th, 6th and 7th ranked offerors who are included in the competitive range should in fact be excluded because even if they too were given perfect scores on price, they also could not beat the 1st ranked offeror. Additionally, if all proposers other than the highest ranked were to be given perfect scores on price, PMIC/Ogden would rank 4th, higher than four offerors who are already included in the competitive range.

C. Argument That There Was No Violation of Law or Regulation

Our appeal decision stated that CUCPR Section 3-106(6) establishes the requirements for the determination of competitive range offerors. CUCPR Section 3-106(6) provides that "...discussions may be conducted with responsible offerors who submit proposals determined to be *reasonably susceptible of being selected for award* for the purpose of clarification and to ensure full understanding of, and responsiveness to, solicitation requirements...." [Emphasis added]. This provision clearly sets forth the requirement for determining proposals reasonably susceptible of award when discussions are conducted with responsible offerors. Because this requirement specifies a " reasonably susceptible of being selected for award" standard, we need to first clarify this phrase before moving into a detailed discussion of this section.

The CUCPR and other local procurement regulations do not provide a definition of the phrase "reasonably susceptible of award." However, a plain language analysis of this phrase clearly indicates that a determination of susceptibility for award must have a reasonable basis. "Reasonable" is defined as fair, governed by reasons, rational, etc. [Black's Law Dictionary, Abridged 5th Ed. 1993]. A sensible reading of the requirement in the CUCPR is that the agency determination should have a fair, rational, and objective basis. Again, as discussed in section "B" of this appeal decision, where GAO has found that an agency action lacks supporting documentation, it cannot conclude that the action was reasonable.

We concluded in our appeal decision that CUC's methodology in determining competitive range offerors does not represent a rational approach to measuring whether a proposal is reasonably susceptible of award. We stated that CUC merely narrowed the number of competitive range offerors from 13 to 6 based on a cut-off score of 57 points and determined that only the 6 proposals whose scores were at or above the cut-off number were reasonably susceptible of award. The appeal decision also stated that we found nothing in the records to indicate that the proposals' relative strengths and weaknesses were compared during the competitive range determination.

CUC's arguments in its reconsideration request have not persuaded us that our earlier findings were erroneous, incorrect, or invalid. As discussed previously, our analysis of CUC's arguments and the evidence before us showed that there was no supporting documentation or justification for the technical scores given to all the proposals, nor for CUC's subsequent selection of only the six highest ranked offerors (later changed to the top seven) as reasonably susceptible of award in this procurement. Documentation is critical in determining whether the basis for CUC's competitive range determination was objective, fair, and in compliance with the CUCPR. We have determined that these unsupported technical scores and unjustified selection of the top six or top seven offerors cannot be a rational basis for objectively determining those offerors reasonably susceptible of award. We therefore reaffirm our earlier conclusion that CUC failed to comply with CUCPR Section 3-106(6).

Additionally, some of the underlying purposes of the CUC Procurement Regulations [CUCPR Section 1-101(2)] are to ensure the fair and equitable treatment of all persons who deal with the procurement system, and to provide safeguards for the maintenance of a

procurement system of quality and integrity. We believe that selecting competitive range offerors based on unsupported technical scores and elimination of offerors in the competitive range without identifying specific reasons is in violation of these policies. As stated in the appeal decision, a proposal "can be excluded from the competitive range if*it is clear* that (a) its contents are so unacceptable that a revision of proposals in the negotiation stage would be equivalent to accepting a new proposal [Harris Data Communications v. United States, cited earlier], or (b) in comparison with other proposals, such proposal*clearly* has no chance of being selected for award [Caldwell Consulting Assocs., B-252590, July 13, 1993, 93-2CPD §18]...." [Emphasis added]. These principles are the ones stated in GAO decisions involving protests of an agency's exclusion of proposals from the competitive range[3]. As for the FAR, the requirement for including proposals in the competitive range is further clarified in FAR 15.609(a) [1996 revision] where it is specifically provided that if the contracting agency is in doubt about whether to exclude a particular proposal from the competitive range, that proposal should be included.

CUC contends, however, that the first of these two methods is irrelevant to the present case. According to CUC, Harris Data Communications [cited earlier] involved a challenge to the award of a contract. Although that particular case did involve a contract award challenge, GAO also applies the same rationale to protests involving competitive range (see related cases on the footnote below). Additionally, CUC contends that the Harris case was based on a challenge to the agency's determination that the proposal submitted by Harris was "unacceptable", an issue not present in this case. This comment is misplaced as our decision has never questioned CUC's determination of the responsiveness of the proposals. We only cited theHarris case to establish that a proposal can be excluded from competitive range if it is unacceptable.

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[3] Nine recent GAO decisions involving a challenge to competitive range determination support the principles stated above, as follows: (1) Systems Planning and Analysis, Inc., B-261857.2, November 9, 1995 (exclusion of a proposal was upheld on the basis that it would require major revisions and substantial rewrite for it to be made acceptable and have a reasonable chance for award); (2)Interactive Communication Technology, Inc., B-271051, May 30, 1996 (revisions would result in a significant increase in the protester's offered price if a protester were permitted to correct noted weaknesses in its proposal); (3)Techniarts Engineering, B-271509, July 1, 1996 (the protester's experience and expertise were evaluated as relatively weak and the agency had received superior proposals at lower prices); (4)Smith Environmental Technologies Corporation, B-272896, October 30, 1996 (the proposal could not be improved to the level of offers in the competitive range considering improvements already made on the proposal); (5)Arsenault Acquisition Corporation, B-276959; B-276959.2, August 12, 1997 (exclusion of a proposal mainly due to lack of experience despite acceptable standing in terms of mathematical average); (6)DuVall Services Company, B-265698.2, February 7, 1996 (exclusion of a proposal due to inferior technical approach and higher price); (7) WP Photographic Services, B-278897.4, May 12, 1998 (major revision would have been necessary to correct substantial deficiencies in the relatively high-priced proposal); (8)Agricultural Technology Corporation, B-272978; B-272978.2 (proposal was excluded due to numerous deficiencies and weaknesses in the proposal including one concerning corporate experience); and (9)Bollam, Sheedy, Torani & Co., B-270700, April 11, 1996 (protester's proposal omitted significant information, ranked 10th in technical merit out of 34 proposals, and initial price offered was higher than seven of the eight proposals with higher technical scores).

Similarly, CUC contends that the GAO cases cited in the appeal decision, except for Caldwell Consulting Assocs. [cited earlier], bear no resemblance to the present case. We found this contention unpersuasive. For instance, CUC states that SDA, Inc. [B-248528.2, April 14, 1993] involves a challenge to the award of a contract, not a competitive range determination. While the facts in SDA may differ, however, the discussions about the evaluation of proposals and selection of winning offerors, specifically the need to provide adequate supporting documentation, is equally relevant to the present case. Determination of competitive range offerors similarly involves a selection decision, differing only in that a final selection is made after conducting further negotiations.

CUC further argues that the passage quoted from the SDA, Inc. case involved an agency's unsupported comparison of the technical point scores and the unscored price analysis. According to CUC, its cost analysis was scored and weighted as disclosed in the RFP. However, CUC missed our point that selection of an offeror, either in the competitive range or final award, that is based only on point scores without supporting explanation, lacks a reasonable basis. In SDA, GAO found no supporting explanation for certain evaluation scores; in particular the record contained no indication that the agency ever considered whether the awardee actually possessed superior or greater experience than the protester, and the Source Selection Evaluation Board (SSEB) report (1) did not explain on what basis the evaluators decided to assign the protester zero points on a certain subfactor, where the rating scheme showed one point as the minimum available, and (2) did not indicate how the evaluators translated the protester's experience in managing apartments and retail sites into the rating system's framework. The present case is in no better position as there were no supporting explanation at all for the technical scores given each proposal.

Although CUC acknowledges that the SDA, Inc. case involved an agency's unsupported comparison of the technical point scores, CUC focuses on its contention that its source selection plan (perhaps referring to the evaluation criteria and maximum points stated in the RFP)was fully disclosed in the RFP and used in its cost analysis. This argument is irrelevant as we have not raised any question on the evaluation criteria or their use in the cost evaluation.

CUC also alleges that OPA cited no authority to support its position that reliance on a numerical scoring system is a violation of law or regulation in the competitive range selection process. CUC contends that the appeal decision diverges from the stance taken by the United States Comptroller General on the acceptability of using a numerical scoring system in determining competitive range. CUC has misunderstood our finding on the evaluation and scoring of the proposals. The appeal decision did not state that reliance on a numerical system is in itself a violation of law or regulation. We do not reject the use of a numerical scoring system in the determination of competitive range so long as the agency identifies specific strengths and weaknesses, or other specific items in the proposals, that would support the individual scores, and the inclusion or exclusion of proposals in the competitive range is shown to have been determined using a rational basis. In this instance, we found that CUC did not have a rational basis for its competitive range determination because, as stated in the appeal decision, CUC's determination was based solely on the scores, without identifying a proposal's strengths and weaknesses. On Page 14 of the appeal decision, we stated that "...in

order to determine whether the proposal has a clear chance of being selected for award, a comparison of the proposals' strengths and weaknesses, *not just an individual scoring of each proposal*, is necessary in this instance...." [Emphasis added].

In its reconsideration request, CUC cited a number of GAO cases that purportedly support the use of a numerical scoring system. While the cited cases did involve the use of a numerical scoring system, it should be noted that the numerical scores were not used as the sole basis of selection. In those GAO cases, the agencies gave clear and specific justifications for excluding proposals, which mostly pertained to technical weaknesses. For example, in Leo Kanner Associates, B-213520, March 13, 1984, the Comptroller General concluded that the Environmental Protection Agency reasonably excluded Kanner from the competitive range on the basis of weaknesses in Kanner's technical proposal, e.g., inexperienced staff, poor print quality samples and weakness in environmental fields, thereby foreclosing Kanner's reasonable chance of award. In the present case, CUC failed to give specific reasons why it excluded the appellant from the competitive range.

Additionally, CUC presented another GAO decision, L&M Technologies, Inc., B-278044.5, May 8, 1998, which denied a protest on the exclusion of a proposal from the competitive range based on a numerical scoring system and comparison of the scores. According to CUC, the procurement issue in this decision is similar to the present case. We disagree because there are significant differences between the situation in the L&M case and the present case in that: (1) the technical scores in L&M appeared to be supported by an evaluation of the proposals' weaknesses[4], while CUC had no supporting explanation for its technical scores; (2) the challenge in L&M was based on the opportunity to adequately revise a proposal already included in the competitive range, unlike the present challenge which was based on not having an opportunity to revise a proposal because it had been excluded from the competitive range; (3) the determination of competitive range in L&M was based on a comparison of competitors' scores, unlike CUC's reconsideration argument that each proposal was compared with the highest ranked proposal; and (4) the protester was given the chance in L&M to submit a best and final offer, in contrast to PMIC/Ogden which was excluded from the competitive range.

D. Allegation That OPA Acted Beyond its Authority

In its reconsideration request, CUC raises the issue of whether OPA, in its appeal decision, acted beyond its authority and usurped CUC's discretion in making specific determinations of competitiveness and reasonable chances of receiving the award. According to CUC, OPA's review is limited to finding a violation of law or regulation. CUC did notcite a specific law

[4] This GAO decision stated that "L&M does not challenge the accuracy of *the agency's evaluation of weaknesses* in L&M's technical proposal or the technical score its proposal received. Instead, L&M argues that the agency improperly failed to provide L&M with an adequate opportunity to revise its proposal." [Emphasis added].

or regulation to support its claim that OPA has limited authority[5]. In any event, this lack of authority claim is moot since OPA has concluded that CUC violated its own regulations in its determination of competitive range offerors. The recommendation made in the appeal decision conforms to the "Remedies Prior to Award" set forth in the CUCPR where there are violations of regulations prior to award.

As for the alleged usurpation of CUC's discretion, OPA will not disturb an agency's decision on competitive range determination absent a clear showing that it was *unreasonable* or contrary to procurement statutes and regulations. In so doing we are consistent with GAO's practice. GAO has held that "The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency...This discretion is *not unfettered*, however, as competitive range determinations and proposal evaluations must be consistent with law and regulation and *have a reasonable basis* in the record." [Possehn Consulting, B-278579.2, July 29, 1998, Emphasis added] [see also Trifax Corporation, B-279561, June 29, 1998].

CUC claims that OPA's conclusion that "the appellant's revised score was competitive in that it was not substantially lower than the next higher ranked proposers" goes beyond finding a legal or regulatory violation, and usurps the agency's discretion. According to CUC, the incremental differences between individual proposals in the middle of the evaluation range is not the proper standard. CUC stated that OPA adopted a standard which is both illogical and contrary to authority. The statement on page 13 of OPA's Decision referred to by CUC was meant only as an additional comment to the revised graph using the approach presented to us by a member of the CUC Selection Committee, and was not meant to usurp the agency's determination. We would like to point out that OPA did not arbitrarily adopt that method of comparing the incremental differences of the scores. OPA simply employed the same approach provided by a member of the Selection Committee to justify the selection of the original six offerors included in the competitive range. The approach comparing the incremental differences of the scores was provided to OPA representatives in an interview. When asked about the rationale for choosing the top six offerors, this Selection Committee member specifically used a bar graph presentation of the scores to emphasize that there was only a slight difference in the interval between the total scores from the 1st to the 6th ranked offerors, while there was a significant drop from the score of the 6th to the 7th ranked offeror. As we mentioned earlier, however, regardless of the true controlling factor in CUC's competitive range determination, CUC should have shown that such basis was rational and documented in the records.

[5] CUC fails to recognize that the Commonwealth Auditing Act imposes on the Public Auditor a special duty to prevent fraud, waste and abuse of public funds. 1CMC §2304(a) provides that "...The Office of the Public Auditor shall specially act to prevent and detect fraud, waste and abuse in the collection and expenditure of public funds. The Public Auditor may audit any transaction involving the procurement of supplies or the procurement of any construction by agencies of the Commonwealth, and the procurement of any supplies and services in connection with such construction...." Contrary to CUC's claim, an OPA review may well go beyond finding a violation of law or regulation.

In addition, CUC alleges that OPA's finding that CUC's competitive range determination was not sanctioned by the CUCPR is "the opposite of the proper analysis." CUC states that "the analysis is not what procedure for selecting a competitive range is 'sanctioned' by the CUCPR, *since no procedure at all is specifically approved by the regulation* , but what procedure is in 'violation' of the CUCPR." [Emphasis added]. We would like to point out that OPA's statement was made in response to the May 5, 1998 rebuttal letter of the Director in which he stated that "...After its initial discussion with the thirteen companies submitting proposals, CUC limited the competitive range to six...*This is the process the regulation provide* and which CUC has used...." [Emphasis added]. We found this inconsistent with CUC's subsequent reconsideration argument that no procedure is specifically approved by the regulation for determining competitive range.

CUC's Correction of the Mathematical Errors

CUC concluded that only the correction in the ranking of the offeror formerly ranked 8th and upgraded to 3rd made a difference in the Selection Committee's competitive range determination. It reiterated that its determination and redetermination of competitive range was based on the reasonable chances, or lack thereof, of the 8th through 13th ranked offerors becoming the awardee through best and final offers.

CUC misses the point of the recommendation in the appeal decision. OPA's findings were not limited to the one correction mentioned above. Rather, those findings showed deficiencies in CUC's determination of competitive range, which affected the reasonableness of the ranking of all the proposals, not just that of the formerly 8th ranked offeror. That is why OPA recommended in the appeal decision that CUC make a full redeterminationof competitive range, which is not only appropriate in this case but also conforms to the "Remedies" in CUCPR Section 5-103. Section 5-103(1) provides that "...If prior to award the Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the solicitation or proposed award shall be: (a) canceled; or (b)*revised to comply with law or regulation*...." [Emphasis added].

CUC's Dispute with OPA Finding on Selection Committee Members' Statement

CUC claims that none of the Selection Committee members stated that twelve out of the thirteen proposals were reasonably susceptible of selection for award or ever held such a belief. CUC alleges that this finding is hearsay and has no supporting evidence. In addition, it states that a verification that the person making the statement understood the words being used, and the simple confirmation that the statement was not a slip-of-the-tongue in an informal interview, are required elements to insure the reliability of the statement, and that this can be easily verified by the use of an affidavit. CUC provided OPA copies of sworn affidavits by all the members of the Selection Committee controverting OPA's finding.

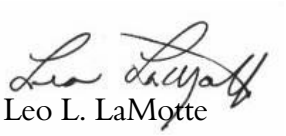
Despite the affidavits submitted by CUC, OPA stands by its finding that a member of the Selection Committee did state that twelve out of the thirteen proposals were reasonably susceptible of award. The minutes of the meeting in our file, signed by two OPA staff

members who were present when the statement was made, document that this committee member made such a statement. Nevertheless, we find it unnecessary to dwell on this issue because we are denying CUC's request for reconsideration on the basis of other findings set forth earlier in this analysis.

DECISION

To obtain reconsideration of an appeal decision under the CUCPR, the requesting party is required to present a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law or information not previously considered. For the reasons set forth above, CUC's arguments in its reconsideration request provide no basis for us to alter our earlier appeal decision, because those arguments have not persuaded us that the appeal decision contained errors of fact or law; those arguments have presented information which was inconsistent, irrelevant, incorrect, or lacking in merit, and therefore do not warrant reversal or modification of our decision.

We therefore affirm the findings of fact presented in our appeal decision, as well as our legal conclusions based thereon. CUC's request for reconsideration is denied in its entirety.



Leo L. LaMotte
Public Auditor, CNMI

September 22, 1998