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Decision

Matter of: American Medical Depot

File: B-285060; B-285060.2; B-285060.3

Date: July 12, 2000

Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Adduci, Mastriani & Schaumberg, for the protester.
Barbara J. Stuetzer, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

1. Exclusion of proposal from competitive range is unobjectionable where agency reasonably concluded that the proposal contained informational deficiencies and other weaknesses that warranted an evaluation rating of marginally acceptable, and the proposed price was relatively high, so that the proposal had no reasonable chance of being selected for award.
 2. Although price proposals were improperly evaluated, protest is nonetheless denied where the agency's error inured to the benefit of the protester.
 3. Amendment of solicitation after competitive range has been determined does not require revising the competitive range determination where the amendment does not materially change the basis on which initial offers were solicited and submitted.
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DECISION

American Medical Depot (AMD) protests the exclusion of its proposal from the competitive range by the Department of Veterans Affairs (VA) under request for proposals (RFP) No. 797-MSPV-99-1005, for the distribution of medical and surgical supplies to specified VA facilities. AMD primarily challenges the evaluation of proposals which led to the competitive range determination.

We deny the protest.

The RFP, issued on June 10, 1999, contemplated an award to a single supplier, known as a "Medical Surgical Prime Vendor," to act as the source of distribution for a broad range of medical and surgical products as required by the VA Medical Center

in San Juan, Puerto Rico and its four outlying clinics (two in Puerto Rico and two in the U.S. Virgin Islands). As amended, the RFP required the prime vendor to commence performance of the contract within 90 days of award. RFP amend. 1, at 2. The RFP pricing structure separates the product price from the distribution fee, RFP part II, § 4.1, and calls for offerors to propose percentage-based distribution fees. The distribution fee is a markup to the product prices established under other federal government contracts, primarily the Federal Supply Schedule (FSS), the Veterans Integrated Service Network, or local agreements, and is intended to cover the prime vendor's costs for managing the customer's inventory, ensuring the timely delivery of needed products to the customer in a more efficient and effective manner than other conventional ordering methods, and administering electronic commerce systems in support of the program. VA National Acquisition Center Database, <<http://www.va.gov/oa&mm/nac/ncs/mspy.htm>>.

A single contract for a base year with four 1-year option periods was to be awarded to the responsible offeror whose offer conformed to the solicitation and represented the best overall value, price and technical factors considered. RFP part VII, at 77. The RFP listed (in descending order of importance) the following technical evaluation factors, which, combined, would be somewhat more important than price in the source selection:

Technical Excellence:

- (1) Distribution and Logistics Management
- (2) Product Availability
- (3) Price Accuracy and Management Information Systems
- (4) Implementation of Prime Vendor Plan

Past Performance

Small Disadvantaged Business Participation

Id.

Part VI of the RFP provided detailed instructions regarding the information that should be included in technical proposals. The solicitation advised that, while the importance of price would increase as a proposal's overall rating became more equal to those for competing offers, the government was more concerned with superior past performance history and technical features than award at the lowest distribution fee. Id. The RFP cautioned offerors that the government intended to award the contract without holding discussions, although it reserved the right to do so if necessary. Id.

On June 29, 1999, the VA held a pre-proposal conference in Puerto Rico which was attended by representatives of 11 firms, including AMD, to explain and clarify the requirements of the solicitation to all interested potential offerors. Contracting

Officer’s Statement at 1. Following the conference, the agency provided conference minutes to all of the conference attendees, in addition to publishing the minutes on the Internet. The minutes include a vendor’s question regarding the applicability of a provision of Puerto Rican law known as “Law 75,” which was not referenced in the RFP. In response to the question, the VA prime vendor program team leader stated that the law does not apply to federal government contracts, and concluded that “that should not be a problem for this procurement and award.” Agency Report, Tab 5, Record of Preproposal Conference, Questions and Answers, at 7. Although the protester states that it later contacted the contracting officer by telephone to discuss this issue, it filed no protest objecting to the agency’s stated position.

Four offerors (Borschow Hospital and Medical Supplies, Inc., two other firms, and the protester) submitted timely proposals. A technical evaluation panel (TEP) reviewed and evaluated the technical proposals of the three small business offerors. Overall, Borschow’s technical proposal was rated “[deleted],” AMD’s was rated “[deleted],” and the third offeror’s was rated “poor.”¹

Prices were submitted as percentage-based distribution fees for three line items, *i.e.*, for the medical center, for the outpatient clinics in Puerto Rico, and for the outpatient clinics in the U.S. Virgin Islands. Borschow’s proposal offered the following fees:

	Line Item 1	Line Item 2	Line Item 3
Base Year	[deleted]	[deleted]	[deleted]
Option Year 1	[deleted]	[deleted]	[deleted]
Option Year 2	[deleted]	[deleted]	[deleted]
Option Year 3	[deleted]	[deleted]	[deleted]
Option Year 4	[deleted]	[deleted]	[deleted]

Agency Report, Tab 8, Borschow’s Offer, at 4.

AMD’s proposal specified an identical fee of [deleted]% for each line item for each year. Agency Report, Tab 7, AMD’s Offer, at 4. The contracting officer reviewed the business proposals and compared the offerors’ fees. The contracting officer compared fees by using an “average distribution fee,” which was calculated on the basis of a simple mathematical average of the base-year and option-year fees that

¹ The RFP included a “cascaded set-aside” clause that is not at issue here, under which the agency initially treated the procurement as a small business set-aside but later, because of the low ratings, the contracting officer determined to also consider the remaining (large business) offeror, whose proposal was evaluated as “poor.” This sequence of events is undisputed and does not affect the protest issues.

each offeror submitted for all of the line items.² Comparing pricing in this manner, the contracting officer determined that Borschow had offered an average fee of [deleted]% in its proposal, while AMD’s proposal offered [deleted]%, and concluded that AMD’s price was “[deleted] higher than Borschow’s.” Contracting Officer’s Statement at 7.

In order to determine which proposals to include in the competitive range, the contracting officer reviewed the technical and price evaluation results, which are summarized in the agency report as follows:

Offeror	Technical excellence	Past Perf. Rating	SDB Rating	Average Dist. Fee	Overall Rating
Borschow	[deleted]	[deleted]	[deleted]	[deleted]	Very good
AMD	[deleted]	[deleted]	[deleted]	[deleted]	Marginal
3 rd Offeror	[deleted]	[deleted]	[deleted]	[deleted]	Poor
4 th Offeror	[deleted]	[deleted]	[deleted]	[deleted]	Poor

Id.

Based on the technical proposal ratings and a comparison of average distribution fees, the contracting officer determined that only Borschow’s offer should be included in the competitive range, because it was the only one with a reasonable chance of receiving the award. Agency Report, Tab 18, Report of Findings, at 2. The remaining offerors were informed of their exclusion by letter and facsimile transmission of February 8 and were given a February 11 deadline for requesting a debriefing.³ Agency Report at 3. AMD filed an agency-level protest on February 17, alleging that it was “the only firm that can legitimately claim successful performance on a med/surg prime vendor contract for this facility” and asserting in essence that it could not reasonably be excluded from the competitive range, based on its current capabilities and past performance record, and that it was improper for the agency not to hold discussions with AMD. Agency Report, Tab 13, Letter from Protester to Contracting Officer (Feb. 17, 2000).

² These fees were adjusted slightly to reflect a price evaluation adjustment clause in the RFP to compare small disadvantaged business (SDB) and non-SDB offeror prices, once it was determined under the cascade feature that the procurement would proceed on an unrestricted basis. Contracting Officer’s Statement at 2, 7. This adjustment is not relevant to the issues raised here.

³ AMD did not submit its debriefing request until February 15; it was rejected as untimely the following day. Agency Report, Tab 15, Letter from Contracting Officer to Protester (Feb. 25, 2000).

On February 25, the VA issued amendment No. 2, which clarified delivery terms in the contract, and on March 30, the agency issued amendment No. 3, which deleted line item 3 (delivery to outpatient clinics in the U.S. Virgin Islands). These amendments were sent to Borschow alone, as the only competitive range offeror. The contracting officer denied AMD's protest against the exclusion of its proposal from the competitive range by letter of March 20, and AMD filed this protest in our Office on April 3. When AMD learned of the amendments from the agency report, it filed a supplemental protest alleging that the amendments so significantly changed the terms of the solicitation that there was no common basis on which to compare offers and contending that, had AMD been given an opportunity to respond to the amended requirement, its fees would have been "comparable to Borschow's proposed fees." Second Supplemental Protest at 3.

THE LAW 75 ISSUE

AMD alleges that all of the other offerors are subject to Law 75, which will restrict their ability to supply all of the medical and surgical supplies required by the solicitation. The protester asserts that it alone (as a U.S. company with relationships with all of the U.S. manufacturers of the supplies) is exempt from the restrictions imposed by the law, and that this should have been considered in the agency's evaluation of proposals. This protest issue is untimely filed and not for consideration on the merits.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2000). Our Regulations also provide that a matter initially protested to the agency will be considered if the initial protest to the agency was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3); Pacific Photocopy and Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 3. Here, the RFP did not provide that Law 75 had any applicability to this procurement. Further, the protester concedes that at the pre-proposal conference attended by its representative, during which a vendor asked how the provisions of Law 75 would affect the procurement, the agency's response "reflected the VA's understanding that Law 75 did not apply to the Federal Government." Protester's Comments at 3. In these circumstances, AMD knew at that time that the RFP did not reference Law 75 and that the VA did not intend to consider Law 75 in its evaluation of proposals. Accordingly, any protest based on the VA's position in this regard was required to be raised prior to the time established for receipt of initial proposals. Further, even if we construed this basis of protest as relating to the evaluation of proposals, rather than relating simply to an alleged apparent impropriety in the solicitation, AMD did not raise the issue of the alleged applicability of Law 75 in its protest to the agency. As an additional ground

of protest, first protested in AMD's submission to our Office, this protest basis does not independently satisfy our timeliness requirements, and will not be considered. MRK Incineration/IDM Corp., a Joint Venture; Halliburton NUS Envrtl. Corp., B-244406.5, B-244406.6, Jan. 16, 1992, 92-1 CPD ¶ 77 at 7-8.

THE TECHNICAL EVALUATION

AMD protests the agency's evaluation of its technical proposal, essentially alleging that the evaluation reflected an improper agency preference for offerors with a presence and existing operations in Puerto Rico, and that its proposal was downgraded for lack of sufficient factual details that could have been provided if the agency had conducted discussions.

After evaluating all proposals, agencies must establish a competitive range if discussions are to be conducted. Based on the ratings of each proposal against all evaluation criteria, the contracting officer is to establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced in circumstances not present here. Federal Acquisition Regulation (FAR) § 15.306(c). In reviewing an agency's technical evaluation and its competitive range determination, our Office will not reevaluate the proposals; rather, we will examine the record to ensure that the evaluation was reasonable and in accordance with the solicitation's evaluation criteria and any applicable statutes or regulations. Cobra Techs., Inc., B- 272041, B-272041.2, Aug. 20, 1996, 96-2 CPD ¶ 73 at 3. The protester's mere disagreement with the agency does not render the evaluation unreasonable. Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 3.

Here, we see no basis to object to the agency's determination to exclude AMD's proposal from the competitive range. As discussed below, the record shows that the evaluation of AMD's technical proposal was reasonable and consistent with the terms of the RFP. In addition, while our review reveals that the fee evaluation was improperly performed, the actual price difference between Borschow's proposal and AMD's is far greater than the contracting officer's analysis indicated. Regarding the technical evaluation, AMD's proposal received a "marginal" rating for technical excellence, which appears in large measure to be based on the TEP's dissatisfaction with the level of specific information provided in the proposal. AMD complains that, "while [the evaluators] also did not believe that AMD provided enough factual detail in its proposal (notwithstanding the page limits of three to five pages each for the four subfactor sections), the evaluators were most critical of AMD for not having an existing facility in Puerto Rico." Protester's Comments at 5-6.

An offeror has the burden of submitting an adequately written proposal for the agency to evaluate, Premier Cleaning Sys., Inc., B-255815, Apr. 6, 1994, 94-1 CPD ¶ 241 at 5, and agencies may exclude all but the most highly rated proposals from further consideration. FAR § 15.306(c). Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to either

omitted or merely inadequate information addressing fundamental factors. McAllister & Assocs., Inc., B-277029.3, Feb. 18, 1998, 98-1 CPD ¶ 85 at 2. Here, the evaluation record reflects the agency's concern regarding AMD's ability to provide the required services within the time limits set forth in the RFP, which was exacerbated by the lack of detailed information in AMD's proposal. For example, under the most important subfactor, distribution and logistics management, the RFP provided that "within 30 calendar days of contract award, the contractor shall be required to provide written certification that its breakout areas and clean rooms [for converting larger shipments into the required low-volume deliveries] are in compliance" with certain listed VA standards. RFP part II, § 5.18.3. AMD's proposal simply indicated that the firm had been "provided with two warehouse locations of existing, fully bonded warehouses owned and operated by the Economic Development Agency of the Commonwealth of Puerto Rico," and proposed to use some of the space for construction of the clean room/bulk-breakdown area, estimating that this would take 3-4 weeks. Agency Report, Tab 7, Protester's Technical Proposal, Vol. II, Tab A, at 1. AMD's proposal failed to discuss what arrangements, if any, had been made to secure the use of these locations or to provide any specific plan regarding how it would ensure that the construction and certification processes would be complete within the 30-day timeframe.

In our view, this level of response to the very specific informational requirements set forth in the RFP was reasonably rated as "marginal." While AMD asserts that its proposal "clearly stated that AMD had secured a firm commitment . . . for warehouse space that would be immediately available upon award," Protest at 8, we do not agree. AMD's proposal stated only that the firm had "been provided with two warehouse locations of existing, fully bonded warehouses," which, in our view, could simply mean that two locations were identified to AMD. Protester's Technical Proposal, Vol. II, Tab A, at 1 (emphasis added). Regarding their availability, the proposal states that they "are available for immediate occupancy," which did not ensure (as AMD claims) that they would be available "upon award" in the absence of any agreement between AMD and the warehouse owner, and no such agreement was mentioned in AMD's proposal. In addition, the evaluators concluded that the two vehicles that AMD proposed to use for delivering products were not enough to service the facilities covered by the RFP. They also concluded that AMD had not provided sufficient information to show its ability to comply with the RFP's requirements in the areas of: meeting the required fill-rates; taking corrective action if fill-rates were not met; meeting off-schedule delivery orders; and procedures for handling pricing exceptions, substitutions, confirmation, and manufacturer's backorders.

While AMD suggests that the evaluators should have considered AMD's "successful performance of the same services in Puerto Rico under its prior contract" as evidence of its ability and experience in setting up the system required here, AMD's reliance on its status as a previous contractor is misplaced. First, the VA disputes the characterization of the requirements under the previous contract as being the

same in a number of ways. More importantly, a procuring agency is not required to overlook a flawed proposal on the basis of the offeror's prior performance; on the contrary, all offerors are expected to demonstrate their capabilities in their proposals. Pedus Bldg. Servs., Inc., B-257271.3 et al., Mar. 8, 1995, 95-1 CPD ¶ 135 at 3-4.

In contrast, the TEP considered Borschow's proposal to be very thorough. Agency Report, Tab 18, Price Negotiation Memorandum, at 8. In the distribution and logistics management portion of its technical proposal, Borschow identified warehouse space that it already has in Puerto Rico, for which it disclosed available space and its proximity to the medical center; it provided a detailed description of its processes for maintaining inventory and filling orders; making off-schedule deliveries, handling pricing exceptions, substitutions, confirmations and manufacturer's back orders; and its quality control program. While AMD characterizes Borschow's proposal as including "somewhat more detail," Protester's Comments at 9, we think the evaluators reasonably concluded that the level of detail in Borschow's proposal was significantly more responsive to the RFP's instructions and merited a "very good" rating.

The combined effect of AMD's low technical rating and its price premium, as discussed below, lead us to find unobjectionable the agency's conclusion that AMD's proposal was not one of the most highly rated and had no reasonable chance of receiving the award. There is no requirement that a procuring agency retain in the competitive range a proposal that is determined to have no reasonable prospect of award, even where its exclusion will result in a competitive range of one. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5-6.

THE PRICE EVALUATION

As explained above, offerors were instructed to submit percentage-based distribution fees for each of the three RFP line items. The RFP provided that for each line item, the proposed base-year fee and proposed option-year fees would be averaged to determine the aggregate fee for each line item over the potential life of the contract. RFP part VII, § 4. This fee would then be multiplied by the annual estimated requirements for each line item to determine the estimated total cost per line item. The government would then determine the lowest price based on the sum of the estimated cost for the three line items. Id.

The contracting officer did not follow the price evaluation procedures established in the RFP. Instead, the contracting officer calculated an overall average percentage fee for each offeror by adding the percentage fees submitted for the base year and each option year for each line item and dividing by 5 (years) and then by 3 (line items). RFP Tab 18, Report of Findings, at 2. Limiting the price evaluation to review of percentage fees (without regard to estimated dollar costs) and averaging the percentage fees for the three line items, in addition to being inconsistent with the

terms of the RFP, completely disregarded the price impact of the differing estimated quantities for each line item. For example, the RFP under line item No. 1 (where Borschow's percentage fee was much lower than AMD's) provided an estimated annual requirement of products valued at \$6,331,000, while for line item No. 3 (where Borschow's percentage fee was higher than AMD's), it estimated a requirement of products valued at only \$48,275. When Borschow's proposed aggregate fees are multiplied by the estimated quantities as provided in the RFP, Borschow's total proposed estimated fee is \$[deleted],⁴ while AMD's is \$[deleted].⁵ Thus, AMD's fees were nearly three times as high as Borschow's, rather than being only 50 percent higher, as the contracting officer had calculated.

While incorrect, the contracting officer's methodology did not result in competitive prejudice to the protester, since its effect was to lessen the difference between the protester's and the awardee's proposed fees. In fact, the price discrepancy between the two proposals, when correctly evaluated, lends further support to the reasonableness of the agency's conclusion that the protester's proposal had no reasonable chance of receiving the award.

THE AMENDMENTS

AMD in its supplemental protest essentially alleges that the amendments relaxed the initially established delivery terms of the RFP, without giving the already excluded offerors an opportunity to compete on the altered requirement. According to AMD, the price impact of the amendments that the VA issued to the solicitation after AMD's proposal was excluded from the competitive range was so great that it rendered the previous comparison of prices meaningless.

Amendment No. 2 reads, in pertinent part, as follows:

The resultant contract will use Federal Supply Schedule, VISN, and local contracts as the base for product pricing for products that will be used by using facilities. The Government will be responsible to the Medical/Surgical Prime Vendor (MSPV) for freight charges, if any, the MSPV incurs for products required by using facilities covered by this contract and priced as F.O.B. Origin under the applicable supply contract.

⁴ This figure is based on the following calculation: $(\$6,331,000 \times [\text{deleted}]) + (\$220,000 \times [\text{deleted}]) + (\$48,275 \times [\text{deleted}]) = \$418,017$. (This does not reflect the 10-percent price evaluation adjustment, since it is not relevant here.)

⁵ This figure is based on the following calculation: $(\$6,331,000 \times [\text{deleted}]) + (\$220,000 \times [\text{deleted}]) + (48,275 \times [\text{deleted}]) = \$1,121,876.75$. (This calculation also does not reflect the 10-percent price evaluation adjustment.)

Agency Report, Tab 2, RFP amend. 2.

AMD contends that its “pricing strategy would have been significantly altered, resulting in a substantially lower proposed distribution fee, had AMD known that the VA intended to reimburse the contractor for all F.O.B. Origin charges added to the Federal Supply Schedule (FSS) prices on those medical/surgical products supplied by manufacturers in the United States, and that the [U.S. Virgin Island] clinics were not going to be included in the contract.” Second Supplemental Protest at 2.

It is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. W.D.C. Realty Corp., B-225468, Mar. 4, 1987, 87-1 CPD ¶ 248 at 5. However, competitive prejudice is an essential element of a viable protest. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209 at 3. There is no basis to sustain a protest that offerors were not competing on an equal basis because the procuring agency changed a term of the solicitation after exclusion of the protester’s proposal from the competitive range, where the solicitation amendment did not materially change the initial solicitation provisions. J.M. Yurick Assocs., Inc., B-242138, Dec. 20, 1990, 90-2 CPD ¶ 511.

Here, the RFP, in part III, at 53-54, included an “F.O.B. Destination” clause, which obligates the contractor to perform a number of tasks such as packing and marking shipments, distributing bills of lading, delivering the shipment, assuming responsibility for loss and/or damage prior to delivery, and paying all charges to the point of delivery. Amendment No. 2 did not change the delivery terms under the prime vendor contract from “F.O.B. Destination” to “F.O.B. Origin,” but rather, only clarified that the government would reimburse the prime vendor “for freight charges, if any,” that are added to the product price by an FSS supplier whose products are “priced as F.O.B. Origin under the applicable supply contract.”

The agency asserts that the price impact of amendment No. 2 is not significant. Supplemental Agency Report at 2. The agency explains in its report that FSS contracts are the primary source for the products required under the prime vendor contract, and that, under these contracts, the FSS contractor may elect F.O.B. destination or F.O.B. origin for orders for addresses in Puerto Rico. Supplemental Agency Report at 2. The contracting officer states that, before issuing the amendment, she contacted major FSS suppliers and determined that most of their contracts provided for F.O.B. destination delivery to Puerto Rico; in addition, she discussed the issue with purchasers from the VA procuring activity in Puerto Rico and was told that F.O.B. origin delivery would affect only a few shipments and have little impact. Id.

In support of its position, the VA has submitted a list of FSS contractors that supply medical/surgical items, showing that approximately 91 percent are delivered under

F.O.B. destination supplier contracts to Puerto Rico. Agency Letter 1 (June 29, 2000). The VA also supplied data showing that, of supplies purchased by the VA in Puerto Rico during the period of January 1 through June 27, 2000 and valued at approximately \$1 million, the amount of supplies that were delivered F.O.B. destination was valued at approximately \$600,000; however, nearly \$300,000 of the remaining money spent was for an item (manual wheelchairs) that, while purchased during this (January - June) time period on an F.O.B. origin basis, would have to be purchased from an F.O.B. destination supplier in the future (based on a recent VA-wide purchase mandate). Contracting Officer's Statement, June 29, 2000, at 1. Thus, historical data provided by the agency shows that 90 percent of the medical/surgical supplies (as measured by dollar value) was (or would be) delivered under F.O.B. destination contracts. The protester has provided no facts or statistical data or other evidence to support its conclusory assertions to the contrary, either in its comments on the agency report or when specifically afforded an opportunity to do so later. In these circumstances, we have no basis to object to the VA's conclusion that amendment No. 2, providing for reimbursements to the prime vendor for transportation costs associated with supplies ordered from FSS suppliers on an F.O.B. origin basis would have a relatively insignificant price impact, and thus was not material.

Finally, AMD also protests that amendment No. 3 materially changed the solicitation requirements. Amendment No. 3 deleted the third line item, covering the distribution of supplies to clinics in the U.S. Virgin Islands. The products that were to be ordered under this line item represent less than 1 percent of the total requirement's dollar value. Supplemental Agency Report at 2; RFP part II, at 3. AMD never explains how the deletion of so small a portion of the requirement could affect AMD's pricing on the remaining items or otherwise materially alter the solicitation. Accordingly, AMD's allegation in this regard lacks a reasonable basis.

The protest is denied.

Comptroller General
of the United States