

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
L-3 Communications Corporation, Link)
Simulation & Training Division) ASBCA No. 54920
)
Under Contract No. F33657-01-D-2077)

APPEARANCE FOR THE APPELLANT: Roy A. Klein, Esq.
Melville, NY

APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF
Chief Trial Attorney
Tedd J. Shimp, Esq.
Senior Trial Attorney
Capt Bradley A. Cleveland, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

L-3 Communications Corporation, Link Simulation & Training Division (hereinafter “Link”) appeals the denial of its claim for breach of the “fair opportunity to be considered” provision applicable to award of a delivery order under a multiple-award, indefinite delivery/indefinite quantity (ID/IQ) contract.¹ We sustain the appeal as to government breach of the fair opportunity provision and find Link entitled to recover its proposal preparation and submission costs in the amount of \$186,482. Link, however, has failed to prove that, but for the breach, it would have been awarded the delivery order. Therefore, we deny its claim for lost profits and other damages resulting from the award of the order to another offeror.

FINDINGS OF FACT²

1. On 5 July 2001, Link and the government entered into the captioned ID/IQ contract for acquisition by delivery order of aircrew and aircraft maintenance training devices and related services (R4, tab 1 at 1-6). The captioned contract was one of eleven such contracts (hereinafter “the TSA II contracts”) awarded at substantially the same time to qualified contractors under the Air Force TSA II program (supp. R4, tab G-8 at 6, 19).

¹ We considered the jurisdictional aspects of this appeal in an earlier opinion. *L-3 Communications Corporation*, ASBCA No. 54920, 06-2 BCA ¶ 33,374.

The contracting agency was the Aeronautical Systems Center, Air Force Materiel Command (ASC/AFMC) (R4, tab 1 at 1).

2. The TSA II contracts included among other provisions the FAR 52.233-1 DISPUTES (DEC 1998) – ALTERNATE I (DEC 1991) clause, the Air Force FAR Supplement (AFFARS) 5352.216-9001 AWARING ORDERS UNDER MULTIPLE AWARD CONTRACTS (MAY 1996) – ALTERNATE II (MAY 1996) (DEVIATION DEC 2000) clause, and a Special Provision H024 entitled ORDERING PROCEDURES (JAN 2001) (R4, tab 1 at 22-23, 29, 46).

3. With exceptions not relevant here, paragraph (a) of the Awarding Orders clause stated: “All multiple award contractors shall be provided a fair opportunity to be considered for each order . . .”. Paragraph (d) of the same Awarding Orders clause designated a “delivery order ombudsman” with responsibility for “reviewing complaints from multiple award contractors and ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders . . .” (R4, tab 1 at 46).

4. Paragraph (d)(6) of the Ordering Procedures clause of the TSA II contracts stated in relevant part:

The cost of preparing any quotation or proposal in advance of receiving a task order . . . is to be considered a bid and proposal (B&P) cost and therefore is only chargeable to the appropriate indirect cost account. Under no circumstances are such B&P costs to be considered as direct costs chargeable to or reimbursable under a task order that may be issued.

(R4, tab 1 at 22-23) Paragraph (g) of the same clause stated:

The Government reserves the right to not award an order after requesting an order proposal. Regardless whether an order is awarded or not, the Government shall not be responsible for the Contractor’s bid and proposal costs.

(*Id.*)

² The findings below are based on the complete record of the evidentiary hearing in this appeal. To the extent of any inconsistency, they supersede the Statement of Facts (SOF) for Purposes of the Motions in our 27 July 2006 decision on the parties’ respective motions to dismiss and for summary judgment. *L-3 Communications Corporation*, ASBCA No. 54920, 06-2 BCA ¶ 33,374.

5. On 14 August 2002, the AFMC Ogden Air Logistics Center (Ogden ALC) issued to the TSA II contractors a Request for Order Proposal (RFOP) for an F-15 trainer support delivery order to begin 1 January 2003 for a base term from date of award to 31 December 2003 with nine successive one-year options thereafter (R4, tab 34 at 1, 3, 16, 61).³ In addition to Link, The Boeing Company, the prime contractor for the F-15 aircraft, was among the TSA II contractors solicited for the order. The RFOP stated that “[t]his is a best value task order selection,” and that “[t]his may result in an award to a higher rated, higher priced offeror, where . . . the Order Award Authority (OAA) reasonably determines that the technical superiority and/or overall business approach of the higher priced offeror outweighs the cost difference” (R4, tab 34 at 52).

6. The F-15 delivery order RFOP specified three evaluation factors for award. These were (i) technical/management (to include proposal risk), (ii) past performance of TSA II delivery orders, and (iii) cost/price. With respect to the relative importance of these three factors, the RFOP stated that the technical/management (to include proposal risk) and past performance factors “are considered equal in importance,” and that those factors “when combined, are significantly more important than cost/price; however, cost/price will contribute substantially to the selection decision.” (R4, tab 34 at 52-53, ¶¶ 2.1, 2.2)

7. The RFOP divided the technical/management factor into six subfactors as follows: (i) concurrency, (ii) commonality, (iii) baseline requirements, (iv) program management and staffing, (v) transitioning, and (vi) TFE-21 conversion to RPS (R4, tab 34 at 52-53, ¶ 2.1). Concurrency referred to how well the offeror’s proposal incorporated planned aircraft modifications into the training devices no less than 60 days before the modifications were incorporated into the first aircraft (R4, tab 34 at 23, ¶ 5.3.1 and at 54, ¶ 2.3.1.1). Commonalty referred to how well the offeror’s proposal used common core software from the Rapid Prototyping System (RPS),⁴ software re-use, common software architecture and commercial off-the-shelf (COTS) hardware in major modifications of the existing training devices and/or design of new systems (R4, tab 34 at 54, ¶ 2.3.1.2). The baseline requirements were the requirements for operational and maintenance support of the existing training devices (R4, tab 34 at 24, ¶ 5.3.3 and at 55, ¶ 2.3.1.3). The program management and staffing subfactor referred to, among other things, the offeror’s proposed management structure, personnel and “interfaces with other organizations” (R4, tab 34 at 24, ¶ 5.3.4 and at 55, ¶ 2.3.1.4). The transitioning subfactor referred to transitioning the

³ The F-15 trainers to be supported were eight aircrew training devices and 37 maintenance training devices located at Air Force bases in the United States and United Kingdom (R4, tab 34 at 91-92).

⁴ The RPS was a system developed and used by the aircraft prime contractor (Boeing) as part of the aircraft operational flight program (OFP) development process (R4, tab 34 at 10, ¶ 2.2).

performance of the trainer support services at the beginning of the delivery order from the existing contractor and at the end of the delivery order to the successor contractor (R4, tab 34 at 55, ¶ 2.3.1.5). The TFE-21 conversion to RPS subfactor referred to the specification requirement for incorporation of the RPS software into the TFE-21 aircraft maintenance trainer (R4, tab 34 at 25, ¶ 5.3.6 and at 55, ¶ 2.3.1.6).⁵

8. The rating scheme for the technical/management evaluation factor and subfactors was described in the RFOP in relevant part as follows:

2.3 Factor and Subfactor Rating:

Technical/Management proposals will be evaluated using the Delphi Method. . . . A government evaluation team using the Delphi worksheet depicted in table 2.3-1 below will independently evaluate each proposal. A numerical rating from “0” to “5” will be assigned to each subfactor under the Technical/Management factor. The numerical rating represents how well the offeror’s proposal meets the F-15 Technical/Management subfactor requirements in accordance with the explanation of how the subfactor will be evaluated in paragraph 2.3.1. Proposal risk will be taken into consideration in this rating. Proposal risk will be integrated into the assessment of each Technical/Management subfactor as described in paragraph 2.3.2. Each offeror’s effective value for each criterion will be calculated by multiplying the assigned numerical rating by the corresponding system weight factor (SWF). An evaluation team consensus and final effective value for each criterion will be provided. Each offeror’s total score will be calculated by totaling the final effective value for each criterion. The highest total score will be calculated by totaling the final effective value for each criterion. The highest total score represents the highest technically ranked proposal.

(R4, tab 34 at 53)⁶

⁵ The Air Force intended eventually to incorporate the RPS into all F-15 training devices in order to lower the time, cost and number of problem reports involved in modifying the training devices to conform to changes in the aircraft OFP. (Tr. 7/300-06, 8/233-35)

⁶ The system weight factors on the Delphi worksheet were concurrency: 9, commonality: 6, baseline requirements: 6, program management and staffing: 7, transitioning: 7, and TFE conversion to RPS: 10 (R4, tab 34 at 53, Table 2.3-1).

9. Evaluation of the past performance factor was specified in the RFOP in relevant part as follows:

2.3.3 Factor 2 – Past Performance:

This factor will only consider past and present performance on delivery orders awarded to the offeror within the TSA II contract. . . . Past performance will be rated as either “Acceptable” or “Not Acceptable”. . . . All offerors are assumed to be acceptable unless a past performance rating less than green is present. . . .

(R4, tab 34 at 56)

10. As initially circulated to potential offerors in draft form, the past performance evaluation paragraph specified a “neutral” rating for offerors with no past performance on TSA II delivery orders (supp. R4, tab G-6 at 5; tr. 5/330-32, 7/183-84). At that time only three of the eleven TSA II contractors had performed delivery orders under their TSA II contracts (supp. R4, tab G-27 at 12).⁷ In response to a small business inquiry as to whether it would be “penalized” for a neutral past performance rating, the government changed “neutral” to “acceptable” in the final RFOP (tr. 5/332-35, 8/226-27). There is no evidence that Link complained to the delivery order ombudsman before award that the evaluation criteria for the past performance factor inherently made that factor of less importance than the technical/management factor, or that those criteria were unfairly biased in favor of offerors that had no prior TSA II delivery orders.

11. The cost/price provisions of the RFOP required offerors to submit prices for (i) firm fixed price contract line item numbers (CLINs) (Table A), (ii) fully-loaded hourly rate CLINs (Table B), (iii) labor hour CLINs (Table C), and (iv) fixed price level of effort CLINs (Table D). The Table B pricing consisted of the offeror’s proposed fully-loaded hourly rates for government-estimated hours for both firm fixed price and cost reimbursement CLINs for future major modifications, development of new devices, and reliability and maintainability improvements. The government-estimated hours on Table B totaled 500,500 hours for the FFP CLINs and 229,500 hours for the cost-reimbursement CLINs. The proposed prices entered on tables A through D plus a government specified amount for cost-reimbursement no fee CLINs were summed on

⁷ Link was one of the three, but the contract under which it was performing the current F-15 trainer support work was awarded to it in 1998 (tr. 1/64-65, 68-70). The 1998 contract was not a delivery order under the TSA II contract, and therefore, under the terms of paragraph 2.3.3 of the RFOP evaluation factors for award, it could not be considered in the evaluation of past performance. *See* finding 9.

Table E for the base period and all option periods to arrive at the “total evaluated price” (TEP) for a proposal. (R4, tab 34 at 38-44, 51, 56, 68-69, 77-78)

12. The RFOP provisions for evaluation of the cost/price factor stated in relevant part:

2.3.4.1 Total Evaluated Price:

The offeror’s Price/Cost proposal will be evaluated for award purposes, based upon the total price proposed for basic requirements (basic award period) and all options. The total evaluated price/cost will be calculated as the sum of the CLINs and other information called for and explained in Table E. Offered FFP [firm fixed price] prices shall not be adjusted as a result of the risk analysis. A quantified risk assessment may be shown to the OAA separately from the FFP values.

.....

2.3.4.1.2 Hourly Rates

The total amounts as proposed in Table B and transferred to Table E will be evaluated and are comprised of fully loaded hourly rates multiplied by corresponding government estimated hours. The government provided hours are for evaluation purposes only and are not reflective of the volume of projected work.

.....

2.3.4.3 Price Reasonableness:

Offeror’s cost/price proposal will be evaluated, using one or more of the techniques defined in FAR 15.404, in order to determine if it is reasonable. A price is reasonable when it provides the best value to the government when consideration is given to the current market prices, technical and functional capabilities of the offeror and proposal risks.

(R4, tab 34 at 56-57)

13. Before submitting its proposal, Link recognized that Boeing had a competitive advantage with respect to the TFE 21 conversion to RPS subfactor because Boeing had “engineered” the RPS and had access to the most current RPS data (tr. 1/262, 2/22, 9/99).

Link also now alleges that the RPS data provided by the government was incomplete and insufficient for proposal preparation (tr. 1/107-09, 260-61, 2/15-18, 2/36-37, 9/14-17). Link, however, did not complain to the delivery order ombudsman before award that the RPS data was insufficient or that the specified evaluation criteria or any other provisions of the RFOP were biased in favor of Boeing. To the contrary, Link considered the RFOP to be “a fair and unbiased procurement that we had a very high chance of winning” (tr. 1/262, 9/84-85).

14. On 30 September 2002, Link submitted its Technical/Management and Cost/Price Proposals for the F-15 trainer support delivery order (R4, tabs 26-29). Boeing and three other TSA II contractors also submitted proposals for that order (R4, tab 20 at 1-2). Fourteen evaluators divided into six teams of six members each (one team for each subfactor) evaluated the technical/management proposals. Six of the 14 evaluators were from the Ogden ALC. Four were from the Aeronautical Systems Center (ASC) at Wright-Patterson Air Force Base (WPAFB)⁸ and four were from other Air Force activities. (Supp. R4, tab G-29 at 3-4)

15. Each evaluator on the subfactor teams was directed to score each proposal from 0 to 5 in .5 increments with 0 for unacceptable, 3 for acceptable and 5 for exceptional (supp. R4, tab G-29 at 8-9). If an evaluator wanted a “clarification” of a proposal, an evaluation notice (EN) could be sent to the offeror requesting the clarification if approved by the contracting officer (*id.* at 14-15). EN’s were to be used only to clarify what was proposed, and not to “lead [offerors] into the technical direction we wanted to go” (tr. 7/201-02).

16. After completing their individual scoring, the subfactor team members conferred to discuss their scores and arrive at a consensus for the subfactor team score. In some but not all cases, the consensus team score was the arithmetical average of the individual scores. The team score was then multiplied by the SWF specified in the RFOP for the subfactor, and the resulting weighted scores for the six subfactors were added to arrive at the total score for the technical/management proposal being evaluated. (Tr. 6/267-69) The total score for the Boeing technical/management proposal was 147.5. The total score for the Link technical/management proposal was 115.1. The scores for the other three offerors were lower. (Exs. A-11 to A-16, A-46; Bd. ex. 1)

⁸ Link alleges that the evaluators from ASC were “within the ACC’s [Air Combat Command] chain of command,” and that ACC wanted Boeing to get the award (app. reply br. at 13). The evaluators from ASC were not within the ACC chain of command. ASC was a component of the Air Force Materiel Command (AFMC). *See* finding 1.

17. Under the RFOP past performance evaluation criteria, all five offerors were found acceptable for past performance (R4, tab 20 at 1; tr. 6/286-87). Under the RFOP TEP evaluation criteria, Link's TEP was \$68,804,370. Boeing's TEP was \$100,236,520. The Boeing TEP was \$31,432,150 or 46 percent higher than the Link TEP. Of this difference, \$20,855,298 was the difference between the Table B hourly rates respectively proposed by Link and Boeing for the government-estimated hours for future modifications.⁹ (R4, tab 6 at 24).

18. In November 2002, the evaluation team results were briefed to Col Halbert, the Order Award Authority (OAA) (tr. 8/224-25). With respect to the past performance evaluation, Col Halbert concluded that: "[w]e followed the rules that we put in our RFP . . . [s]o that was off the table" (tr. 8/226-28). With respect to the technical/management evaluation, Col Halbert considered the strengths and weaknesses found by the evaluators in relation to the six strategic objectives¹⁰ and the technical/management subfactor evaluation criteria specified in the RFOP. Col Halbert testified at length and in detail on his consideration of the technical/management proposal evaluations, and summarized his conclusions as follows:

To summarize all that, we went through all the criteria, but the commonality issue, the strategic commonality plan and how it played out in an actual example, the TFE-21, those are the ones that were the most convincing to me that . . . no matter how you play with the points, you're going to have Boeing come out with a significantly stronger technical approach to doing this job.

(Tr. 8/228-256)

19. With respect to the total evaluated prices, Col Halbert asked the evaluation team the following questions: (i) "is the Boeing proposal really going to cost me \$100 million" and (ii) "why are the numbers in Link's [TEP] proposal . . . and the number[s] in the Boeing [TEP] proposal so different" (tr. 6/302, 8/256). The evaluation team chairman, Maj (now Lt Col) Baxter assisted by his lead engineer, Mr. Eddards,

⁹ The Boeing Table B (future modifications) total cost was \$51,676 520. The Link Table B (future modifications) total cost was \$30,821,222. (R4, tab 6 at 24)

¹⁰ Three of those objectives were: "c) Decrease long-term training system costs; maximize use of common software and develop common system architectures using COTS technology to the maximum extent possible[;] d) Provide devices concurrent with the fielded weapons system with performance identical to aircraft systems . . . , [and] e) Minimize the time to field and/or upgrade training system capabilities." (R4, tab 34 at 3)

answered these questions by analyzing the Link and Boeing proposed plans (“roadmaps”) and estimated costs for future modifications and/or replacements of the existing training devices to achieve the commonality objectives of the RFOP.¹¹ For comparable proposed future modifications and/or replacements for the period 2003 through 2012, Mr. Eddards determined that the Link estimated cost was \$42,193,956 and the Boeing estimated cost was \$22,917,434 (ex. A-20 at 12-13; tr. 8/80-105).

20. At the final briefing of the OAA on 20 November 2002, a “Quantified Risk Assessment” (QRA) was presented in which the future modification/replacement costs in Mr. Eddard’s analysis of the roadmaps in the Boeing and Link technical/management proposals were substituted for the Table B future modification costs in the Boeing and Link TEP proposals. The QRA showed that the Boeing proposal had a higher cumulative total cost to the government over the first three years of the delivery order, that the Link proposal had a higher cumulative total cost thereafter, and that if all annual options were exercised, the total cost at the end of the delivery order would be approximately \$80 million under the Link proposal and approximately \$67.5 million under the Boeing proposal.¹² (R4, tab 6 at 26-27)

21. Since the total future modification costs in the parties’ respective Table B submissions were a product of government-estimated hours times contractor proposed hourly rates (finding 11), the QRA based entirely on the parties’ roadmaps was in substance a cost realism analysis of the government-estimated hours in Table B.

22. Following the final briefing, Col Halbert determined in an Order Assessment Report (OAR) that, since all offerors were rated as acceptable, past performance was not a discriminator for the award, and that Boeing had the superior technical/management proposal for all subfactors except transitioning. On the cost/price factor, Col Halbert’s OAR concluded as follows:

The Total Evaluated Price (TEP) was calculated per the RFP instructions. [Link’s] Total Evaluated Price is \$68,804,370 compared to \$100,236,520 for The Boeing Company proposal. This TEP is comprised of firm fixed price amounts for Program Management, CLS, Ramp Up/Transition, core TSSC functions and the TFE-21 Conversion modification,

¹¹ The roadmaps and estimated costs were required by paragraph 5.3.2 of the RFOP Proposal Preparation Instructions for the commonality subfactor of the technical/management proposal (R4, tab 34 at 23-24).

¹² At the final briefing, the QRA was shown on a graph with lined increments of \$20 million (R4, tab 6 at 27). The precise numbers in the Eddard’s analysis were \$80,177,103 for Link and \$67,760,000 for Boeing (ex. A-20 at 6, 7).

Labor hour rates and estimates for Overtime/Surge and maintenance calls. The TEP also includes “estimated” amounts for future modifications established by the offerors providing firm labor rates for government established categories and hours. The purpose of this procedure was to analyze labor rates and potential future costs with all offerors proposing to equal labor efforts. This area accounted for approximately 50% of the Total Evaluated Price. This evaluation approach did not account for differences in proposed technical approaches or efficiencies. After evaluating the technical proposals of [Link] and The Boeing Company it became apparent that the approaches for accomplishing future modifications were vastly different and would not require equal amounts of labor due to different approaches and efficiencies. As permitted in the RFP a Quantified Risk Assessment was made that addressed concurrency, commonality and TFE-21 Conversion to RPS where significant risk factors with the proposed approaches (and reflected in the technical scores) existed and estimated cost information was provided but not reflected in the Total Evaluated Price. The Quantified Risk Assessment utilized the cost numbers taken from the offerors’ proposals (contractually binding amounts for Program Management, CLS, SDC/TSSC, Ramp Up/Transitioning and the firm rates for OT, Surge and Maintenance calls) and combined them with the non-binding estimates provided in each proposal for future major modifications and OFP updates. These amounts when summed provided a more realistic view of potential future costs for the program and the risks of meeting program objectives associated with each offeror’s approach. The results of this Quantified Risk Assessment considerably closed the gap between the two cost proposals and even reflected an overall cost savings with The Boeing Company proposal over the life of the delivery order.

(R4, tab 20 at 7-8)

23. While the OAR indicated that the QRA was a factor in the best value decision, Col Halbert’s testimony at hearing indicated that, even without the QRA, his best value decision would have been the same. That testimony was:

So when we got into doing this [QRA] analysis on whether the gap was closed on the TEP – it doesn't replace the TEP; the rules are the rules on the TEP. We said what it was. . . . But the value that you get for a contract over time – it's going to be a long-term deal. You may not be dollars ahead on the dollars necessarily, but there's going to be some other value.

Value – you got value to the war fighter in terms of faster, high-quality updates to those fellows that are learning to squeeze off the trigger the first time in combat. You've got the value to the program offices because we do not have the government people left anymore to spend a lot of time with concurrency managers face to face working out problem reports. We're still going to do that, but the [volume] has got to be reduced. By using this common software architecture, we can reduce the volume of those problem reports.

And then money is just part of value . . . when it comes to lives saved, winning the war, of a pilot, it's worth it.
[emphasis added]

(Tr. 8/265-66)

24. Col Halbert also testified to the importance of the trainer support delivery order to the Air Force mission in general and specifically to aircrew survival as follows:

. . .all pilots and other aircrew spend a lot of time in simulators and various other training devices. It started on day one of pilot training and all the way through when you're a mission pilot out at the squadron. . . . You have certain things you can't practice in an airplane, like an engine flameout, and so you practice those emergency procedures in the simulator or training device.

. . . .

Going back to my pilot days, I know very well the frustration and the negative training that happens when the training device is not like the airplane. It's vitally important that the trainers build skills and habits and react like the airplane does in order to build the skills. . . . A few years ago in

Afghanistan . . . [an MH-53 helicopter] crashed and 19 Americans died. And they weren't shot down. In the analysis of this crash, the Safety Board came back and said that there were deficiencies in the MH-53 simulator as far as letting pilots practice landing at high altitude.

Now again, I was a KC-135 pilot. There were a number of times when, as an instructor, if [the] simulator was not working right, I'd rather have no training than do bad training, you know, teach these young fellows, you know, do it wrong. It can have big consequences.

As a senior officer today, with fighters though, there are some other things that are very important. Today's Air Force, we have a lot less ranges that you can go to practice dropping bombs on. When I was a tanker pilot, I never dropped bombs. But that's what these guys in the F-15s do. They go out by themselves or with their back-seater [weapons systems officer] and they fire air-to-air missiles and drop bombs. But they don't have much practice [with] live fire because there's a lot of environmental restrictions for the ranges we do have. . . . These weapons we're putting on [the aircraft] are very, very expensive rounds, and there's just not a lot available for practice shots.

So these fighter pilots today, these young fellows, they get a lot – I mean most of their training – in simulators that are highly realistic simulators, highly concurrent simulators. If they weren't highly realistic and concurrent, it wouldn't work because these guys may be firing off their first live shot in combat . . . There's also defensive systems. If they make a mistake on their defensive systems in combat, they're dead. So simulators and trainers of this type are even more important today than they were when I was flying 15 years ago.

(Tr. 8/178-79, 218-20)

25. On 26 November 2002, Col Halbert signed the Order Award Decision determining that the F-15 training devices effort proposed by Boeing provided the best overall value to satisfy the government's requirements (R4, tab 24). Of all the personnel involved in the evaluation of the proposals, Col Halbert, with his 25 years commissioned

service in the Air Force, including 10 years and 2,500 flying hours as a mission and instructor pilot, an acquisition assignment on the Air Staff and the full complement of professional military education up to and including the Industrial College of the Armed Forces, was uniquely qualified to make the final decision as to whether the higher quality technical proposal for the F-15 trainer support delivery order was worth the 46 percent higher price (tr. 8/171-84).

26. Following a debriefing on the award, Link on 19 December 2002 wrote to the ASC Training Systems Product Group Director alleging that the Ogden ALC had not followed the requirements of the RFOP in making the award to Boeing. Link requested that a temporary stop work order be issued “until the proper evaluation is completed.” (R4, tab 22) By letter dated 28 January 2003, the ASC Training Systems Product Group Director denied the request (R4, tab 23).

27. In response to a senatorial inquiry, the Department of Defense Inspector General (IG) investigated the award to Boeing. In a report dated 21 October 2004, the IG alleged various defects in the evaluation process and concluded that “[a]s a result, the Air Force Order Award Authority did not have the most reliable information to support the “best value” decision [to award the delivery order to Boeing].” The IG, however, did not recommend that the award to Boeing be canceled and an award be made to Link. The IG recommended only that the Air Force determine whether the delivery order should be “re-competed.” The Air Force replied to this recommendation with a statement that before extending the order it would determine “that such an extension was the most advantageous method of fulfilling the Government’s need.” The IG found this reply “acceptable.” (Ex. A-41 at 5-6) As of May 2007, the Air Force had exercised all annual options of the Boeing F-15 trainer support delivery order up to that date (ex. A-42).

28. On 28 May 2004, Link submitted a certified claim to the contracting officer in the amount of \$2,131,579 plus interest for government breach of the fair opportunity provision of the TSA II contract in awarding the F-15 training devices delivery order to Boeing rather than Link. The claim alleged that the government breached the contract by conducting “an improper price evaluation,” refusing to consider “the high quality of Link’s past performance,” and failing to “correct errors in its evaluation of Link’s technical proposal.” The claim was received by the contracting officer on 1 June 2004. (R4, tabs 11-13)

29. The damages claimed by Link consisted of (i) \$186,482 for preparation and submission of its proposal in response to the RFOP, (ii) \$1,567,112 in lost fees and profits which it allegedly would have earned if the delivery order had been awarded to it, (iii) \$299,320 in severance costs paid to terminated employees as a result of loss of the order to Boeing, and (iv) \$78,665 in relocation costs allegedly incurred as a result of loss of the order to Boeing. These amounts total \$2,131,579. (R4, tab 12)

30. The Defense Contract Audit Agency (DCAA) has “verified claimed B&P [bid and proposal] costs [\$186,482] to [Link’s] accounting books and records.” The DCAA also states, disapprovingly, that Link has not booked these costs as indirect bid and proposal (B&P) costs but has retained them as direct costs of the TSA II contract “based on their argument of improper source selection procedures used by the Air Force.” (Supp. R4, tab G-59 at 4-5) Since Link has not booked its claimed proposal costs as indirect costs, it has not recovered any part of those costs under flexibly priced contracts with the government.

31. By final decision dated 10 November 2004, Link’s claim was denied in its entirety (R4, tab 2). This appeal followed.

32. Link’s post-hearing brief cites ten items allegedly constituting a flawed, biased, and otherwise unfair evaluation of the technical/management proposals (app. br. at 76-96). Our findings on these allegations are set forth in findings 33-58 below.

33. Five of the ten items and two of the four cited “instances” in a sixth item consist of allegations that 6 of the 14 technical/management proposal evaluators and a staff officer in the Air Combat Command (ACC), who was not an evaluator, were either biased against Link, biased in favor of Boeing, “not qualified for their tasks,” or violated the procedural rules for the evaluation (app. br. at 76-92, ¶¶ C.1, C.3, C.4, C.5, C.6, C.8). We see no need to make detailed findings on these allegations. If the scores of the accused six evaluators are removed from the proposal evaluations, the Boeing technical/management proposal remains the higher scored proposal (143.1 to 119.8) (exs. A-11 to A-16, A-46).

34. The ACC staff officer accused of “bias” in favor of Boeing was responsible for funding F-15 aircraft operations, maintenance, and other functions, but not the F-15 trainer support delivery order (tr. 7/7, 16-19, 8/11). Before the RFOP was issued, this officer had recommended a sole source award of the trainer support delivery order to Boeing on both technical and national security grounds. This recommendation, however, was not approved. The ACC officer was not part of the subsequent proposal evaluation team, and had no role in scoring the technical/management proposals. (Tr. 8/43-45; supp. R4, tab G-29 at 3)

35. Link alleges that the technical/management subfactors “unfairly” favored Boeing because three of the subfactors (concurrency, commonality, and TFE-21 conversion to RPS), constituting 55 percent of the total technical/management factor rating, “involved the offeror’s use of Boeing’s RPS process and required the offerors to obtain data and cooperation from Boeing” (app. br. at 79-80, ¶ C.2). Boeing’s competitive advantage with respect to the subfactors involving the RPS was not “unfair.”

It arose out of its development of the RPS as a legitimate part of its aircraft business, and the government's desire to use the same system to reduce the time, cost and number of problem reports in conforming the training devices to changes in the aircraft. (*See* finding 7, n.4)

36. Link alleges that the government failed to follow its stated evaluation procedures in four instances (app. br. at 83-85, ¶ C.6). The first two instances involved actions of three of the allegedly biased/unqualified evaluators which we have addressed in finding 33 above. The third alleged instance is that the evaluators dispersed to their home bases in the midst of the evaluation process and concluded their evaluations there. We find nothing in the evaluation team instructions ("General Rules of Engagement") that prohibited this dispersal and subsequent meetings by telephone conference (supp. R4, tab G-29 at 16).¹³

37. The fourth alleged instance of a violation of procedural instructions is an allegedly improper evaluation notice (EN) issued to Boeing on the transitioning subfactor (app. br. at 84). The EN requested: "What cost savings do we see if the TSSC is located on base at [Seymour Johnson Air Force Base]?" Since the Boeing proposal stated that one of the major criteria for the proposed location was "reducing cost to the government," the EN was a proper request for clarification of the proposal.¹⁴ (Ex. A-46 at 112)

38. Link alleges that the evaluators failed to properly apply the Delphi Method in rating the proposals and that the proper application of the method would have reduced the difference between the Boeing and Link technical/management proposal scores from 28 percent to 12.6 percent (app. br. at 85-86, ¶ C.7(a)). The final numerical score under Link's understanding of the Delphi Method, however, establishes only the relative ranking of the proposals and does not measure the degree of superiority of a higher ranked proposal over a lower ranked proposal.¹⁵

¹³ To the contrary, paragraph 3 of the evaluation team instructions stated: "Proposal reviews and evaluations may be conducted outside of designated source selection rooms as long as all data is safeguarded and not divulged to anyone outside the team membership" (supp. R4, tab G-29 at 16).

¹⁴ Link also alleges that the EN was improper because it was initiated by an evaluator (Mr. Eddards) who was not a member of the transitioning subfactor evaluation team (app. br. at 84). In addition to being the subfactor team chief in two areas, Mr. Eddards was also "the technical lead for the overall evaluations" (tr. 7/370). There was nothing improper in his initiating an EN in any area of the technical/management proposals where he saw a need for clarification.

¹⁵ Under Link's interpretation of the Delphi Method, the initial scoring of a proposal measuring its degree of compliance with the subfactor requirements establishes

39. Link alleges that the evaluation of its technical/management proposal was based on an inaccurate factual conclusion that its Associate Contractor Agreements (ACAs) were “immature”(app. br. at 86-87, ¶ C.7(b)(i)). Link’s proposal showed that the ACAs for five associate contractors were not requested until one week before the proposal was due and the proposal did not contain the replies to those requests (R4, tab 27 at 135-39). “Maturity” of the ACA documentation was one of the expressly stated evaluation criteria for the concurrency subfactor (R4, tab 34 at 54). Regardless of the responses ultimately received, the tardiness of the requests could be reasonably understood as indicating a lack of appreciation on the part of Link of the importance with which the government viewed the development of ACAs for assuring concurrency of the training devices with the operational aircraft. We find on this record that there was a rational basis for the conclusion of immaturity of the ACA documentation in the team evaluation of Link’s proposal for the concurrency subfactor.

40. Link alleges that the evaluators erroneously concluded that the Link technical/management proposal inadequately incorporated RPS into the training devices (app. br. at 87-88, ¶ C.7(b)(ii)). Link’s proposal for the commonality subfactor, however, addressed only three of the ten types of F-15 training devices listed in the RFOP (R4, tab 27 at 54, ¶ 2.6; tab 34 at 91), and its proposal for the TFE-21 conversion to RPS proposed only software changes and no hardware changes (R4, tab 27 at 53, ¶ 2.4.3.1). The team evaluation for the TFE-21 conversion to RPS subfactor noted that the TFE-21 processor “does not have sufficient processing time available to the new RPS simulation” and that “[n]o additional processor will be added” (ex. A-16 at 3). In contrast the Boeing proposal provided for an additional processor (ex. A-46 at 113-14). On this evidence, there was a rational basis for the evaluators to conclude that the Boeing proposal was superior to the Link proposal with respect to the application of the RPS to the training devices (R4, tab 20 at 6-7).

41. Link alleges that the evaluators erroneously concluded that its labor rates were artificially low (app. br. at 88, ¶ C.7(b)(iii)). The team evaluations of the concurrency, commonality and program management and staffing subfactors all cited low proposed labor rates as a “weakness” or high risk to the government in the Link proposal (exs.

only its relative rank for the subfactor. The final subfactor score for the proposal is its relative rank times the subfactor SWF. (*See* finding 8, n.5) For example, with five proposals being scored, the highest initially scored proposal for compliance with the commonality subfactor requirements will always have a final subfactor score of 5 x 9 or 45, and the second highest initially scored proposal for that subfactor will always have a final subfactor score of 4 x 9 or 36, regardless of the difference between the initial scores measuring their respective compliance with the subfactor requirements. (Ex. A-41 at 20-21 and Fig. 3)

A-11 at 4, A-12 at 3, A-14 at 3). The low composite rate of \$14.35 cited in the program management and staffing team evaluation was on its face in error. But the low composite labor rate range cited in the commonality team evaluation (\$20.60/hour to \$28.65/hour) was not (ex. A-12 at 3). A Link witness testified at hearing that the actual composite labor rate was \$23/hour (tr. 9/72-78). Moreover, the team evaluations for all three subfactors noted other weaknesses in addition to low labor rates (exs. A-11 at 3-4, A-12 at 3, A-14 at 4-5). We are not persuaded that the program management and staffing subfactor team evaluation would have scored the Link proposal any higher if it had computed the proposed composite labor rate correctly.

42. Link alleges that the government failed to apply the specified evaluation factors in the RFOP by marking down its proposal for “invalid” weaknesses (app. br. at 88-89, ¶ C.7(c) *First*). The invalid weaknesses to which Link refers are the 30 such weaknesses alleged in the IG report (ex. A-41 at 22, Table 3, and at 32-34, Appendix B). Since Link relies solely on the IG report for its contention that the 30 weaknesses were invalid, we have examined each of the cited weaknesses with respect to (i) the reason stated in the IG report for invalidity, (ii) the relevant RFOP subfactor evaluation criteria, and (iii) the relevant subfactor process narratives in Link’s technical/management proposal. For the reasons stated in findings 43-53 below, we conclude that the cited grounds for invalidity in the IG report of 27 of the 30 allegedly invalid weaknesses are without merit.

43. Eight of the cited weaknesses (L2, L3, L12, L14, L15, L17, L18 and L30) in various technical/management subfactor evaluations were deemed invalid by the IG because they referred to the cost ramifications of Link’s subfactor process narratives and should have been considered only in the cost/price factor evaluation (ex. A-41 at 32-34). However, paragraph 2.3.2 of the RFOP evaluation factors for award stated that proposal risk would be evaluated at the technical/management subfactor level and that this evaluation would include “an assessment of the potential [of the offeror’s proposed approach] for disruption of schedule, *increased cost*, degradation of performance . . . as well as the likelihood of unsuccessful contract performance” (emphasis added) (R4, tab 34 at 55-56).

44. Five of the cited weaknesses (L21, L24, L26, L27 and L28) in various technical/management subfactor evaluations were deemed invalid by the DOD IG on the ground that the subfactor rating had been downgraded “even though [an] evaluation notice was resolved” (ex. A-41 at 32-34). Evaluation notices were issued for clarification of a proposal, and were considered “closed” when the clarification was received and the evaluation could be completed. Clarification of a proposal did not necessarily mean that a weakness was “resolved.” (Ex. A-41 at 41, and finding 15 above)

45. Two of the cited weaknesses (L4 and L7) in the concurrency evaluations referred to Link's slow progress in obtaining ACAs and were deemed invalid by the IG on the ground that: "Prospective contractors refused to sign an ACA until contract award" (ex. A-41 at 32). However, the evaluation criteria for the concurrency subfactor expressly provided that: "the offeror will be evaluated on the maturity of documentation supporting its ACAs (actual, unexecuted ACA; letter of intent, etc.)" (R4, tab 34 at 54, ¶ 2.3.1.1.1(1)). For five of six required ACAs, Link's supporting documentation consisted only of its letters of request dated one week before the proposal was due and included no responses from the those five contractors (R4, tab 27 at 117-18, 135-39).

46. Two of the cited weakness (L13 and L16) in the commonality evaluations were substantially the same as the L4 and L7 weaknesses in the concurrency evaluations and were deemed invalid on the ground that they related only to the concurrency subfactor (ex. A-41 at 33). However, the RFOP evaluation criteria for the commonality factor stated that the subfactor was met "when the offeror identifies the data necessary to execute the [commonality plan] and its approach to acquiring . . . this data" (R4, tab 34 at 54, ¶ 2.3.1.2). The ACAs were Link's approach to acquiring the data for commonality between the aircraft and the training devices and any weakness therein could be properly noted under the specified criteria in both the concurrency and commonality subfactor evaluations.

47. One of the cited weaknesses (L20) in a baseline requirements evaluation was substantially the same as the L4, L7, L13 and L16 weaknesses in the concurrency and commonality evaluations and was deemed invalid by the IG for the same reason (ex. A-41 at 33 and findings 45-46 above). However, the RFOP evaluation criteria for the baseline requirements subfactor stated that the subfactor requirements were met when "the offeror describes satisfactory processes and procedures for all baseline requirements" (R4, tab 34 at 55, ¶ 2.3.1.3). One of the processes described in Link's process narrative for the baseline requirements was the use of ACAs for gathering data that was necessary for performance of the baseline requirements (R4 tab 27 at 58, ¶ 3.3.2).

48. Two of the cited weaknesses (L6 and L11) in the concurrency evaluations were for Link's proposed location of its Training Systems Support Center (TSSC) in Phoenix, Arizona "far from an 'F-15 centered' Air Force Base" and for short term "personnel retention" reasons. The IG deemed these weaknesses invalid on the ground that they did not relate to the technical/management subfactor criteria. (Ex. A-41 at 32) However, the RFOP evaluation criteria for the concurrency subfactor included the following: "How well does the offeror's overall approach to designing, developing and fielding updates facilitate meeting the 60-day concurrency window?" (R4, tab 34 at 54, ¶ 2.3.1.1(3)) The TSSC was where updates of the hardware and software for the training devices were designed and developed (tr. 3/40, 5/26). The advantages/disadvantages of

its location for that purpose was within the scope of the cited RFOP concurrency evaluation criteria.

49. Two cited weaknesses in the program management and staffing subfactor evaluations (L22 and L23) were substantially the same as the L6 and L11 weaknesses in the concurrency evaluations and were deemed invalid by the IG for the same reason (ex. A-41 at 33 and finding 48 above). However, the RFOP evaluation criteria for the program management and staffing subfactor included evaluation of the offeror's proposed "interfaces with other organizations" (R4, tab 34 at 55, ¶ 2.3.1.4). Link's process narrative for the program management and staffing subfactor expressly recognized that the proposed TSSC location "will present a challenge to maintain the same level of TSSC interface the program has had over the past 10 years." (R4, tab 27 at 82, ¶ 4.4.1-1)

50. Two weaknesses in a concurrency evaluation (L9 and L10) referred to the limited reference in Link's concurrency process narrative to the use of the RPS, and were deemed invalid by the IG on the ground that they related to the commonality and TFE-21 conversion to RPS subfactors and not to the concurrency subfactor (ex. A-41 at 32). Use of the RPS was a significant means of achieving the concurrency as well as the commonality and TFE 21 conversion to RPS requirements of the delivery order. *See* finding 7, n.4. The cited weaknesses were within the concurrency evaluation criteria quoted in finding 48 above.

51. One cited weakness (L5) in a concurrency evaluation that the contractor's statement of work (SOW) was "weak" was deemed invalid by the IG on the ground that it did not relate to the technical/management subfactor evaluation criteria (ex. A-41 at 32). However, the RFOP proposal preparation instructions stated that the offeror's SOW was to be a part of its technical/management proposal and was subject to evaluation under the "Evaluation Factors and Subfactors defined in the Evaluation Factors for Award section" (R4, tab 34 at 22-23, ¶ 5.2). Under these provisions of the RFOP, any weakness in the SOW with respect to the concurrency requirements of the delivery order could be properly noted in a concurrency subfactor evaluation.

52. One cited weakness (L25) in a transitioning subfactor evaluation that referred to the "primary downside" of locating the TSSC in Phoenix was deemed invalid by the IG on the ground that the TSSC location issue was "reported by the evaluator as both a strength and weakness" (ex. A-41 at 33). We find nothing "invalid" in an evaluation finding the same feature of a proposal to be both a strength and a weakness.

53. One cited weakness (L29) in a TFE-21 conversion to RPS subfactor evaluation was that Link's proposal was based on "having an unclassified version of the RPS software January 2003, which will not happen." The IG deemed this weakness

invalid on the ground that it did not relate to the technical/management subfactor criteria (ex. A-41 at 34). The RFOP evaluation criteria for the TFE-21 conversion to RPS subfactor included the following: “how well the proposed approach incorporates RPS processes and data into an efficient design and modification process leading to fielded RPS-compatible training devices.” (R4, tab 34 at 55, ¶ 2.3.1.6). There was clearly a weakness in a plan for “an efficient design and modification process” that was dependant on a questionable data availability date.

54. Assuming *arguendo*, that the IG’s determination of valid/invalid weaknesses was correct, there were 19 valid weaknesses in the Link technical/management proposal evaluations and 21 valid weaknesses in the Boeing technical/management proposal evaluations. However, the Link proposal had more valid weaknesses (14) in the concurrency, commonality and TFE-21 conversion to RPS subfactors than the Boeing proposal evaluations for the same subfactors (4). Those subfactors had a combined system weight factor of 25, or 55 percent of the total system weight factors (45). Thus, even under the IG analysis of valid/invalid weaknesses, the Boeing technical/management proposal was the superior proposal. (Ex. A-41 at 22, Table 3 and finding 8, n.5)

55. Link alleges that the team summary ratings “repeatedly” marked down the Link proposal for relatively minor weaknesses while Boeing was not similarly penalized for far more serious weaknesses (app. br. at 89-90, ¶ C.7(c) *Second*). Link compares the team summary scores for each subfactor and provides its own assessment as to what were major and what were minor weaknesses in the Link and Boeing subfactor proposals. There is no evidence, however, that the strengths and weaknesses of the Link and Boeing proposals were identical for any subfactor for which the Boeing proposal was scored higher than the Link proposal.

56. Link alleges that the government was required by the RFOP to “disqualify” Boeing for failing to submit evidence of government approval of its proposal to relocate the TSSC at the Seymour Johnson Air Force Base (SJAFB) (app. br. at 90-91, ¶ C.7(c) *Third*; ex. A-48 at 2, ¶ 5.2.1). The RFOP proposal preparation instructions required documentation of government approval of any plan to relocate the TSSC to a government facility (R4, tab 34 at 25, ¶ 5.3.5). The RFOP provision allowing the government to find a proposal unacceptable for failing to comply with instructions, however, was discretionary not mandatory (R4, tab 34 at 17, ¶ 3.2). Asked at the hearing whether he contemplated finding the entire Boeing proposal unacceptable for failing to provide documentation approving location of the TSSC at SJAFB, Col. Halbert testified: “It never crossed my mind for a mistake like that to . . . throw them out of the competition. I mean, they’re going to get scored lower. . . . So they took their hit in that area” (tr. 8/252-53). We find no abuse of discretion by the OAA in not “disqualifying” Boeing for failing to submit the required approval of its proposed TSSC location.

57. Link alleges that one evaluator “came forward to express his concerns about the Technical/Mechanical evaluation process,” that these concerns “indicated that the entire source selection process had been tainted, justifying its termination and the commencement of a new process,” and that the government dismissed these concerns as “a personality conflict” and took no action (app. br. at 91-92, ¶ C.8) The facts are that one evaluator told the evaluation team chairman that another evaluator was openly biased, threatened to call the GAO, and later “raised similar concerns” with the contracting officer (tr. 3/73-75). As a result of the bias allegation, the team chairman had a study performed of the individual evaluators’ scores and determined that if the scores of the accused evaluator and the scores of the other evaluators from the same office were removed from the evaluations, the Boeing proposal would still be the higher scored proposal (tr. 6/269-82).

58. Link alleges that the Air Force failed to respond adequately to Link’s post award concerns and ignored the IG’s recommendations (app. br. at 92-94, ¶¶ C.9, C.10). Our findings relevant to these allegations are set forth in findings 26-27 above.

59. Link’s post-hearing brief increases claimed proposal costs from \$186,482 to \$187,382 without explanation. We find the increase to be unsupported. The brief also increases the other claimed damages for a revised total of \$4,145,770. (App. br. at 3, 98-102)

DECISION

Link contends that it was denied a fair opportunity to be considered for award of the F-15 trainer support delivery order pursuant to the express terms of the TSA II contract because the government (i) “negated the cost/price factor,” (ii) did not treat the past performance factor as “equal in importance” to the technical/management factor; and (iii) conducted a flawed, biased and otherwise unfair evaluation of the technical/management factor (app. br. at 69, 74, 76). With respect to the cost/price evaluation, Link specifically alleges that the government’s QRA negated the cost/price factor by in effect substituting the parties’ estimated future modification costs in their technical/management proposals for the Table B future modification costs in their cost/price proposals (app. br. at 69-74). The government argues that the QRA was not substituted for Table B, but was presented separately to the OAA as permitted by the RFOP (gov’t reply br. at 22).

The QRA was prepared and presented to the OAA to answer his questions as to (i) whether the Boeing proposal was “really going to cost me \$100 million,” and (ii) why the numbers in the two Boeing and Link proposals were so different (finding 19). A

QRA or cost realism analysis as defined in FAR 15.404-1(d)¹⁶ was expressly permitted by both paragraphs 2.3.4.1 and 2.3.4.3 of the Evaluation Factors for Award of the RFOP (finding 12). A QRA based on the offeror's technical/management proposal roadmap estimated costs might have been appropriate in evaluating the realism of the offeror's proposed Table B costs if the Table B costs were based on the offeror's estimated hours as well as its proposed hourly rates. The estimated hours in Table B, however, were specified by the government in the RFOP and the offeror proposed only the hourly rates (finding 11). We find it fundamentally unfair for the government, without notice in the RFOP, to use an offeror's technical/management proposal roadmap costs to evaluate the realism of its Table B costs that were required to be based on government-estimated hours.

The Order Assessment Report described how the QRA was derived and concluded that: "The results of this Quantified Risk Assessment considerably closed the gap between the two cost proposals and even reflected an overall cost savings with The Boeing Company proposal over the life of the delivery order" (finding 22). We need not find, and do not find, that the QRA was the determinative factor in the award to Boeing, or that but for the QRA, the award would have been made to Link. It is sufficient to find, and we do find, that the QRA was a significant factor in the award decision, and that Link was thereby denied a fair opportunity to be considered for the award. This denial was a breach of paragraph (a) of the Awarding Orders clause of the TSA II contract (finding 3).

We find no breach of the fair opportunity provision in the government's evaluation of past performance. The RFOP stated that past performance would be equal in importance to the technical/management proposal, but it also specified that the evaluation of past performance would be limited to performance of TSA II delivery orders, that ratings would be limited to acceptable or unacceptable with no gradations of acceptability, and that offerors having no record of past performance under TSA II delivery orders would be rated acceptable (findings 6, 9). There is no evidence that Link protested the specified criteria to the delivery ombudsman prior to award of the contract (finding 10). The past performance factor was not a discriminator for the award because all five offerors were acceptable under the specified evaluation criteria, and not because the government treated the factor of less importance than the technical/management factor (findings 17, 22).

¹⁶ FAR 15.404-1(d) states in relevant part: "Cost realism analysis. (1) Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of requirements; and are consistent with the unique method of performance and materials described in the offeror's technical proposal." 48 CFR § 15.404-1(d)(1) (2000).

We also find no breach of the fair opportunity provision in the government's evaluation of the technical/management proposal. Eliminating entirely the scoring of the six evaluators accused by Link of incompetence or bias, and using Link's interpretation of the correct application of the Delphi Method, the Boeing technical/management proposal remains the technically superior proposal (findings 33, 38). The other deficiencies in the government's evaluation of the technical/management proposals are either unsupported by the evidence or insufficient to support a finding of no rational basis in the OAA's determination that the Boeing technical/management proposal was superior to that of Link (findings 18, 33-58).

For the government's breach of the fair opportunity provision with respect to its evaluation of the cost/price factor, Link is entitled to recover its costs of preparing and submitting its delivery order proposal as reliance damages resulting from the breach. *See, e.g., Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374, 1382-83 (Fed. Cir. 2001). The DCAA has determined that the claimed costs of proposal preparation and submission (\$186,482) were actually incurred by Link for the stated purpose (findings 29-30). The government argues that paragraphs (d)(6) and (g) of the Ordering Procedures clause of the TSA II contract and Link's own accounting practices expressly prohibited the recovery of delivery order bid and proposal costs except as indirect costs (gov't br. at 69-70, finding 4). Paragraph (d)(6) and Link's accounting practices are not relevant. They concern how B&P costs, if incurred, are to be charged. Here, the reliance damages put Link in as good a position as it would have been if the B&P costs had not been incurred. The government disclaimer of contractual responsibility for B&P costs in paragraph (g) is also not relevant. A general disclaimer of a contractual obligation to pay for B&P costs "whether an order is awarded or not," is not sufficient to disclaim liability for such costs where they are damages resulting from a government breach of the contract. Moreover, since Link has not charged the claimed damages as indirect costs, but has retained them as direct costs, it has not recovered any part of those costs under its flexibly priced contracts with the government (finding 30).

Link's claim for lost profits, employee severance and relocation costs fails the proximate causation test. *See California Federal Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005) ("the plaintiff must establish that there would have been a profit but for the breach"). Link's lost profits, employee severance and relocation costs claim assumes that, but for the government's improper application of the QRA to the Table B proposed costs, the delivery order would have been awarded to Link. That assumption fails for lack of proof. While we have found a breach of the fair opportunity provision with respect to the cost/price evaluation, we have found no such breach with respect to either the past performance or the technical/management evaluations. The RFOP advised offerors that award to a higher priced offeror might be made if the OAA "reasonably determines" that the offeror's technical superiority outweighed the higher price (finding

5). We make no finding as to what the OAA would have done absent the QRA. But his testimony indicated that he would still have awarded the order to Boeing, and we find that if he had, he would have had a rational basis for doing so, notwithstanding the 46 percent higher price. (Findings 5, 22-25)

Link suggests that a 28 percent higher technical score cannot reasonably justify under any circumstances a 46 percent higher price (app. br. at 95 and app. A). We reject any rule that the limits of rationality are set by a simple comparison of the percentage differences in technical scores and prices. The limits of rationality will vary with the subject matter of the procurement. The subject matter of the F-15 trainer support delivery order directly involves aircrew war-fighting capability and safety attested to by the OAA (finding 24). Whatever rational limit there is on the premium paid for a superior proposal in these circumstances, it is not exceeded by the 46 percent premium here. On this record, Link has failed to prove that, but for the government's breach of the fair opportunity with respect to the cost/price evaluation, it would have been awarded the delivery order.

For the reasons stated above, the appeal is sustained to the extent that Link is entitled to recover \$186,482 for the cost incurred in preparation and submission of its proposal in response to the RFOP. Interest pursuant to 41 U.S.C. § 611 shall run on that amount from 1 June 2004. (Findings 28-29). The appeal is in all other respects denied.

Dated: 5 May 2008

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54920, Appeal of L-3 Communications Corporation, Link Simulation and Training Division, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals