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U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Oracle America, Inc.

File: B-416061

Date: May 31, 2018

Marcia G. Madsen, Esq., David F. Dowd, Esq., Luke Levasseur, Esq., Roger V. Abbott, Esq., and Michael J. Word, Esq., Mayer Brown LLP, for the protester.
A. Jeff Ifrah, Esq., and Whitney A. Fore, Ifrah Law, for REAN Cloud LLC, the intervenor.
Rachel E. Woods, Esq., and Wade L. Brown, Esq., Department of the Army, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party to protest that the agency improperly used its other transaction authority to enter into a follow-on production transaction, where the protester's interest in a competed solution if the protest is sustained is sufficient for it to be considered an interested party.

2. Protest of the agency's entry into a follow-on production transaction under the agency's other transaction authority is sustained, where the agency did not comply with the requirements of the statute.

DECISION

Oracle America, Inc., of Reston, Virginia, challenges the Department of the Army's entry into an other transaction agreement[1] (OTA) with REAN Cloud LLC (REAN), of Herndon, Virginia, which was awarded as a follow-on production OTA (P-OTA) under 10 U.S.C. § 2371b(f) for cloud migration and cloud operation services. Oracle contends that, in

[1] "Other transactions" are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts. These instruments are used for various purposes by federal agencies that have been granted statutory authority permitting their use. See, e.g., the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 106(l)(6).

entering into the P-OTA, the Army did not properly exercise the authority granted to it under the statute.

We sustain the protest.

BACKGROUND

Statutory Background

Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. No. 103-160), as amended by section 804 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, granted the Department of Defense (DoD) the authority to enter into OTAs for prototype projects. Section 815 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, repealed section 845 and codified at 10 U.S.C. § 2371b DoD's authority to use OTAs for prototype projects.[2] Transactions for these prototype projects may be entered into if they are "directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a)(1). Section 867 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, established a preference for use of other transaction authority in circumstances determined appropriate by the Secretary of Defense.

In their current form, the provisions of 10 U.S.C. § 2371b relevant to this protest are as follows:

> (a) Authority.—
>
> (1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.
>
> (2) The authority of this section—
>
> (A) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of $100,000,000 but not in excess of $500,000,000 (including all options)

[2] This statute is distinguished from 10 U.S.C. § 2371, which addresses other transactions for basic, applied, or advanced research projects.

only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of $500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

* * * * *

(f) Follow-on Production Contracts or Transactions.—

(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority

> of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

10 U.S.C. § 2371b(a), (f).

History of the Transaction

In August 2015, DoD established the Defense Innovation Unit (Experimental) (DIUx) in Mountain View, California, in order to "accelerate the development, procurement, and integration of commercially-derived disruptive capabilities to regain our nation's technological lead in offensive and defensive capabilities." Agency Report (AR), Tab 3, Commercial Solutions Opening (CSO) Special Notice, at 1; see also Combined Contracting Officer's Statement (COS)/Memorandum of Law (MOL), at 2; AR, Tab 32, DoD Directive 5105.85 (establishing DIUx's mission and internal governance council).

On June 15, 2016, DIUx published a CSO under the authority of 10 U.S.C. § 2371b in order to "award[] funding agreements . . . to nontraditional and traditional defense contractors to carry out prototype projects that are directly relevant to enhancing. . . mission effectiveness. . . ."[3] AR, Tab 2, DIUx CSO at 1. The CSO is available for 5 years and provides for a multi-step evaluation process consisting of a solution brief and/or demonstration, followed by a request for prototype proposal (RPP) and submission of a proposal. Id. The agency considers this process to be competitive. Id. Solution briefs are not evaluated against each other, but instead are compared to the AOI under four factors described in the CSO: relevance, technical merit, viability, and uniqueness. Id.; COS/MOL at 3.

Touting the "[b]enefits of the CSO process and OTAs" to prospective contractors, the CSO states that there is "[p]otential follow-on funding for promising technologies . . . and possible follow-on production." AR, Tab 2, DIUx CSO at 2. The remainder of the CSO explains the process progressing from solution brief to the possibility of "additional work." Id. at 9.

On January 17, 2017, DoD issued an updated Other Transactions (OT) Guide for Prototype Projects in order to "assist Agreements Officers in the negotiation and administration of OTs." AR, Tab 16, OT Prototype Guide, at 1. As relevant to this protest, the OT Prototype Guide instructs users that "[t]he acquisition approach for a prototype project should address the strategy for any anticipated follow-on activities[,]" such as "the ability to procure the follow-on activity under a traditional procurement contract." Id. at 10. The OT Prototype Guide advises that "[s]ection 10 U.S.C. 2371b

[3] Although the Army states that the CSO is used to "solicit solution ideas from industry," the CSO does not, in fact, invite the submission of solution briefs. COS/MOL at 18, citing AR, Tab 16, OT Prototype Guide, at 8; AR, Tab 2, DIUx CSO. Instead, the CSO establishes the initial solicitation framework, and solution briefs are solicited through the subsequent issuance of Area of Interest (AOI) statements. COS/MOL at 2-3.

authorizes DoD to structure OTs for prototype projects that may provide for the award of a follow-on production contract or transaction . . . ." Id. at 10-11.

Also in January 2017, a [DELTED] in a building on [DELETED], damaged some of the computer servers housed there that supported the U.S. Transportation Command (TRANSCOM). Hearing Transcript (Tr.) at 344:19-346:8.[4] After the servers were repaired, the TRANSCOM commander created a team to address the risks associated with local server outages, with special consideration of a cloud-based solution. Id. at 346:14-347:5; 481:16-19. In exploring the problem, the team identified that many of TRANSCOM's software applications were legacy applications built with outdated code. As a result, these applications were in a format that did not allow for automatic migration to a cloud-based system. Id. at 358:7-359:1.

The agency asserts that, because the migration of legacy applications is time-intensive and demands significant resources, the TRANSCOM team searched for a "repeatable automated methodology" that could convert and migrate TRANSCOM's local applications to cloud-based applications while maintaining their functionality. Id. at 360:1-14. The TRANSCOM team contacted a range of DoD organizations to assess whether they possessed a solution. Id. at 362:21-363:17. Finding no agency with these capabilities, the TRANSCOM team contacted DIUx. Id. at 363:19-20. DIUx confirmed to the TRANSCOM team that several other DoD entities were searching for similar solutions, which the TRANSCOM team relied on as evidence that similar solutions were not in use elsewhere within DoD. Id. at 363:20-364:5; 366:10-18; see also id. at 408:19-21 ("To the best of my knowledge . . . no one in DoD has been able to implement this.").

DIUx agreed to facilitate TRANSCOM's search for a solution on the dual conditions that TRANSCOM provide funding and that the competition was broadened to encompass problems identified to DIUx by other DoD entities.[5] Id. at 367:6-10; 369:15-19. TRANSCOM worked with DIUx to draft a problem statement that would serve as a public call for solution briefs. Id. at 368:16-17. DIUx combined the "different requirements" of TRANSCOM and two other DoD entities--one from at Hanscom Air Force Base and the other from the Pentagon in Arlington, Virginia--into a single announcement seeking solution briefs. Id. at 195:7; 369:14-22; AR, Tab 25, AOI, at 2. DIUx published the consolidated announcement, now called an AOI, on March 10, 2017. AR, Tab 25, AOI. The AOI, titled "Agile Systems Development Environment," read as follows:

[4] On April 19-20, 2018, GAO held a hearing in this protest. Four witnesses testified: the agreements officer who signed the P-OTA, the principal assistant responsible for contracting, the TRANSCOM executive officer, and TRANSCOM'S chief engineer on this project. Transcript citations in this decision relate to the transcript for this hearing.

[5] The record does not identify these entities, so they are referred to throughout only by their associated location.

> Seeking the prototyping[6] of a robust and scalable software development environment to enable the modernization of Department of Defense (DoD) command and control systems in a cloud infrastructure. Environment must include a scalable software development and production platform to enable continuous integration, continuous delivery, and operation of new applications, as well as the containerization, rehosting, and refactoring[7] of existing DoD applications. Additionally, ideal solutions will consist of an ecosystem of software and platforms to rapidly deploy advanced commercial capabilities, to include, but not limited to[:] workflow, geospatial services, data analytics and visualization, and data management. Prototype will be deployed to a government cloud and/or an on premise[s] cloud infrastructure,[8] and the effectiveness of the solutions will be demonstrated through the migration and modernization of a collection of DoD applications. Solutions must be commercially viable and ready to support the application migration within 30 days of award.

Id. at 2. The AOI was posted on the DIUx website from March 10 through March 22. Id. at 3. DIUx received 21 solution briefs, including one from REAN. AR, Tab 26, Vendor List. Oracle did not submit a solution brief. Tr. at 399:11-13.

TRANSCOM and the other teams separately evaluated the 21 solution briefs with DIUx to determine if any of the briefs responded to the solution sought by that entity. Tr. at 391:2-3. Although the AOI stated that "ideal solutions will . . . include geospatial services, data analytics and visualization, and data management," TRANSCOM was not seeking a solution related to geospatial services or data analytics and visualization, and thus presumed that solutions in these areas were sought by the Hanscom and/or Pentagon entities. AR, Tab 25, AOI, at 2; tr. at 377:5-13; 379:13-17; 394:5-8. Therefore, a solution that addressed geospatial services would have been considered not relevant from TRANSCOM's perspective, although it could have still been found responsive and selected by either of the other teams. Id. at 393:1-9. The solution briefs

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[6] The CSO describes a prototype as "a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item or system." AR, Tab 2, DIUx CSO at 2.

[7] The Army explained that "rehosting is . . . taking the data as it is today, and migrating it through [an] automated process [to the migration destination, where] it looks exactly the same . . . . Refactoring is . . . changing out some different technologies that that actual application has but . . . for the most part, [the application] stays intact. . . . [Rebuilding] is starting . . . from the ground up, but rebuilding [the application] in a cloud[-]native type of platform." Tr. at 419:15-420:3.

[8] In fact, TRANSCOM was not interested in an on-premises or government cloud solution, and instead sought a solution that would be deployed to the government-approved commercial cloud. Tr. at 343:11-13; 481:20-482:10.

were evaluated only against the AOI and were not compared to each other. Id. at 395:21-396:4.

Of the 21 solution briefs received, TRANSCOM, Army Contracting Command – New Jersey (ACC-NJ)[9] and DIUx selected five for a subsequent presentation at which each company would demonstrate its proposed solution. AR, Tab 28, REAN Evaluation (Solution Brief), at 1-2; tr. at 401:15-22. TRANSCOM, ACC-NJ and DIUx next evaluated the four presentations (one company chose not to participate further) and selected two companies, including REAN, to receive an RPP.[10] AR, Tab 28, REAN Evaluation (Presentation), at 3-4; tr. at 410:16-22. DIUx, TRANSCOM and REAN then collaborated on the REAN RPP, No. DIUx-17-R-0037, which was finalized on April 4. COS/MOL at 4; tr. at 42:21-43:2; AR, Tab 4, RPP. The agency sought "the prototyping of a robust and scalable software development environment to enable the modernization of DoD command and control systems in a cloud infrastructure." Agency Req. for Dismissal, Mar. 6, 2018, at 2. Although the RPP response date was April 14, id. at 1, the agency nevertheless accepted REAN's late prototype proposal, submitted on April 17, and REAN's late pricing proposal, submitted on May 8.[11] AR, Tab 29, REAN Technical Proposal; Tab 30, REAN Pricing Proposal. Neither the RPP nor REAN's proposals referred to a possible follow-on production transaction. Id.; see also AR, Tab 4, RPP.

On May 10, ACC-NJ executed a determination and findings (D&F) to approve the use of its other transaction authority under 10 U.S.C. § 2371b for the award of a prototype OTA to REAN. AR, Tab 5a, Prototype OTA D&F, May 10, 2017.

On May 23, REAN and ACC-NJ entered into prototype OTA No. W15QKN-17-9-1012, with a total value of $2,426,799, for the rehosting and refactoring of up to six TRANSCOM applications into an unclassified Amazon Web Services (AWS) environment. AR, Tab 6a, Prototype OTA, at 2, 11. The prototype OTA had a 6-month period of performance from the award date. Id. at 20. The transaction also provided that "[t]his OTA will be available for use for a period of 6 months from the date the OTA is awarded." Id. The prototype OTA was modified six times. Modifications P0001

[9] Although TRANSCOM was purchasing the prototype, ACC-NJ managed the OTA award in its role as a contracting activity for DIUx. Tr. at 17:8-9; 432:11-16.

[10] The REAN demonstration evaluation states that "[t]he ROM [rough order of magnitude] estimated price is acceptable for the proposed prototype" and was "well below expected project constraints. . . ." AR, Tab 28, REAN Evaluation (Demonstration), Apr. 3, 2017, at 4. However, the record does not show that the ROM was finalized prior to the REAN presentation evaluation. AR, Tab 27, REAN Solution Brief; Tab 65, REAN Presentation; see also tr. at 411:19; id. at 159:12-14. At best, the parties discussed a ROM during REAN's presentation. Id. at 159:22.

[11] REAN's prototype and pricing proposals are undated, but the document dates were provided in the Agency Report Index. AR, Index, at 3.

through P0004 made administrative changes. Modification P0004, issued on August 2, 2017, also incorporated DoD form DD-254 in order to initiate the process for REAN to be able to work on classified software applications, the first step in potentially adding the migration of classified applications to the prototype OTA.[12] AR, Tab Amend. P0004; tr. at 66:12-68:22.

On August 25, the Army executed a D&F to approve a modification to the prototype OTA to add "assessment and planning for technical and business benefits of full enclave migration"[13] to the scope of work, which previously called for only the migration of individual applications. AR, Tab 8, Enclave D&F, at 1. On August 29, the Army executed the modification to add the movement of enclaves into the prototype and increased the total value of the prototype OTA by $6,566,283 to $8,993,082. AR, Tab 7e, Amend. P00005, at 1-2, 11-13.

On November 8, TRANSCOM concluded that REAN had "performed the requirements" of the prototype OTA, despite the fact that the enclave work added with modification P0005 was ongoing. AR, Tab 9, TRANSCOM Mem. for Record, Nov. 8, 2017, at 2. AR, Tab 7e, Amend. P00005, at 1, 11-13. On November 14, ACC-NJ notified REAN that it intended to enter into a P-OTA "as a follow-on to the successful completion of the [prototype OTA], for REAN . . . to deploy, implement and sustain migrated application infrastructure into a Government authorized commercial cloud environment." AR, Tab 10, ACC-NJ P-OTA Ltr., Nov. 14, 2017. On November 16-17, TRANSCOM, REAN, DIUx, and ACC-NJ jointly drafted the P-OTA. COS/MOL at 5-6. On December 11, TRANSCOM finalized an independent government cost estimate (IGCE) of $116,765,808 for the P-OTA. AR, Tab 40, IGCE, at 2.

On December 22, ACC-NJ executed modification P0006 to modify the prototype OTA to add funding for the enclave work included in modification P0005.[14] AR, Tab 7f, Amend. P0006, at 1. Although the period of performance of individual contract line item numbers was changed, the prototype OTA still provided for a 6-month period of performance and a 6-month period of use from signature date of May 23, 2017, i.e., through November 23, 2017.

On February 1, 2018, ACC-NJ executed a D&F concluding that the requirements of 10 U.S.C. § 2371b had been met, including the completion of the initial prototype project

[12] At the time the AOI was drafted, TRANSCOM was not seeking the ability to migrate classified software to an approved classified cloud. Tr. at 381:8-388:13.

[13] The agency defines an "enclave" as "a network of interdependent and interpretational applications performing disparate functions, but tied through closely connected entities (e.g., databases, interfaces, etc.)." Agency's Req. for Dismissal, Mar. 6, 2018, at 3 n.3.

[14] Modification P0006 was executed almost 1 month after the end of the OTA's period of performance or availability for use.

for the migration of six applications, and thus ACC-NJ could award the P-OTA.[15] AR, Tab 19, P-OTA D&F. The same day, REAN and ACC-NJ executed the P-OTA, which had a not-to-exceed (NTE) value of $950 million.[16] AR, Tab 7i, P-OTA. The P-OTA was structured to function similar to an indefinite-delivery, indefinite-quantity (IDIQ) ordering agreement that was available to be used by other DoD entities through an order placed by ACC-NJ. COS/MOL at 7.

On February 2, ACC-NJ placed the first order (Order 1) against the P-OTA in the amount of $14,121,976, that provides for REAN to establish foundations, and provide refactoring, redeveloping and managed services for TRANSCOM in classified and unclassified environments.[17] AR, Tab 13, P-OTA Order 1 at 4.

On February 12, the Army posted the notice of award to REAN on FedBizOpps, erroneously providing a value of $950,000 instead of $950 million. AR, Tab 43, FedBizOpps Notice, at 1. Oracle filed this protest on February 20.

On February 22, the DoD Chief Management Officer and the Undersecretary of Defense (USD) (Acquisition & Sustainment) directed DIUx to "coordinate with ACC-NJ to immediately pause the issuance of any additional orders against" the P-OTA. AR, Tab 11a, DoD Mem., Feb. 22, 1018.

On March 1, the DoD Chief Management Officer and the USD (Research & Engineering) directed DIUx "to work with ACC-NJ to promptly reduce the value of the production agreement to a ceiling of $65 [million]" and limit the services to TRANSCOM. AR, Tab 11b, DoD Mem., Mar. 1, 2018. On March 6, ACC-NJ advised REAN that only orders for TRANSCOM projects would be placed on the P-OTA, and that the total value would not exceed $65 million. AR, Tab 11c, ACC-NJ Mem., Mar. 6, 2018.[18]

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[15] As of April 20, the prototype OTA enclave work was not completed. Tr. at 86:18-20. The agency stated that the assessment that the prototype project was completed applied only to the those "parts of the prototype" project described in the prototype OTA prior to its modification. Tr. at 471:18-19.

[16] On January 16, 2018, "[b]ased on the interest received to date [from other DoD agencies interested in placing orders under the P-OTA] coupled with the DoD required acceleration to the cloud," ACC-NJ and DIUx agreed that the NTE value of the P-OTA should be $950 million. AR, Tab 11, P-OTA Ceiling Determination; Tr. at 118:5-7.

[17] As of April 19, REAN was not certified to operate in a classified environment. Tr. at 182:9-10; 182:20-183:2. Nevertheless, Order 1 commits the Army to purchasing AWS's classified and unclassified environments for REAN's anticipated migration of classified and unclassified applications. AR, Tab 13, P-OTA Order 1 at 4-5.

[18] By its terms, with the exception of minor administrative changes, the P-OTA may only be amended by bilateral signature. AR, Tab 7i, P-OTA at 16. As a result, the NTE value remains at $950 million, and the only change was the reduction in the intended use of the instrument. Tr. at 119:22-120:6.

DISCUSSION

Oracle contends that the Army's use of its other transaction authority in 10 U.S.C. § 2371b to award the P-OTA did not comply with the statutory provisions. The agency and intervenor argue that Oracle is not an interested party under our Bid Protest Regulations to challenge the agency's use of its other transaction authority and thus the protest should be dismissed. As discussed below, we conclude that the protester is an interested party to pursue its protest of the award of the production OTA. As to the merits of the protest, for the reasons discussed below we conclude that the agency did not properly use its authority under 10 U.S.C. § 2371b in awarding the production OTA, and we sustain the protest.[19]

Jurisdiction

As a preliminary matter, we review our jurisdiction to hear the challenge to the Army's exercise of its other transaction authority. Oracle contends that "GAO has jurisdiction to review whether an agency properly exercised Other Transaction authority in lieu of using a procurement contract." Protest at 13, citing Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22. The Army agrees that Rocketplane Kistler provides for

[19] Oracle also argues that the Army did not comply with the requirements of subsection 2371b(a) because the agency failed to obtain the internal approvals or provide the Congressional notifications described therein. Protest at 37. Although the authority to award a follow-on production transaction in subsection (f)(3) rests upon subsection (a), the agency reads the internal approval and Congressional notification provisions as applicable only to prototype projects. Tr. at 251:7-9. Accordingly, the agency views P-OTAs as exempt from these provisions, regardless of value. COS/MOL at 27; tr. at 108:5-6; 251:10-13. Although we do not agree with the Army's statutory interpretation, resolution of this protest does not require that we determine whether the lack of internal approval or Congressional notification resulted in the award of the P-OTA without proper authority.

In addition, Oracle contends that the award of the P-OTA was improper because it did not "include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement," unless that party has already provided the government with similar audit access, as required by 10 U.S.C. § 2371b(c) for transactions with a value in excess of $5 million. 10 U.S.C. § 2371b(c)(1), (2); Oracle Post-Hearing Comments at 2. While the agreements officer characterized this omission as an "oversight," the agency later argued that a clause requiring REAN to "maintain adequate records to account for Federal funds received" for inspection by the agreements officer or designee for up to 3 years after the expiration of the prototype satisfied the intent of the statute. Tr. at 115:20; COS/MOL at 8; Agency Post-Hearing Brief at 13. As above, resolution of this protest does not require that we determine whether the absence of this provision resulted in the award of the P-OTA without proper authority.

limited GAO jurisdiction to review whether "the agency is improperly using [a] non-procurement instrument . . . ." Agency Req. for Dismissal, Mar. 6, at 5.[20]

Under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). In circumstances where an agency has statutory authorization to enter into "contracts . . . [or] other transactions," we have concluded that agreements issued by the agency under its "other transaction" authority "are not procurement contracts," and therefore we generally do not review protests of the award or solicitations for the award of these agreements under our bid protest jurisdiction. Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3; see also MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133 at 7-8. We will review, however, a timely protest that an agency is improperly using its other transaction authority. 4 C.F.R. § 21.5(m) (Although "GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts, with the exception of awards or agreements as described in § 21.13[,] GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services."); see also Rocketplane Kistler, supra; MorphoTrust USA, supra. In this regard, our Office will review only whether the agency's use of its discretionary authority was proper, i.e., knowing and authorized. MorphoTrust USA, supra, at 8. Because Oracle argues that the Army did not appropriately use its authority under 10 U.S.C. § 2371b to award the P-OTA to REAN, we conclude that our Office has jurisdiction to review this limited protest issue.[21]

[20] The Army also argues that the protest is untimely because Oracle did not challenge the March 23, 2017, award of the prototype OTA within 10 days of award. Agency Req. for Dismissal, Mar. 6, 2018, at 9. The protester contends that, since it challenges the award of the P-OTA, and since the P-OTA was published by ACC-NJ on February 12, 2018, its February 20 protest of the P-OTA award was timely filed. Protester's Opp'n to Agency's Req. for Dismissal, Mar. 12, 2018, at 19. Because the protest is limited to the agency's authority to award the P-OTA, and because Oracle filed its protest within 10 days of when it knew or should have known of the award, we conclude that the protest is timely under our Bid Protest Regulations. 4 C.F.R. § 21. 2(a)(2).

[21] Oracle argues that the Army must employ a Federal Acquisition Regulation-based procurement unless this option is not "feasible or suitable." See, e.g., Protest at 4. Where, as here, an agency's use of its "other transaction" authority is authorized by statute or regulation, our Office will not review the agency's decision to exercise such authority. MorphoTrust USA, supra, at 9. On this basis, these protest arguments are dismissed.

Interested Party

We next consider the Army's argument that Oracle is not an interested party to pursue its protest. Agency Req. for Dismissal, Mar. 6, 2018, at 9-11. Specifically, the agency contends that Oracle's failure to submit a solution brief in response to the June 2016 CSO precludes it from being an interested party, because "Oracle is not an actual or prospective offeror whose direct economic interest would be affected by the award of a contract (or OTA in this case) or by the failure to award a contract (OTA)." Id. at 11 citing 4 C.F.R. § 21.0(a)(1); Agency Post-Hearing Brief, Apr. 27, 2018, at 16, citing Made in Space, Inc., B-414490, June 22, 2017, 2017 CPD ¶ 195.[22] The intervenor similarly argues that Oracle's failure to submit a solution brief deprives it of standing to challenge the award of the P-OTA. Intervenor Req. for Dismissal, Mar. 7, 2018, at 6-7.

Oracle asserts that the CSO and the AOI, whether considered collectively or separately, did not provide adequate notice of the agency's intent to award a production OTA, as compared to only a prototype OTA. Protester Post-Hearing Brief at 10-11. The protester also alleges that the AOI did not reasonably advise potential contractors of the solution sought by the agency nor the intended scope of the P-OTA. Protester Opp'n to Req. for Dismissal at 15-21. Oracle contends that if the AOI and/or the CSO had accurately described the prototype competition, or had advised parties that the Army contemplated the award of a P-OTA, it would have submitted a solution brief. Protester Post-Hearing Brief at 10-13.

Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. See, e.g., Helionix Sys., Inc., B-404905.2, May 26, 2011, 2011 CPD ¶ 106 at 3. Thus, even a protester who did not respond to a solicitation may be an interested party if it has a direct economic interest in the competition of the procurement if its protest is sustained. Id. (protester who did not submit proposal was interested party to challenge solicitation terms that deterred it from competing); Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4 (protester was interested party, despite not submitting bid or offer, where remedy sought was the opportunity to compete); Afghan Carpet Servs., Inc., B-230638, June 24, 1988, 88-1 CPD ¶ 607 at 3 (protester is an interested party if it is a potential competitor if the protest is sustained, even though it did not submit bid under the protested solicitation); MCI Telecomm. Corp., B-239932, Oct. 10, 1990, 90-2 CPD ¶ 280 at 4-5 (protester was interested party to challenge order as out of scope of the underlying contract, even where protester did not participate in the competition of the contract); Coulson Aviation (USA) Inc. et al., B-409356.2 et al., Mar. 31, 2014, 2014

[22] The Army also argues that Oracle is not an interested party because it is "not in line for award even if it prevails in its protest." Agency Req. for Dismissal, Mar. 6, 2018, at 11. However, since solution briefs were not competed against one another, there are no offerors in "line for award" and thus Oracle cannot be uninterested under this test. AR, Tab 2, CSO, at 1.

CPD ¶ 106 at 16 (protesters were interested parties to challenge sole-source award because if agency decided to meet its needs using a competitive procurement, the protester would be eligible to compete).

In awarding the follow-on P-OTA without competition, the Army relied on the exception under 10 U.S.C. § 2371b(f)(2) that permits such award if a prototype OTA of similar subject matter was competed. Agency Post-Hearing Brief at 9; tr. at 171:17-22. However, the record shows that neither the CSO nor the AOI contemplated the prototype OTA awarded here nor any follow-on P-OTA. For example, the "ideal solution" described in the AOI included geospatial services and data analytics and visualization geospatial, i.e., attributes not sought by TRANSCOM. Compare AR, Tab 25, AOI, at 2 with tr. at 377:5-13; 379:13-17; 394:5-8. Similarly, the AOI stated that DIUx sought deployment "to a government cloud and/or an on-premise[s] cloud infrastructure," while TRANSCOM personnel testified that, in fact, it sought only a solution proposing an off-premise commercial cloud. Compare AR, Tab 25, AOI, with tr. at 345:5-13; 423;13-14; 481:20-482:10; 543:3-14.

Likewise, at the time the AOI was formulated, TRANSCOM did not consider using the solution for the migration of classified software applications. Id. at 382:9-12. Nevertheless, the first order placed on the P-OTA anticipates the migration of classified applications. AR, Tab 13, P-OTA Order 1. More broadly, potential prototype OTA contractors were not advised that the agency intended to award a follow-on P-OTA to a successful vendor. Although the agency argues that the CSO's inclusion of "possible follow-on production" among OTA benefits provided adequate notice, we find this statement too vague and attenuated to describe the agency's intended procurement.

Therefore, the material differences between the AOI and the actual solution sought by the agency provide a sufficient basis for the protester to argue that it would have submitted a solution brief had the AOI reasonably described the intended procurement. Thus, although Oracle did not submit a solution brief, we conclude that it is an interested party to challenge the agency's use of its OTA authority because it has a direct economic interest in the agency's award here. See Space Exploration Techs. Corp., B-402186, Feb. 1, 2010, 2010 CPD ¶ 42 at 4 n.2 (finding protester to be interested party to challenge order under IDIQ contract, even where protester was not a vendor under the IDIQ contract, where protester challenged the order as outside the scope of the IDIQ contract). Where, as here, a protest involves an award which is allegedly defective because it was not made with appropriate authority, a protester's economic interest in a competed solicitation if the protest is sustained is sufficient for it to be considered an interested party even if the protester has not competed under the allegedly defective solicitation.[23] See Afghan Carpet Servs., supra, at 3.

[23] The Army also asserts that Oracle is not an interested party because the protester allegedly does not have a certain certification, which the Army alleges was a necessary qualification for selection during the prototype evaluation. Agency Post-Hearing Brief at 17-18. However, neither the CSO nor the AOI refers to this certification (continued...)

Prototype

Oracle contends that the agency did not have the authority to award the P-OTA because, in the protester's view, the initial, prototype OTA was commercial in nature and thus did not qualify as a prototype project under 10 U.S.C. § 2371b(a). Protest at 5, 20-24. The Army argues the prototype OTA properly qualified as a prototype project because it complied with internal guidance. COS/MOL at 14. The agency sought a "repeatable process that highly automates the installation of these applications and the op[eration]s and maintenance of these applications down the road into a commercial cloud environment," which, it argues, meets the definition of a prototype project. Tr. at 421:8-12. In this regard, the agency contends that a commercial program could still qualify as a prototype project if it had not been previously deployed within the DoD, in part due to the DoD's stringent security requirements. Id. at 408:12-15, 415:17-22. In this regard, neither the agency nor the protester could identify any DoD entity that had successfully implemented a similar automated migration program. Id. at 408:19-21.

The statute itself does not define the term "prototype," but the DoD OT Guide for Prototype Projects defines a prototype project as follows:

> A prototype project can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes. By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype.

AR, Tab 16, OT Prototype Guide, at 4.

We find that the original effort procured under the prototype OTA properly consisted of a prototype project. In this regard, the migration of TRANSCOM's applications can fairly be called a "pilot" or "test" program, as well as a "demonstration" of REAN's capabilities. The agency procured an "agile systems development enterprise" that included "the demonstration of a repeatable framework consisting of tools, processes and methodologies for securing, migrating (re-hosting) and refactoring, existing applications into a government-approved commercial cloud environment." AR, Tab 6a, Prototype

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(...continued)
as a requirement or as part of the evaluation criteria. AR, Tab 2, CSO; Tab 25, AOI. As such, this argument provides no basis to dismiss the protest.

OTA, at 12. The initial award consisted of a proof of concept. AR, Tab 5a, Prototype OTA D&F, at 4.

Although the protester urges our Office to apply a dictionary definition of "prototype," instead of that in the OT Prototype Guide, we decline to do so where the agency guidance was published well in advance of the AOI and the protester does not explain how the definition in the OT Prototype Guide is improper, ambiguous, or should be disregarded in favor of another definition. See, e.g., AINS, Inc., B-400760.4, B-400760.5, Jan. 19, 2010, 2010 CPD ¶ 32 at 11 (relying on internal guidance for definition of terms); Protest at 22-23. On this record, we conclude that the underlying prototype OTA properly consisted of a prototype project.

Follow-On Production Transaction Without Competitive Procedures

This protest also challenges the agency's use of its statutory authority to award a follow-on P-OTA under 10 U.S.C. § 2371b(f). Both Oracle and the Army agree that the P-OTA was awarded without competitive procedures, relying on the exception under subsection (f)(2). Protester Post-Hearing Brief at 22-25; Agency Post-Hearing Brief at 7. Oracle argues that the Army lacked the authority to award a follow-on P-OTA because the prototype OTA did not provide for a follow-on P-OTA, as required by subsection (f)(1). Protester Comments at 24-25. Oracle also alleges that the P-OTA award was improper because the prototype project is not complete, a prerequisite to award under subsection (f)(2)(B).[24] Protester Post-Hearing Brief at 64. The agency contends that its award of the P-OTA complied with the relevant statutory requirements to enter into a follow-on production transaction. COS/MOL at 50. Here, we find that the Army did not comply with the statutory provisions regarding the award of a P-OTA because the prototype OTA did not provide for the award of a follow-on production transaction and because the prototype project provided for in the prototype OTA has not been completed.

[24] The protester also raises a variety of related protest grounds. After review, we find that none of these arguments provides an independent basis to sustain the protest. For example, Oracle also asserts that the agency did not comply with the provision in subsection (f)(2)(A) that requires competitive procedures to have been used to select the parties to the prototype OTA in order to award a follow-on P-OTA without competitive procedures. Protester Post-Hearing Brief at 23. The June 2016 CSO provides that the procedures therein constitute a "competitive process." AR, Tab 2, CSO, at 1. The AOI was published on March 10, 2017. AR, Tab 25, AOI. There is nothing in the record to suggest that the agency did not follow the procedures in the CSO in selecting REAN for the prototype award. To the extent that Oracle now challenges those procedures as not in compliance with subsection (f)(2)(A), this is an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1). To the extent that Oracle contends that the P-OTA was outside of the scope of the CSO and AOI, given the bases for sustaining the protest described below, we need not address this argument in order to resolve the protest. See, e.g., Protester Comments at 35-36.

The provision at issue here, subsection (f), "Follow-on Production Contracts or Transactions," states:

> (1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.
>
> (2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—
>
> > (A) competitive procedures were used for the selection of parties for participation in the transaction; and
> >
> > (B) the participants in the transaction successfully completed the prototype project provided for in the transaction.
>
> (3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

10 U.S.C. § 2371b(f).

The starting point for our analysis is the statutory language used by Congress. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."). In construing the statute, "'we look first to its language, giving the words used their ordinary meaning.'" Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, 519 U. S. 248, 255, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997) (quoting Moskal v. United States, 498 U. S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)). Generally, we must give effect to all words in the statute, as Congress does not enact unnecessary language. Life Techs. Corp. v. Promega Corp., 580 U.S. __, __, 137 S. Ct. 734, 740, 197 L. Ed. 2d 33, 41 (2017) (citing Hibbs v. Winn, 542 U.S. 88, 89, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)). It is a cardinal principle of statutory construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001), citing Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. Myore v. Nicholson, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (internal citations omitted). GAO likewise applies the "plain meaning" rule of statutory interpretation. See, e.g., Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107.

Follow-on Transaction

Applying the principles above to the language of 10 U.S.C. § 2371b(f), we conclude that a follow-on P-OTA may only be awarded to the prototype transaction participants without the use of competitive procedures if the "transaction entered into under this section for a prototype project"--i.e., the prototype OTA itself--"provide[d] for the award of a follow-on production contract or transaction to the participants in the transaction." 10 U.S.C. § 2371b(f)(1), (2). The Army acknowledges that the prototype OTA does not in any way "provide for" a follow-on P-OTA. Agency Post-Hearing Brief at 10. The agency contends, however, that the June 2016 CSO's references to a possible follow-on P-OTA satisfy the statutory requirement to "provide for" a P-OTA. Id. at 11 ("The language in the CSO has the same effect as if it were specifically incorporated in the individual prototype OTAs – it is clearly an optional part of the intent of the parties from the inception, if the prototype is successful."); see also tr. at 257:5-13 ("Q. Where is your . . . authority to award a follow-on production transaction without having that follow-on transaction being initially provided for in a transaction under paragraph [(f)]1? A: Again, I point to the CSO and the fact that we had in there[,] in the solicitation document that we were going to potentially go to commercial.").

The agency argues that the CSO's language properly "provides for" a follow-on P-OTA in accordance with subsection 2371b(f)(1), in order to allow for a non-competitive award of a P-OTA under (f)(2). Agency Post-Hearing Brief at 10-11. This position, however, fails to consider that such award is only permitted if there is a provision for follow-on production included in "[a] transaction entered into under this section." 10 U.S.C. § 2371b(f)(1). In this regard, the CSO (and for that matter, the AOI) cannot be a "transaction [that is] entered into," because it is a standalone announcement. Id. The "transaction" is the legal instrument itself, and not the solicitation documents. MorphoTrust, supra, at 6; see also Exploration Partners, supra, at 4. Thus, the only reasonable reading of this phrase is as a reference to the prototype OTA itself, which does qualify as a "transaction [that is] entered into." Id. We therefore conclude that the Army's argument as to the sufficiency of the CSO references is unreasonable because it neither reflects the ordinary meaning of the statute nor accounts for all of the phrases therein. TRW Inc. v. Andrews, supra; Alaska Dept. of Envtl. Conservation v. Environmental Protection Agency, 540 U.S. 461, 489 n.13, 124 S. Ct. 983, 157 L. Ed. 2d 967 ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (citation omitted).

Not only is this reading consistent with the plain meaning of the statute, but it is also concordant with the agency's own internal guidance, which advises that the agency's "acquisition approach should . . . [a]ddress the OT source selection process, the nature and extent of the competition for the prototype project, and any planned follow-on activities." AR, Tab 16, OT Prototype Guide at 10; id. at 6 ("It is the Agreements Officer's responsibility to ensure that the terms and conditions negotiated [for the prototype OTA] are appropriate for the particular prototype project and should consider expected follow-on needs."). The agency explains, however, that although all of the

DIUx OTAs contemplate that the prototype "projects may eventually result in follow-on production," planning for a P-OTA was not addressed at the time of the award of the prototype OTA because "it's too early in the process." Tr. at 157:18-20; 158:1.

Thus, because the plain and unambiguous meaning of the statute provides that the Army only has the authority to award a follow-on P-OTA if it was provided for in the prototype OTA, and because the prototype OTA here included no provision for a follow-on P-OTA, we conclude that the Army lacked the statutory authority to award the P-OTA and sustain the protest on this basis.

Completion of Prototype Project

As another prerequisite to award of a P-OTA without competition, subsection (f)(2) states that "the participants in the transaction [must have] successfully completed the prototype project provided for in the transaction." 10 U.S.C. § 2371b(f)(2)(B). Oracle asserts that the agency lacked authority to award the P-OTA because the prototype project was not completed. Protester Post-Hearing Brief at 63-64. The Army contends that "[t]he prototype project was successfully completed (as required by section (f)(2)(B)) under the prototype other transaction agreement awarded to REAN on May 23, 2017." COS/MOL at 22.

The prototype OTA as awarded contemplated the migration of six applications, and the option to migrate an additional six. AR, Tab 6a, Prototype OTA, at 4, 7. The prototype OTA was subsequently modified to include enclave migration.[25] AR, Tab 7e, Amend. P0005, at 1 ("The purpose of this modification is to incorporate the movement of Enclaves into the prototype effort."). The enclave work was not completed on February 1, 2018, when the Army signed the D&F approving the award of the P-OTA and awarded the P-OTA. Tr. at 86:18-20.

The Army acknowledges that the enclave work is not complete, but contends that its award of the P-OTA was nevertheless in compliance with the statute because REAN had completed those "parts of the prototype" project that were included in the P-OTA. COS/MOL at 30 ("Only those same capabilities successfully prototyped are included in the production OT."); tr. at 471:19. Because award of a P-OTA requires "successful[] complet[ion of] the prototype project provided for in the transaction," the Army in essence argues that, for the purposes of awarding the $950 million P-OTA, the enclave work is not part of the prototype project. COS/MOL at 21; 10 U.S.C. § 2371b(f)(2).

[25] Although the modification adding funding for the enclaves was signed on December 22, i.e., after the prototype OTA had apparently expired, the enclaves were added as part of the prototype OTA scope of work on August 29, prior to the expiration. AR, Tab 7f, Amend. P0006; Tab 7e, Amend. P0005. In this regard, the agency also argues that the failure to change the period of performance in the prototype OTA was, alternatively, an oversight. Agency Post-Hearing Brief at 5.

We apply the same principles of statutory interpretation described above to determine whether the requirement for successful completion of "the prototype project provided for in the transaction" refers to all of the prototype project or only the project as initially awarded. Again, the plain meaning of the phrase "completed the prototype project provided for in the transaction" is the entire prototype project described in the transaction, i.e., the instrument itself. Here, the record shows that the transaction includes enclaves. Furthermore, if the enclaves were not properly part of the "prototype project," then they would not be included in the Army's award authority under 10 U.S.C. § 2371b(a).

The Army argues, on one hand, that the enclaves were properly added to the prototype OTA as an in-scope modification, and that the prototype OTA has not expired. Agency Post-Hearing Brief at 6. On the other hand, the Army asserts that the prototype project has been completed. COS/MOL at 21-23. These inconsistent positions are not persuasive, because it is unreasonable to simultaneously conclude that the modifications were effective to change the scope of work and extend the period of performance, but did not form part of the prototype effort. We agree with the Army that the prototype OTA was modified to include enclave migration. As a result, enclave migration now forms part of the prototype project. It is undisputed that this work is not complete. As a prerequisite to award of a P-OTA, the statute requires successful completion of "the prototype project provided for in the transaction." 10 U.S.C. § 2371b(a). Because the prototype project provided for in the transaction has not been successfully completed, we conclude that the Army did not comply with the statutory requirements in awarding the P-OTA, and we sustain the protest.

RECOMMENDATION

As set forth above, we conclude that the Army had no authority to award the P-OTA here. As a result, we recommend that the Army terminate the P-OTA and review its procurement authority in accordance with this decision. To the extent the Army has a requirement for cloud migration and/or commercial cloud services, we recommend that the agency either conduct a new procurement using competitive procedures, in accordance with the statutory and regulatory requirements, prepare the appropriate justification required by CICA to award a contract without competition, or review its other transaction authority to determine whether an award is possible thereunder. See 10 U.S.C. § 2304(c); 10 U.S.C. § 2371b.

We also recommend that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The

protester must submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

In the United States Court of Federal Claims

BID PROTEST
No. 19-742C
Filed Under Seal: August 26, 2019
Reissued: August 28, 2019[*]

SPACE EXPLORATION TECHNOLOGIES CORP.,	)	
Plaintiff,	)	Post-Award Bid Protest; Motion to Dismiss; Rule 12(b)(1); Other Transactions; 10 U.S.C. §§ 2371 and 2371b.
v.	)	
THE UNITED STATES,	)	
Defendant,	)	
v.	)	
BLUE ORIGIN, LLC, *et al.*,	)	
Defendant-Intervenors.	)	

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[*] This Memorandum Opinion and Order was originally filed under seal on August 26, 2019 (docket entry no. 75). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted from the Memorandum Opinion and Order. The parties filed a joint status report on August 27, 2019 (docket entry no. 76) indicating that no redactions are necessary. And so, the Court is reissuing its Memorandum Opinion and Order, dated August 26, 2019 as the public opinion.

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MEMORANDUM OPINION AND ORDER

GRIGGSBY, Judge

I. INTRODUCTION

In this post-award bid protest matter, Space Exploration Technologies Corp. ("SpaceX") challenges the United States Air Force Space and Missile Systems Center's (the "Air Force") evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions, issued pursuant to the Department of Defense's ("DoD") authority to enter into other transaction agreements. *See generally* Compl. The government has moved to dismiss this matter for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *See generally* Def. Mot. SpaceX has also moved to transfer this matter to the United States District Court for the Central District of California. *See generally* Pl. Resp. For the reasons discussed below, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

SpaceX provides space launch services to the United States Government and to commercial customers. Compl. at ¶ 90. In this post-award bid protest matter, SpaceX

[1] The facts recited in this Memorandum Opinion and Order are taken from the complaint ("Compl."); the corrected administrative record ("AR"); and the government's motion to dismiss ("Def. Mot."). Except where otherwise noted, the facts stated herein are undisputed.

challenges the Air Force's evaluation and portfolio award decisions for launch service agreement ("LSA") request for proposal, Solicitation No. FA8811-17-9-001 (the "LSARFP"), to facilitate the development of launch systems in the United States. Compl. at 1. As relief, SpaceX requests, among other things, that the Court: (1) declare the Air Force's portfolio award decision to be contrary to Congress's mandate for assured access to space; (2) enjoin any further investment in the launch service agreements awarded by the Air Force; (3) enjoin further performance by the awardees; and (4) require the Air Force to reevaluate proposals. *Id*. at 78.

1. DoD's Authority To Use Other Transaction Agreements

As background, Congress granted the Department of Defense the authority to enter into other transactions ("OT"). 10 U.S.C. §§ 2371(a) and 2371b(a). OTs are agreements that are not procurement contracts, cooperative agreements, or grants. *See, e.g.*, 10 U.S.C. § 2371(a) (authorizing "transactions (other than contracts, cooperative agreements, and grants)"); 32 C.F.R. § 3.2 (defining "other transactions" as "transactions other than contracts, grants or cooperative agreements"); *see also* United States Department of Defense, Other Transactions Guide (2018), at 5 ("OT Guide"), https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf (defining OTs as "NOT: a. FAR-based procurement contracts; b. Grants; c. Cooperative Agreements; or d. Cooperative Research and Development Agreements (CRADAs)").

While not defined by statute, the Government Accountability Office ("GAO") has defined OTs as follows:

> An 'other transaction' agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use 'other transactions.' GAO's audit reports to the Congress have repeatedly reported that 'other transactions' are 'other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.'

MorphoTrust USA, LLC, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). The DoD's OT Guide also provides that OTs are intended "to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments." OT Guide at 4. And so, OTs are "generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative

agreements" and these agreements are "not required to comply with the Federal Acquisition Regulation (FAR) and its supplements." 32 C.F.R. § 3.2.

Pursuant to 10 U.S.C. § 2731b, DoD may use its other transaction authority to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2731b(a).[2] But, DoD may only use this authority if one of the four conditions set forth below have been met:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

10 U.S.C. § 2371b(d)(1); *see also* OT Guide at 13-14; 32 C.F.R. § 3.5. In addition, Congress has required that, "[t]o the maximum extent practicable, competitive procedures shall be used when entering into [OT] agreements to carry out the prototype projects." 10 U.S.C. § 2371b(b)(2).

2. The National Security Space Launch Program

The National Security Space Launch program—previously known as the EELV program (the "Program")—is charged with procuring launch services to meet the government's national security space launch needs. AR Tab 19 at 786. The Program has an overarching need through

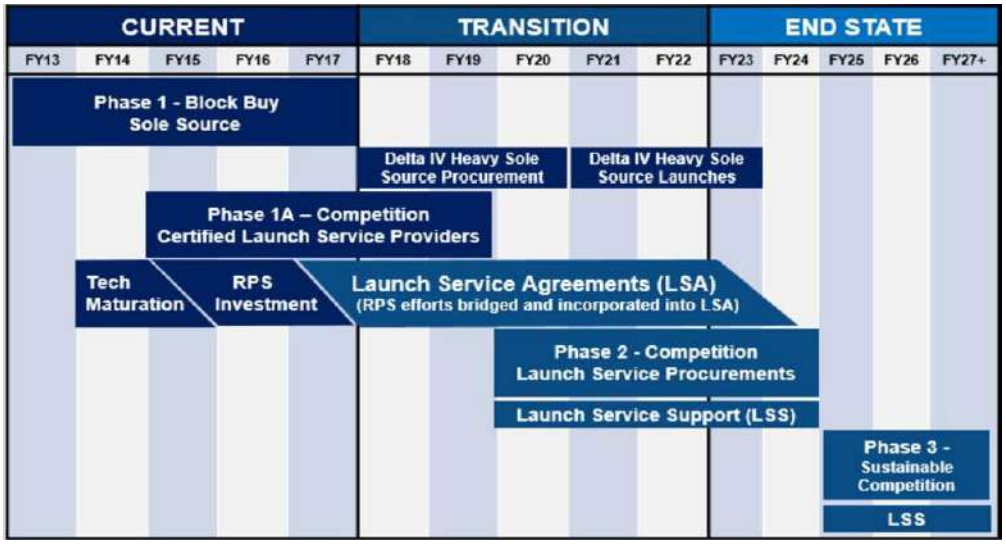
[2] Title 10, United States Code, section 2358 authorizes DoD to "engage in basic research, applied research, advanced research, and development projects." 10 U.S.C. § 2358(a).

FY30 to address the challenges of maintaining affordability and assured access to space, which requires the Air Force to sustain the availability of at least two families of space launch vehicles and a robust space launch infrastructure and industrial base. *Id.* at 787; *see also* 10 U.S.C. § 2273(b). The actions necessary to ensure continued access to space have been defined by Congress to include:

> (1) the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of Defense or the Director of National Intelligence as a national security payload
>
> (2) a robust space launch infrastructure and industrial base; and
>
> (3) the availability of rapid, responsive, and reliable space launches for national security space programs to—
>
> > (A) improve the responsiveness and flexibility of a national security space system;
> >
> > (B) lower the costs of launching a national security space system; and
> >
> > (C) maintain risks of mission success at acceptable levels.

10 U.S.C. §2273(b).

As shown below, the Program involves a multi-phase strategy that will be implemented by the Air Force between FY 2013 and FY 2027 to accomplish the aforementioned actions. AR Tab 19 at 788.



Id.

a. The LSA Competition

The LSARFP involves a competition for the development of space launch vehicles (the "LSA Competition"). *Id.* at 788. During the LSA Competition, the Air Force sought to develop "launch system prototypes, to include the development and test of any required [rocket propulsion systems], the launch vehicle and its subsystems, infrastructure, manufacturing processes, test stands, and other items required for industry to provide domestic commercial launch services that meet all [National Security Space] requirements." AR Tab 38 at 1261. The prototype sought to be developed during the LSA Competition includes "[a] fully developed and certified EELV Launch System, including the validation of all non-recurring engineering (NRE) work." *Id.* And so, the awardees of the LSA will receive funding from the Air Force and these awardees "will perform prototype development, including system design and development, risk reduction activities, test and evaluation activities, and technical demonstration of system capabilities." AR Tab 19 at 796.

The Air Force expects that following its investment "in the development of prototypes for launch systems," those systems can be "used to provide commercial launch services that will also be extended to provide [National Security Space] launch services." *Id.* at 793. The Air Force also acknowledges that the LSAs will "facilitate development of at least three EELV Launch System prototypes as early as possible, allowing those launch systems to mature prior to a future selection of two [National Security Space] launch service providers for Phase 2 launch service procurements, starting in FY 20[20]." AR Tab 38 at 1260.

b. The Phase 2 Procurement

During Phase 2 of the Program, the Air Force anticipates awarding two requirements contracts for launch services, delivering multiple national security space missions with annual ordering periods from FY 2020 through FY 2024. Compl. Ex. B at 2. Congress has mandated that, with some exceptions, "the Secretary of Defense may not award or renew a contract for the procurement of property or services for space launch activities under the [Program] if such contract carries out such space launch activities using rocket engines designed or manufactured in the Russian Federation." FY 2015 National Defense Authorization Act, Pub. L. No. 113-291,

128 Stat. 3292, 3626 (2014). And so, a key goal of the Program is to transition from the use of non-allied space launch engines. AR Tab 38 at 1260.

The Air Force has described the Phase 2 Procurement as a "follow-on activit[y]." AR Tab 19 at 807; *see also id.* at 810 ("The follow-on activity will be procurement of launch services.") The Air Force has also stated that the "LSA is designed to work in synergy with commercial launch vehicle development efforts that will lead in space for decades to come." AR Tab 47 at 1351.

The Phase 2 Procurement is open to all interested offerors. AR Tab 19 at 807. And so, this procurement will not be limited to the organizations that have received awards during the LSA Competition. *See* AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could include companies that were not previously awarded LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements . . ."); *see also* Status Conf. Tr. at 17:1-17:5, 18:15-18:18.

3. The LSA Award

The Air Force issued the LSARFP on October 5, 2017. *See generally* AR Tab 35. On March 21, 2018, the Assistant Secretary of the Air Force (Acquisition, Technology & Logistics) determined that "exceptional circumstances surrounding the [Program] and the domestic launch industry justify the use of a transaction that provides for innovative business arrangements and provide[s] an opportunity to expand the defense supply base in a manner that would not be feasible under a contract." AR Tab 47 at 1349. And so, the Air Force issued the LSARFP pursuant to DoD's authority to enter into other transactions. *Id*.

SpaceX and three other companies—United Launch Alliance, LLC ("ULA"), Blue Origin, LLC ("Blue Origin") and Orbital Sciences Corporation ("Orbital ATK")—submitted proposals in response to the LSARFP. *See* AR Tab 136 at 41752. Following discussions, negotiations and the receipt of revised proposals, the Air Force awarded LSAs to Blue Origin, ULA, and Orbital ATK in October 2018. *Id.* at 41753. The LSAs awarded to ULA, Blue Origin, and Orbital ATK provide these awardees with investment funding to develop launch vehicle prototypes. AR Tab 38 at 1261.

SpaceX filed an objection to the aforementioned portfolio awards with the Air Force on December 10, 2018. Compl. at ¶ 76; Compl. Ex. R at 2. The Air Force subsequently denied SpaceX's objection on April 18, 2019. Compl. at ¶ 79; Compl. Ex. R at 1. SpaceX commenced this post-award bid protest action on May 17, 2019. *See generally* Compl.

B. Procedural Background

SpaceX commenced this post-award bid protest matter on May 17, 2019. *See generally id.* On May 21, 2019, Blue Origin and ULA filed unopposed motions to intervene in this matter. *See generally* Blue Origin Mot. to Intervene; ULA Mot. to Intervene. On May 22, 2019, the Court granted these motions and entered a Protective Order in this matter. *See generally* Scheduling Order, dated May 22, 2019; *see also* Protective Order, dated May 22, 2019. On May 22, 2019, Orbital ATK filed an unopposed motion to intervene. *See generally* Orbital Mot. to Intervene. On May 23, 2019, the Court granted this motion. *See generally* Order, dated May 23, 2019.

On June 11, 2019, the government filed the administrative record. *See generally* Initial AR. On June 13, 2019, the government filed a motion to dismiss this matter for lack of subject-matter jurisdiction. *See generally* Def. Mot. On June 26, 2019, the government filed a corrected administrative record. *See generally* AR.

On June 28, 2019, SpaceX filed a response and opposition to the government's motion to dismiss and, in the alternative, a motion to transfer venue. *See generally* Pl. Resp. On July 9, 2019, the government filed a reply in support of its motion to dismiss and a response to SpaceX's motion to transfer venue.[3] *See generally* Def. Reply. On August 15, 2019, the Court held oral argument on the parties' motions. *See generally* Oral Arg. Tr.

These matters having been fully briefed, the Court resolves the pending motions.

III. LEGAL STANDARDS

A. RCFC 12(b)(1)

When deciding a motion to dismiss upon the ground that the Court does not possess subject-matter jurisdiction pursuant to RCFC 12(b)(1), this Court must assume that all factual

[3] ULA, Blue Origin, and Orbital ATK have not participated in the briefing of the government's motion to dismiss.

allegations in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); RCFC 12(b)(1). But, a plaintiff bears the burden of establishing subject-matter jurisdiction, and it must do so by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citing *Zunamon v. Brown*, 418 F.2d 883, 886 (8th Cir. 1969)). Should the Court determine that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

B. Bid Protest Jurisdiction

The Tucker Act grants the United States Court of Federal Claims jurisdiction over bid protests brought by "an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The United States Court of Appeals for the Federal Circuit has held that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010); *see also United States v. Testan*, 424 U.S. 392, 399 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (citation omitted). And so, relief in bid protest matters pursuant to the Tucker Act is unavailable outside the context of a procurement or proposed procurement. *Res. Conservation*, 597 F.3d at 1245; *see, e.g.*, *Hymas v. United States*, 810 F.3d 1312, 1329-30 (Fed. Cir. 2016) (finding no jurisdiction over cooperative farming agreements).

The Tucker Act does not define the term "procurement." *See generally* 28 U.S.C. § 1491(b)(1). But, the Federal Circuit has relied upon the definition of procurement set forth in 41 U.S.C. § 111 to determine whether a procurement has occurred. *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (this section was formerly cited as 41 U.S.C. § 403(2)). Section 111 defines procurement to cover "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111; s*ee also AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018); 10 U.S.C. §2302(3) (stating

that the term "procurement" has the meaning provided in chapter 1 of title 41, United States Code). And so, the Federal Circuit has held that, to establish jurisdiction, a contractor must show "'that the government at least initiated a procurement, or initiated the process for determining a need for acquisition.'" *AugustaWestland*, 880 F.3d at 1330 (quoting *Distributed Sols.*, 539 F.3d at 1346) (internal quotations omitted).

Specifically relevant to this dispute, in *Hymas*, the Federal Circuit held that the competitive requirements of CICA did not apply to the United States Fish and Wildlife Service's cooperative farming agreements, because the cooperative farming agreements were not procurement contracts under the Federal Grant and Cooperative Agreement Act. 810 F.3d at 1320, 1329-30. And so, the Federal Circuit concluded that this Court must dismiss a bid protest action challenging the government's award of these agreements for lack of subject-matter jurisdiction. *Id*. at 1330.

The Federal Circuit has also considered the meaning of the phrase "in connection with a procurement or a proposed procurement." *See* 28 U.S.C. § 1491(b)(1). In this regard, the Federal Circuit has held that "[t]he operative phrase 'in connection with' is very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). The Federal Circuit has also held that an alleged statutory violation suffices to supply Tucker Act jurisdiction, so long as the statute has a connection to a procurement proposal. *Id*. In addition, the Federal Circuit has recognized that Congress intended for all objections connected to a procurement or proposed procurement to be heard by this Court. *See Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1079 (Fed. Cir. 2001) (noting that the Administrative Dispute Resolution Act of 1996 made clear that "Congress sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims"). And so, the Federal Circuit has held that "a narrow application of section 1491(b)(1) does not comport with the [Tucker Act's] broad grant of jurisdiction over objections to the procurement process." *Sys. App. & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012).

There are, however, limits to the Court's bid protest jurisdiction under the Tucker Act. For example, the Federal Circuit held in *AgustaWestland* that an execution order regarding the use of Army helicopters was not "in connection with a procurement or proposed procurement," "because it did not begin 'the process for determining a need for property or services.'" 880

F.3d at 1331 (quoting *Distributed Sols*., 539 F.3d at 1345). In *Geiler/Schrudde & Zimmerman v. United States*, the Federal Circuit also held that the Department of Veterans Affairs' revocation of a bidder's status as a service-disabled veteran-owned small business was not a decision "in connection with a procurement or a proposed procurement," because the revocation had no effect upon the award or performance of any contract. 743 Fed. App'x 974, 977 (Fed. Cir. 2018).

Similarly, in *BayFirst Sols, LLC v. United States*, this Court addressed the limits of the phrase "in connection with a procurement or proposed procurement" in determining whether the Federal Acquisition Streamlining Act's bar on challenges in connection with the issuance or proposed issuance of a task or delivery order would bar the cancellation of a solicitation. 104 Fed. Cl. 493, 507 (2012). In that case, the Court determined that the cancellation decision was not "in connection with" the task order award, because the cancellation decision was "a discrete procurement decision and one which could have been the subject of a separate protest." *Id.* Lastly, in *R&D Dynamics Corp. v. United States*, this Court held that a Phase II Small Business Innovation Research ("SBIR") non-procurement award was not "in connection with" a Phase III procurement, because the SIBR Phase II program appeared to be "of a developmental nature." 80 Fed. Cl. 715, 722 (2007). And so, the Court determined that the SBIR award was not "in connection with" a procurement, notwithstanding the possibility that the SBIR award "may ultimately lead to the development of a capacity to provide goods or services in Phase III." *Id.*

C. 10 U.S.C. §§ 2371 And 2371b

Title 10, United States Code, section 2371 generally provides DoD with the statutory authority to enter into other transaction agreements in carrying out "basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). Pursuant to Title 10, United States Code, section 2371b, DoD may use its OT authority to carry out certain prototype projects. 10 U.S.C. § 2371b. Specifically, this statute provides that DoD may:

> carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

10 U.S.C. §2371b(a)(1). Section 2371b also requires that, "[t]o the maximum extent practicable," DoD use competitive procedures when entering into agreements to carry out the

prototype projects. *Id.* at § 2371b(b)(2). In addition, the statute provides that DoD may only use this authority if one of the following conditions are met:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

Id. at § 2371b(d)(1).

D. Transfer Of Venue

Lastly, Title 28, United States Code, section 1631 provides that:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed or noticed.

28 U.S.C. § 1631. The Federal Circuit has held that the burden is on the party seeking transfer "to identify the proposed transferee court and show that jurisdiction would be proper there." *Maehr v. United States*, 767 Fed. App'x 914, 916 (Fed. Cir. 2019) (per curiam) (citing *Hill v. Dep't of the Air Force*, 796 F.2d 1469, 1470-71 (Fed. Cir. 1986)). And so, the Court may transfer a matter to a district court, if the Court determines that it lacks subject-matter jurisdiction to consider a matter and that a transfer of venue would be in the interest of justice. 28 U.S.C. § 1631.

IV. LEGAL ANALYSIS

The government has moved to dismiss this post-award bid protest matter for lack of subject-matter jurisdiction upon the ground that SpaceX's challenges to the Air Force's evaluation and portfolio award decisions are not "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32. The government also argues that the Court should dismiss this matter for want of subject-matter jurisdiction, because SpaceX does not allege a violation of a procurement statute. *Id*. at 32-33. And so, the government contends that the claims asserted in this bid protest matter fall beyond the boundaries of the Tucker Act. *Id*. at 20-24.

In its response and opposition to the government's motion to dismiss, SpaceX counters that the Court may entertain this bid protest matter because SpaceX alleges non-frivolous violations of law that are in connection with the Air Force's ongoing procurement of launch services during Phase 2 of the National Security Space Launch Program. Pl. Resp. at 19-25. SpaceX also contends that the Court possesses subject-matter jurisdiction to consider its claims, because the Air Force violated 10 U.S.C. § 2371b and the Administrative Procedure Act, 5 U.S.C. §§ 551-59, during the LSA Competition. *Id*. at 31-37. And so, SpaceX requests that the Court deny the government's motion to dismiss, or, alternatively, transfer this matter to the United States District Court for the Central District of California. *Id*. at 37-39.

For the reasons set forth below, SpaceX has not shown that the Court possesses subject-matter jurisdiction to consider any of its claims. And so, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

A. The Court May Not Consider SpaceX's Claims

The parties appear to agree that the launch service agreements at issue in this bid protest matter are not procurement contracts and that the LSARFP was not a procurement. *See* Def. Mot. at 1-2, 24; Pl. Resp. at 5, 16; Def. Reply at 4-6; Oral Arg. Tr. 9:20-10:10. The parties disagree, however, about whether the Air Force's evaluation and the portfolio award decisions for the LSA Competition are, nonetheless, "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32; Pl. Resp. at 19-25.

In this regard, SpaceX argues that the Air Force's evaluation and portfolio award decisions are "in connection with" the ongoing procurement of launch services during Phase 2 of the Program, because the LSA Competition "was the third step in a multi-stage procurement process that the [Air Force] devised to fulfill the [a]gency's identified need to procure domestic launch services." Pl. Resp. at 2; *see also id*. at 19-25. The government counters that the Air Force's decisions are not "in connection with a procurement or proposed procurement," because the LSA Competition involved a solicitation that was separate and distinct from the Phase 2 Procurement. Def. Mot. at 28-32; Def. Reply at 11-16. For the reasons set forth below, the Court agrees.

1. LSAs Are Not Procurement Contracts

As an initial matter, there can be no genuine dispute that the LSAs at issue in this dispute are not procurement contracts that fall within the purview of this Court's bid protest jurisdiction. The administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress granted to the DoD to enter into other transactions under 10 U.S.C. §§ 2371 and 2371b. AR Tab 38 at 1263; 10 U.S.C. §§ 2371 and 2371b; *see also* Def. Mot. at 1-2, 18, 24; Pl. Resp. at 5, 16, 26. Neither this Court nor the Federal Circuit has examined the question of whether the Court's bid protest jurisdiction extends to disputes involving the award of LSAs. But, the Federal Circuit has made clear that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010); *see also United States v. Testan*, 424 U.S. 392, 399 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (citation omitted). And so, this dispute must concern a procurement solicitation or contract to fall within the boundaries of the Tucker Act.

The Federal Circuit has also held that this Court must dismiss a bid protest action challenging the award of cooperative farming agreements for lack of subject-matter jurisdiction, because cooperative farming agreements are not procurement contracts. *Hymas*, 810 F.3d at 1320, 1329-30. And so, the Court reads *Hymas* to require that it must dismiss a bid protest matter challenging agency decisions that are related to the award of an agreement that is not a procurement contract. *Id.*

In this case—like in *Hymas*—the record evidence makes clear that the LSAs are not procurement contracts. *See* 10 U.S.C. § 2371(a); *see also* 32 C.F.R. § 3.2. Rather, the administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress has granted to DoD to enter into other transactions pursuant to 10 U.S.C. § 2371b. The administrative record also shows that LSAs are are not subject to the federal laws and regulations applicable to procurement contracts. AR Tab 38 at 1263; *see also MorphoTrust USA, LLC*, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). Given this, the Court agrees with the government that this Court may not exercise its bid protest jurisdiction under the Tucker Act to consider a challenge to the Air Force's evaluation and portfolio award decisions.[4] *Hymas*, 810 F.3d at 1320, 1329-30; *Res. Conservation Grp.*, 597 F.3d at 1245 (stating that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts"); RCFC 12(b)(1).

2. SpaceX Has Not Shown That The Air Force's Decisions Are In Connection With A Procurement

SpaceX also has not shown that the Air Force's evaluation and portfolio award decisions during the LSA Competition are "in connection with a procurement or proposed procurement." The Federal Circuit has held that "[t]he operative phrase 'in connection with' is very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d at 1286, 1289 (Fed. Cir. 1999). But, the Federal Circuit has also recognized that there are limits to this Court's bid protest jurisdiction under the Tucker Act. *See, e.g.*, *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018). And so, not every decision *related* to a procurement is "in connection with a procurement or proposed procurement" as contemplated by the Tucker Act.

In this case, SpaceX argues with some persuasion that the Air Force's evaluation and portfolio award decisions are related to the Air Force's Phase 2 Procurement, because the LSA portfolio award will lead to the development of launch vehicles to be bid during the Phase 2 Procurement. Pl. Mot. at 2; Oral Arg. Tr. at 36:23-36:25. In this regard, the administrative

[4] The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act. The Court simply concludes that the specific facts in this case show that the LSAs at issue are not procurement contracts and therefore, the Air Force's decisions related to the award of these agreements may not be reviewed by the Court pursuant to the bid protest provision of the Tucker Act.

record shows that the LSA Competition and Phase 2 Procurement share the mission of assuring the Nation's access to space and eliminating reliance upon Russian-made rocket engines. AR Tab 19 at 791; *see also* AR Tab 19 at 786; AR Tab 38 at 1260 (stating the goal of the Program "is to leverage commercial launch solutions in order to have at least two domestic, commercial launch service providers that also meet [National Security Space] requirements, including the launch of the heaviest and most complex payloads"). During oral argument, SpaceX also correctly observed that the funding provided by the Air Force pursuant to the LSAs will aid the development of prototype launch vehicles that Blue Origin, Orbital ATK and ULA will bid during the Phase 2 Procurement. Oral Arg. Tr. at 29:21-29:25; 36:21-37:1; 57:5-57:12. And so, the record evidence shows that the funding provided pursuant to the LSAs will help the Air Force competitively procure launch services during the Phase 2 Procurement. AR Tab 38 at 1260.

But, the record evidence also shows that, while related to the Phase 2 Procurement, the Air Force's evaluation and portfolio award decisions are not "in connection with" that procurement for several reasons.

First, as the government persuasively argues in its motion to dismiss, the administrative record shows that the LSA Competition and the Phase 2 Procurement involve separate and distinct solicitations. Def. Mot. at 28-29; Def. Reply at 12-13. It is a well-established tenet of procurement law that a selection decision made under one procurement or solicitation does not govern the selection under a different procurement or solicitation. *SDS Int'l v. United States*, 48 Fed. Cl. 759, 772 (2001); *see also Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 671 (2001) ("[A]n attack upon a new solicitation or upon any other aspect of the administration of the previous contract, must stand on its own."). And so, generally, the Court must view the Air Force's evaluation and portfolio award decisions during the LSA Competition separately from the selection of awardees for the Phase 2 Procurement for launch services contracts. *Id*.

In this case, the Air Force's Acquisition Strategy Document for the Program makes clear that the Program consists of a four-phase strategy that will employ different solicitations and other steps to be implemented by the Air Force between FY 2013 to FY 2027. *See* AR Tab 19 at 788. Specifically, this document provides that the LSA Competition sought certified launch

service providers to develop launch system prototypes and that this competition commenced in FY 2017 and will conclude in FY 2024. *Id. Id.* at 786, 788. By comparison, the Air Force's Acquisition Strategy Document shows that the Phase 2 Procurement will involve a procurement for launch services and that this procurement will commence in FY 2020 and will conclude in FY 2024. *Id*. at 788. And so, the record evidence supports the government's view that the LSA Competition and the Phase 2 Procurement are two separate and distinct parts of a multi-phase program.

Second, the administrative record also shows that the LSA Competition and the Phase 2 Procurement involve different acquisition strategies. Def. Mot. at 29-30; Def. Reply at 13. As discussed above, the Air Force issued the LSARFP to facilitate the successful development of launch systems pursuant to the DoD's authority to enter into other transactions. AR Tab 38 at 1263. And so, the LSA Competition was not subject to the requirements of the FAR. AR Tab 35 at 1068 ("[T]he FAR and its supplements do not apply to this selection process"); s*ee also* AR Tab 19 at 794-95; 10 U.S.C. §§ 2371 and 2371b; Def. Mot. at 29. In contrast, the Phase 2 Procurement will involve a FAR-based competition. AR Tab 19 at 807 (stating that "the Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements"). Given this, the record evidence makes clear that the LSA Competition and the Phase 2 Procurement also differ with regards to how bidders will compete and the legal requirements that govern each solicitation.

The administrative record also makes clear that the specific goals of the LSA Competition and the Air Force's Phase 2 Procurement differ. The goal of the LSA competition is to increase the pool of launch vehicles that meet the Air Force's needs by "invest[ing] in industry to develop enhanced configurations to support all [National Security Space] requirements." AR Tab 19 at 789. By comparison, the goal of the Phase 2 Procurement is to procure, through requirements contracts awards, "launch services." *Id.* at 786.

In addition—and perhaps more significantly—the administrative record makes clear that the LSA Competition did not involve the procurement of any goods or services by the Air Force. AR Tab 38 at 1261; *see also* Oral Arg. Tr. at 21:3-21:12. While it is undisputed that the Air Force will provide funding to develop launch service prototype vehicles under the LSAs, the Air

Force will not purchase or own these prototypes. AR Tab 38 at 1261; Oral Arg. Tr. at 21:3-21:20. Nor will the Air Force acquire any services under the LSAs. AR Tab 38 at 1261; Oral Arg. Tr. at 21:15-21:16; 26:15-26:22. And so, unlike the Phase 2 Procurement, the LSA Competition did not involve an acquisition of goods or services.

Given the aforementioned differences between the LSA Competition and the Phase 2 Procurement, the record evidence supports the government's view that the evaluation and portfolio award decisions during the LSA Competition are distinct agency decisions that are not connected to the Phase 2 Procurement. *BayFirst Sols., LLC v. United States*, 104 Fed. Cl. 493, 507 (2012).

The Court is also not persuaded by SpaceX's arguments that the Court may consider its claims, notwithstanding the evidence showing that the LSA Competition and Phase 2 Procurement are distinct and separate solicitations.

First, SpaceX argues without persuasion that Tucker Act jurisdiction is established in this case, because the Air Force's portfolio award decision will impact the government's acquisition of launch services in the future. Pl. Resp. at 21-23. But, in *R&D Dynamics Corp. v. United States*, this Court recognized that the fact that resources expended by the government during one phase of a government program may lead to the development of the capacity to provide goods and services in the future does not, alone, render an award a "procurement." 80 Fed. Cl. 715, 722 (2007) (holding that a Phase II Small Business Innovation Research ("SBIR") award was not a procurement, and therefore the award could not be "in connection with" a Phase III procurement as contemplated by the Tucker Act). Similarly here, the fact that the development of prototype launch vehicles could eventually lead to the Air Force's acquisition of launch services is not sufficient, alone, to render the Air Force's decisions "in connection with" the Phase 2 Procurement in this case. *Id.*

SpaceX's argument that the LSA Competition must be "in connection with" the Phase 2 Procurement is also contradicted by the undisputed fact that the Phase 2 Procurement will be a fully open competition. Notably, the administrative record shows that the Phase 2 Procurement will be open to all interested offerors and that this procurement will not be limited to the three companies that have been awarded LSAs. AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could

include companies that were not previously awarded LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements . . . ").

During oral argument, SpaceX acknowledged that it will compete for the award of a launch services contract during the Phase 2 Procurement, even though SpaceX was not awarded a launch service agreement during the LSA Competition. Oral Arg. Tr. at 37:14-37:21. Given this, the record evidence makes clear that the Air Force's portfolio award decision during the LSA Competition will not dictate the outcome of the Phase 2 Procurement, as Space X suggests. Pl. Resp. at 23.

Indeed, while SpaceX raises understandable concerns that it may be disadvantaged in the future by the fact that the Air Force is funding the development of launch vehicle prototypes by Blue Origin, ULA and Orbital, such concerns involve a potential challenge to the *Phase 2 Procurement*—which is not the subject of this dispute. Oral Arg. Tr. at 37:5-37:8; 39:22-40:6. The Court also acknowledges that the question of whether the decisions made by the Air Force during the LSA Competition are "in connection with" the Phase 2 Procurement is a close one, given the evidentiary record in this case. But, the Court must answer this question based upon the totality of the record evidence and this evidence indicates that, while related, the LSA Competition and the Phase 2 Procurement are separate and distinct solicitations for the National Security Space Launch Program.

The Court also takes into consideration the intent expressed by Congress to remove the LSAs—which are not procurement contracts—from the legal requirements and process that govern procurement contracts. *See* 10 U.S.C. §§ 2731, 2731b; *see also* Def. Mot. at 6-7; Oral Arg. Tr. at 17:21-18:8. And so, for these reasons, the Court **GRANTS** the government's motion to dismiss this bid protest matter for lack of subject-matter jurisdiction. RCFC 12(b)(1).

Because the Court finds that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition are not "in connection with" the Phase 2 procurement, the Court does not reach the remaining jurisdictional issues raised in the government's motion to dismiss.

B. Transfer Of This Matter Is In The Interest Of Justice

As a final matter, the Court agrees with SpaceX that a transfer of this matter to the United States District Court for the Central District of California would be in the interest of justice. SpaceX requests that the Court transfer this matter to the United States District Court for the Central District of California, should the Court determine that it lacks subject-matter jurisdiction to consider its claims. Pl. Resp. at 37-39. Title 28, United States Code, section 1631 provides that the Court "shall" transfer an action to another federal court when: (1) the transferring court finds it lacks jurisdiction; (2) the proposed transferee court is one in which the case could have been brought at the time it was filed; and (3) the transfer is in the interest of justice. 28 U.S.C. § 1631; *see also Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1303 (Fed. Cir. 2008). Each of these circumstances has been met here.

First, SpaceX persuasively argues that the claims asserted in the complaint could have been brought in the United States District Court for the Central District of California at the time Space X commenced this action. Pl. Resp. at 37-38; *see also* 28 U.S.C. § 1391(b)(2) (stating that a civil action may be brought against the United States in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated"). SpaceX represents that its principal place of business is located within the Central District of California and that the Air Force office that made the evaluation and portfolio award decisions for the LSARFP is also located within that district. Pl. Resp. at 38. And so, Space X has shown that that the events giving rise to its claims occurred within in the Central District of California.

SpaceX has also shown that it would be in the interest of justice to transfer this case to the district court. *See* Pl. Resp. at 38-39; *see also Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987) (stating that "[t]he phrase 'if it is in the interest of justice' relates to claims which are nonfrivolous and as such should be decided on the merits (citing *Zinger Constr. Co. v. United States*, 753 F.2d 1053, 1055 (Fed. Cir. 1985)). SpaceX alleges non-frivolous claims in this matter that the Air Force's evaluation and portfolio award decisions were unreasonable and in violation of federal law. Compl. at ¶¶ 101, 209. Specifically, SpaceX alleges, among other things, that the Air Force based the portfolio award decision on an arbitrary and unequal evaluation process and that the Air Force's portfolio award decision violates the

assured access to space requirements mandated by Congress. *See* Compl. at ¶ 227. Given the non-frivolous nature of SpaceX's claims, the Court believes that SpaceX should be afforded the opportunity to pursue these claims in the district court. And so, the Court **GRANTS** SpaceX's motion to transfer venue to the United States District Court for the Central District of California.

V. CONCLUSION

In sum, the administrative record in this bid protest matter makes clear that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition were not "in connection with" the Phase 2 Procurement. Space X has also shown that it is in the interest of justice to transfer this matter to the United States District Court for the Central District of California. And so, for the foregoing reasons, the Court:

1. **GRANTS** the government's motion to dismiss;
2. **GRANTS** SpaceX's motion to transfer venue; and
3. **DISMISSES** the complaint.

The Clerk is directed to transfer the above captioned case to the United States District Court for the Central District of California.

Each party to bear its own costs.

The Clerk shall enter judgment accordingly.

Some of the information contained in this Memorandum Opinion and Order may be considered protected information subject to the Protective Order entered in this matter on May 22, 2019. This Memorandum Opinion and Order shall therefore be filed **UNDER SEAL**. The parties shall review the Memorandum Opinion and Order to determine whether, in their view, any information should be redacted in accordance with the terms of the Protective Order prior to publication.

The parties shall **FILE** a joint status report identifying the information, if any, that they contend should be redacted, together with an explanation of the basis for each proposed redaction, on or before **October 30, 2019**.

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

435 F.Supp.3d 1003
United States District Court, D. Arizona.

MD HELICOPTERS INCORPORATED, Plaintiff,
v.
UNITED STATES of America, et al., Defendants.

No. CV-19-02236-PHX-JAT
|
Signed 01/24/2020

Synopsis

Background: Disappointed bidder brought action against the United States, alleging that the Army violated the Administrative Procedure Act (APA) by giving arbitrary and capricious reasons for not selecting bidder to participate in program to develop advanced military helicopters, and requesting injunctive relief in form of order directing Army to advance bidder's proposal to first phase of the program. Both sides moved for summary judgment.

Holdings: The District Court, James A. Teilborg, Senior District Judge, held that:

[1] limited waiver of sovereign immunity contained in APA did not apply, and

[2] Administrative Dispute Resolution Act's (ADRA) sunset provision deprived district court of jurisdiction.

Government's motion granted; bidder's motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (11)

[1] **Federal Courts** Jurisdiction, Powers, and Authority in General

Federal Courts Dismissal or other disposition

"Jurisdiction" is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

[2] **Federal Courts** Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute.

[3] **Federal Courts** Necessity of Objection; Power and Duty of Court

Because a court lacking subject-matter jurisdiction also lacks the power to decide a case, courts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.

[4] **United States** Necessity of waiver or consent

The United States, as sovereign, is immune from suit save as it consents; therefore, when a plaintiff sues the Federal Government, Congress's consent to suit is a necessary prerequisite for jurisdiction.

[5] **Federal Courts** Administrative agencies and proceedings in general

Although not itself a grant of jurisdiction, the Administrative Procedure Act (APA) waives sovereign immunity for certain claims brought under the aegis of federal question jurisdiction; this limited waiver of sovereign immunity applies to claims that are not for money damages, do not seek relief expressly or impliedly forbidden by another statute, and for which no adequate remedy is otherwise available. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331.

[6] **United States** Equitable remedies; specific performance

Tucker Act impliedly forbids declaratory and injunctive relief for contract claims against the

government and precludes an Administrative Procedure Act (APA) based waiver of sovereign immunity in suits on government contracts; thus, if claim is contractually-based, there is no jurisdiction. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1491.

[7] **United States** Actions in general

To determine whether a claim against the government is contractually-based for purposes of the Tucker Act, courts look to the source of rights upon which the plaintiff bases its claims, and the type of relief sought or appropriate. 28 U.S.C.A. § 1491.

[8] **Public Contracts** Judicial Remedies and Review

United States Judicial Remedies and Review

Limited waiver of sovereign immunity contained in the Administrative Procedure Act (APA) did not apply to disappointed bidder's claim for injunctive relief, an order directing the Army to advance its proposal to first phase of advanced military helicopter prototype program operated under Army's authority to enter "other transactions" (OT), and thus, Tucker Act impliedly barred district court's jurisdiction, since OT agreement that bidder sought was a contract, and right to have Army evaluate its prototype project, and to receive associated funding, stemmed from that potential contract. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1491.

[9] **Public Contracts** Bidding and Bid Protests

United States Bidding and Bid Protests

As used in the Administrative Dispute Resolution Act (ADRA), "procurement" refers to all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout. 28 U.S.C.A. § 1491(b)(1).

[10] **Federal Courts** Public contracts

Court of Federal Claims has exclusive jurisdiction over a case when the government has at least initiated a procurement or initiated the process for determining a need for acquisition. 28 U.S.C.A. § 149(b)(1).

[11] **Federal Courts** Public contracts

Administrative Dispute Resolution Act's (ADRA) sunset provision deprived district court of jurisdiction over disappointed bidder's protest of Army's selection of entitles for award of "other transactions" (OT) agreement to participate in program to develop advanced military helicopter prototype, since actions that bidder objected to took place within procurement process, determining the need for acquisition of advanced helicopters. 28 U.S.C.A. § 149(b)(1).

Attorneys and Law Firms

***1005** Brett William Johnson, Colin Patrick Ahler, Derek Conor Flint, Eric Harmon Spencer, Snell & Wilmer LLP, Phoenix, AZ, for Plaintiff.

Anne Elizabeth Nelson, US Attorneys Office, Phoenix, AZ, James Mackey Ives, US Dept. of the Army US Legal Services Agency, Fort Belvoir, VA, for Defendants.

ORDER UNDER SEAL

James A. Teilborg, Senior United States District Judge

****1** Plaintiff MD Helicopters, Inc. ("MDHI") alleges that Defendants the United States of America, the United States Department of the Army, and the Secretaries of Defense and the Army in their official capacities (collectively, "the Army"), violated the Administrative Procedure Act ("APA") by giving arbitrary and capricious reasons for not selecting MDHI to participate in the Future Attack Reconnaissance Aircraft Competitive Prototype ("FARA CP") program. (Doc. 135 at 1–2). It seeks to compel "the Army to advance MDHI's proposal" to Phase 1 of the FARA CP program. (Doc. 1 at 5).

The parties have filed cross-motions for summary judgment on this claim.

I. BACKGROUND

A. Statutory Background: Other Transaction Authority

At the dawn of the space race, the Soviet Union successfully launched the Sputnik satellite into Earth's orbit, prompting a growing national concern that the United States had fallen behind its rivals technologically. Heidi M. Peters, Cong. Research Serv., R45521, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress* 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45521. In response, Congress passed the National Aeronautics and Space Act of 1958, which established the National Aeronautics and Space Administration ("NASA"). *Id.* To enable NASA to pursue its mission without encountering unnecessary delay, Congress empowered it with authority to "enter into and perform contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate." National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 203(5), 72 Stat. 426, 430 (1958) (emphasis added). Congress has since extended the authority to enter into "other transactions" ("OTs") to several other executive agencies, including the Department of Defense ("DoD"). Peters, *supra*, at 1. As the Army puts it, OTs have several benefits in this context, including:

> (a) attracting non-traditional defense contractors to propose prototype projects; (b) encouraging traditional defense contractors to use new and innovative techniques and processes to accelerate development of technologies that are relevant to both defense and commercial markets; and (c) using flexible business ***1006** arrangements to accelerate development and transition to production.

(Doc. 70 at 6).

Two statutes currently govern DoD's authority to enter into OTs. The first authorizes the "Secretary of Defense and the Secretary of each military department" to "enter into transactions (other than contracts, cooperative agreements, and grants) ... in carrying out basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). The second authorizes OTs for "carry[ing] out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by [DoD], or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a)(1). This second statute also authorizes the government to enter into an OT for follow-on production, which may be awarded without using competitive procedures if certain conditions are met. 10 U.S.C. § 2371b(f).

B. Factual Background: The FARA CP Program and MDHI's Proposal

****2** In October of 2018, the U.S. Army Contracting Command–Redstone issued Solicitation No. W911W6-19-R-0001 ("the Solicitation") for proposals for the FARA CP. (Docs. 1 at 2; 71 at 3; 136 at 2). Because the Army identified the need to act quickly with respect to updating its helicopter fleet, (*see* Doc. 42 at 3), it structured the FARA CP program "as a phased approach with aggressive deadlines," (Doc. 136 at 2). In particular, the Army elected to use OTs for prototype projects under 10 U.S.C. § 2371b to award funding to the selected participants. (Doc. 36-3 at 3–5, 9; *see also* Doc. 80 at 1, 5).

As the Solicitation outlined, the FARA CP program will progressively down-select among candidates until potentially only one entity remains. That process would begin with prospective bidders submitting proposals to the Army. (Doc. 36-3 at 3). From these, the Army would select several entities for the award of OT agreements. (*Id.* at 4–5). The Army would then advance the recipients of the OT agreements ("Performers") to Phase 1, giving them "nine months to develop preliminary designs and provide the [Army] team with the data and insight required for the [Army] to down-select to two (or possibly more based on funding available) Performers for Phase 2." (*Id.* at 4–5). The Solicitation estimated that, under the OT agreements, "[e]ach Phase 1 Performer [would] receive approximately $15 [million] between" fiscal years ("FYs") 2019-20. (*Id.* at 9). In later phases, Performers would design, build, and test their proposed aircraft before providing them to the Army for further evaluation. (*Id.* at 5–6). "If executed," the final

phase of the FARA CP program contemplates the potential award of a follow-on production OT to a Performer for entry into subsequent full system integration, qualification, and production efforts. (*Id.* at 6).

In response to the Solicitation, MDHI submitted a proposal ("the Proposal") to participate in the FARA CP program. (Doc. 1 ¶ 7). After evaluating the Proposal, the Army notified MDHI that it was not selecting MDHI to participate in the FARA CP program because "MDHI's proposed design purportedly did not meet the Solicitation's requirements." (*Id.* ¶ 8). Shortly thereafter, MDHI filed a "bid protest objecting to the Army's ... action with the Government Accountability Office ("GAO")." (*Id.* ¶ 9). The GAO dismissed the protest, reasoning that while it had jurisdiction to review "a timely pre-award protest that an agency is improperly using its [OT] authority to procure goods or services," the GAO was not statutorily authorized to review OTs because they are ***1007** not "procurement contracts." (Doc. 13-1 at 3); *see also* 4 C.F.R. § 21.5(m) ("GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts...."). MDHI then filed a complaint in this Court, alleging that the Army "failed to properly evaluate the Proposal" and "arbitrarily and capriciously ignored or misunderstood important aspects of the Proposal." (Doc. 1 ¶ 15).

II. JURISDICTION

Before reaching the merits, this Court must first address the question whether it has subject-matter jurisdiction over this action. *See Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 693 (7th Cir. 2003) (explaining that, notwithstanding the fact that no party contested jurisdiction, "inquiring whether the court has jurisdiction is a federal judge's first duty in every case"). The parties agree that this Court possesses subject-matter jurisdiction to review the Army's decision under 28 U.S.C. § 1331 and 5 U.S.C. § 702. (Docs. 66 & 70). Intervenors to this action have, however, argued that this Court lacks jurisdiction for two independent reasons. Citing *Cooper v. Haase*, 750 F. App'x 600, 601 (9th Cir. 2019) and *Gabriel v. General Services Administration*, 547 F. App'x 829, 831 (9th Cir. 2013), intervenors assert that "district courts lack jurisdiction over APA claims challenging the award of ... contracts." (Doc. 43 at 8). Separately, citing this Court's ruling in *Fire-Trol Holdings L.L.C. v. United States Department of Agriculture Forest Service*, No. CV-03-2039-PHX-JAT, 2004 WL 5066232, at *3–4 (D. Ariz. Aug. 13, 2004), intervenors argue that the sunset provision of the Administrative Dispute Resolution Act of 1996 ("ADRA") eliminated district courts' jurisdiction to hear the kind of "bid protest" cases that they formerly could under their "*Scanwell* jurisdiction." (Doc. 43 at 8).

****3** In response, MDHI claims that, unlike *Cooper* and *Gabriel*, this Court may properly exercise jurisdiction because MDHI has not asserted a contract with the government. (Doc. 66 at 3). The parties argue further that Plaintiff's claim is not procurement-related because OTs are "not procurement contracts" and the ADRA's sunset provision terminated district court jurisdiction only over procurement matters. (Docs. 66 at 2–3; 70 at 10–12).

a. Legal Standard

[1] **[2]** **[3]** **[4]** "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868). " 'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.' " *Gunn v. Minton*, 568 U.S. 251, 256, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). Because a court lacking subject-matter jurisdiction also lacks the power to decide a case, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). "The United States, as sovereign, is immune from suit save as it consents...." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *see also Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998) ("[A] suit against the United States must start from the ... assumption that no relief is available."). Therefore, when a plaintiff sues the Federal Government, Congress's consent to suit is a necessary "prerequisite for jurisdiction." ***1008** *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); *see also Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed *in statutory text* ...." (citations omitted)) (emphasis added); *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1090 (9th Cir. 2007) (explaining that, typically, "[o]nly Congress enjoys the power to waive the United States' sovereign immunity") (citing *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 734, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982)); *Brazil v. Office of Pers. Mgmt.*, 35 F. Supp. 3d. 1101, 1116 (N.D. Cal. 2014) ("[A]n agency

cannot waive sovereign immunity and thus alter federal court jurisdiction.") (citing *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).

[5] Although not itself a grant of jurisdiction, the APA waives sovereign immunity for certain claims brought under the aegis of 28 U.S.C. § 1331. *Tucson Airport Auth.*, 136 F.3d at 645. This limited waiver of sovereign immunity applies to claims that are not for money damages, do not seek relief expressly or impliedly forbidden by another statue, and for which no adequate remedy is otherwise available. *Id.*

b. MDHI's Requested Relief is Impliedly Forbidden by the Tucker Act

[6] **[7]** "[T]he Tucker Act 'impliedly forbids' declaratory and injunctive relief and precludes [an APA-based] waiver of sovereign immunity in suits on government contracts." *N. Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir. 1985); *see also Price v. U.S. Gen. Servs. Admin.*, 894 F.2d 323, 324 (9th Cir. 1990). Thus, if the claim is "contractually-based, there is no jurisdiction." *Tucson Airport Auth.*, 136 F.3d at 646. This is true even if the action is brought under the APA. *Price*, 894 F.2d at 324. To determine whether a claim is contractually-based, courts look to "the source of rights upon which the plaintiff bases its claims, and ... the type of relief sought (or appropriate)." *Gabriel*, 547 F. App'x at 831 (quoting *Doe v. Tenet*, 329 F.3d 1135, 1141 (9th Cir. 2003)).

****4** MDHI attempts to distinguish the case at bar from *Gabriel*, but the facts are virtually identical. There, the plaintiff submitted an unsuccessful bid to purchase several lighthouses and subsequently sued for equitable relief against the General Services Administration ("GSA"). 547 F. App'x at 831. The Ninth Circuit explained that the plaintiff's "source of rights stem[med] from a potential contract with the GSA" because an injunction would have required the GSA to accept his bid and sell him the lighthouses. *Id.* Thus, the relief requested was "just another name for specific performance" and "the natural inference follow[ed] that a contractual remedy indicate[d] a contractually-based set of claims." *Id.*

MDHI seeks an order directing the Army to advance it to Phase 1 of the FARA CP program. (Doc. 1 at 5). As noted, under the Solicitation, the right of an entity to even participate in Phase 1—and thus to receive the accompanying funding award and prototype evaluation—turns on whether the Army awarded that entity an OT agreement. Therefore, if the OT agreement is a contract, then the conclusion seems inescapable that MDHI seeks to force the Army to award it a contract and to obtain rights flowing from an accepted bid—the kind of relief that the Tucker Act impliedly forbids before the district court.

MDHI argues that its "claim is *not* based on the Tucker Act or any express or implied contract" meaning "*Cooper* and *Gabriel* are irrelevant." (Doc. 66 at 3). To the extent that MDHI argues that the ***1009** relief requested is not impliedly forbidden by the Tucker Act simply because MDHI invokes the APA, its argument is misplaced. *Price*, 894 F.2d at 324; *see also Doe*, 329 F.3d at 1141 ("The label that is attached to a claim is not conclusive, however."); *Henderson v. U.S. Air Force, DMAFB*, No. CIV 06-323-TUC-FRZ, 2007 WL 2081481, at *2 (D. Ariz. July 20, 2007) ("The substance of the Complaint and not Plaintiff's characterization, defines this Court's jurisdictional review...."). To the extent that MDHI argues that OTs are not contracts, however, its argument carries some persuasive force given that OTs are statutorily defined as transactions that are "other than contracts." 10 U.S.C. § 2371(a).

Nonetheless, this position is undermined by the fact that DoD guidance and the Congressional Research Service—in documents the Army itself relied on—take the position that the word "contracts" in 10 U.S.C. § 2371(a) means "procurement contracts." *See Other Transactions Guide* at 38; Peters, *supra*, at 2 ("Other transactions are legally binding contracts...."). [1] Indeed, DoD's guidance states: "OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract ... and will be signed by someone who has the authority to bind the [F]ederal [G]overnment.... The terms and conditions can be enforced by and against either party." *Other Transactions Guide* at 38. In reality, these sources explain, 10 U.S.C. § 2371(a) refers to OTs as "other than contracts" to indicate that they are not subject to regulations, such as the Federal Acquisition Regulation, that usually govern the acquisition process. *Other Transactions Guide* at 38; Peters, *supra*, at 4. Even the Army's supplemental brief addressing jurisdiction implicitly recognizes that OTs are contracts, citing *Protect Lake Pleasant LLC v. McDonald*, 609 F. Supp. 2d 895 (D. Ariz. 2009) for the proposition that district courts retain jurisdiction under the ADRA's sunset provision in non-procurement contract cases. (Doc. 70 at 8). [2]

[1] The *Other Transactions Guide* is part of this Court's record, attached to the declaration of General Walter T. Rugen. (Doc. 42-1).

[2] Importantly, *Protect Lake Pleasant LLC*'s analysis of the plaintiffs' claim that Maricopa County violated the Federal Property and Administrative Services Act of 1949 is distinguishable from MDHI's case because the plaintiffs sought only to prevent the construction of a marina and yacht club, not an order requiring the government to accept its bid. 609 F. Supp. 2d. at 904–15.

****5** Despite the broad language used in these sources, this Court need not determine whether all OTs are contracts. Instead, this Court must look to the OT agreement at issue in this case. It is in examining the terms of the OT agreement —appended to the Solicitation—that it becomes clear that MDHI seeks the award of a contract and to obtain the benefits flowing from that contract.

The OT agreement governs virtually every aspect of the business relationship between the parties but, at its most basic level, it awards funds to the Phase 1 Performer. (Doc. 36-3 at 49). In exchange for those funds, the Phase 1 Performer "shall be responsible for performance of the work set forth in this Agreement at Attachment 1." (*Id.* at 51). Attachment 1 lists the Army's objectives for the FARA CP program and requires the Performer to:

- Define, design, build and test prototype aircraft that meet mandatory attributes and other performance requirements as described in System Performance Specification and Initial Capability Refinement Document....
- Collaboration with the [Army] on developing cost models, physics-based ***1010** engineering models and systems engineering models.
- Ground testing, flight envelope expansion and vehicle characterization testing necessary to develop data required to demonstrate the FARA CP capabilities and requirements.
- Data to support airworthiness and acquisition planning (e.g. manufacturing readiness level, supportability, suitability) for anticipated subsequent full system qualification and production activities.

(*Id.* at 83). Moreover, as indicated by the Solicitation, the award is a "[f]ixed amount OT," defined in the OT agreement as an arrangement in "which the awardee agrees to complete a prototype project for an agreed upon total price and where payments are not based on amounts generated from the awardee's financial or cost records." (*Id.* at 53). The OT agreement goes on to state that, in the event "estimated total program costs are projected to exceed the total amount of this Agreement," the Performer need not continue performance "unless[ ] and until the [Army] notifies the Performer in writing that the amount allotted by the [Army] has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the [Army] to this Agreement." (*Id.* at 64). The OT agreement even establishes dispute resolution procedures in the event of a disagreement between the Army and the Performer. (*See id.* at 65–66).

[8] There are myriad other aspects of the business relationship controlled by the OT agreement, including patent rights to inventions conceived during the FARA CP program, (*id.* at 66–70), the amount of access foreign firms or institutions may have to any of the findings and technology developed, (*id.* 73–75), disclosure of information, (*id.* at 79–80), and disposition of property acquired during the FARA CP program, (*id.* at 76–79). The OT agreement additionally indicates that, a Performer signing or accepting funds under it, also agrees to comply with a panoply of federal laws and regulations. (*Id.* at 79). But the Court need not rehearse all aspects of the lengthy OT agreement; rather, given that all the features of a contract are present, the Court has little difficulty concluding that the OT agreement that MDHI seeks is a contract. The right to even have the Army evaluate a prototype project, and to receive the associated funding, stems from that potential contract. Because, just like the plaintiff in *Gabriel*, MDHI's source of rights stems from a potential contract with the government, the APA does not waive sovereign immunity with respect to its claim for injunctive relief in this Court.

c. The ADRA Precludes Jurisdiction

****6** Having concluded that the limited waiver of sovereign immunity contained in the APA does not apply, this Court could normally stop its analysis and dismiss this action for lack of subject-matter jurisdiction on that basis. In seeming contradiction to the relief requested in its complaint, however, MDHI's motion for summary judgment asks this Court to issue an order to "re-open the evaluation process to provide MDHI with a proper Phase 1 evaluation." (Doc. 135 at 16). Given that this new request is somewhat ambiguous as to whether it seeks advancement to Phase 1, or a reevaluation of the Proposal, this Court will also address whether the ADRA's sunset provision deprives it of jurisdiction here. Although there is a relative lack of authority addressing the interplay between statutes authorizing OTs and the ADRA, this Court concludes that this action falls within the terms of the ADRA's

sunset provision, meaning that this Court cannot exercise jurisdiction.

The ADRA states in pertinent part that

> ***1011** both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 U.S.C. § 1491(b). Federal district court jurisdiction over the actions described in this section sunset on January 1, 2001. As this and several other courts have found, if an action falls within the terms of 28 U.S.C. § 1491(b)(1), the Court of Federal Claims has exclusive jurisdiction even when the plaintiff invokes the APA. *See, e.g.*, *Vero Tech. Support, Inc. v. U.S. Dep't of Def.*, 437 F. App'x 766, 768 (11th Cir. 2011) (reasoning that "the Tucker Act ... forbid[s] relief that would otherwise be available under the APA, mainly the ability to resolve an APA claim that falls within the scope of the Tucker Act ... in a federal district court"); *Sigmatech, Inc. v. U.S. Dep't of Def.*, 365 F. Supp. 3d 1202, 1205–06 (N.D. Ala. 2019); *Validata Chem. Servs. v. U.S. Dep't of Energy*, 169 F. Supp. 3d 69, 75 (D.D.C. 2016); *Fire-Trol Holdings LLC*, 2004 WL 5066232, at *4; *see also Space Exp. Techs. v. United States*, 144 Fed. Cl. 433, 439 (2019) (analyzing jurisdiction under the ADRA).

It is indisputable that MDHI is objecting to "a solicitation by a Federal agency for bids or proposals for a proposed contract," given that its allegations relate entirely to the Army's rejection of the Proposal. Although such an allegation might appear to place this case squarely within the text of the ADRA, the Federal Circuit has explained that the ADRA "speaks 'exclusively' to 'procurement solicitations and contracts.' " *Hymas v. United States*, 810 F.3d 1312, 1317 (Fed. Cir. 2016) (quoting *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010)) (emphasis omitted).[3] Indeed, in its review of the ADRA's legislative history, the Federal Circuit observed that the statute's sponsors clearly "sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims." *Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). Thus, while it is true that "a narrow application of [the ADRA] does not comport with the statue's broad grant of jurisdiction over objections to the procurement process," *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012), the Federal Circuit has reasoned that the types of governmental actions reviewable under the ADRA are limited to procurement decisions, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381 (Fed. Cir. 2018) (citing *Distributed Sols, Inc. v. United States.*, 539 F.3d 1340, 1346 (Fed. Cir. 2008)); *Res. Conservation Grp., LLC*, 597 F.3d at 1245 ("[R]elief under [28 U.S.C. §] 1491(b)(1) is unavailable outside the procurement context.").

3 This Court is "especially interested in the Federal Circuit's views on" the ADRA because that court has "exclusive appellate jurisdiction over all cases filed on or after January 1, 2001." *See Baltimore Gas & Elec. Co. v. United States*, 290 F.3d 734, 737 (4th Cir. 2002).

****7** **[9]** **[10]** As used in the ADRA, "procurement" refers to "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Sols., Inc.*, 539 F.3d at 1345 (emphasis and quotation omitted); *see also* 41 U.S.C. § 111. Therefore, the Court of Federal Claims has exclusive jurisdiction ***1012** over a case when "the government [has] at least initiated a procurement[ ] or initiated 'the process for determining a need' for acquisition.' " *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018) (quoting *Distributed Sols., Inc.*, 539 F.3d at 1346).

In considering whether an objection to an OT is made "in connection with a procurement," this Court fortunately does not write on a blank slate. The Court of Federal Claims faced just such an issue in *Space Exploration Technologies Corp. v. United States*. There, SpaceX challenged the government's "evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions." 144 Fed. Cl. at 435. SpaceX made its objection in the overarching context of the "National Security Space Launch program," which "is charged with procuring launch services to meet the government's national security space launch needs." *Id.* at 436. To accomplish this goal, the

government initiated a multi-phase strategy in FY 2013 that will be completed by FY 2027. *Id.* at 436–37. The program's first phase involved "a competition for the development of space launch vehicles," during which the government sought to develop a prototype that could comply with national security requirements while also providing domestic commercial launch services. *Id.* at 437. The awardees of the competition would receive government funding for further prototype development and testing. *Id.* There, as here, the solicitation and resulting awards were issued under DoD's authority to enter into other transactions. *Id.* at 438.

In a separate and distinct part of the government's strategy, it anticipated "awarding two requirements contracts for launch services, delivering multiple national security space missions with annual ordering periods from FY 2020 through FY 2024." *Id.* at 437. This "Phase 2 Procurement" would be held open to "all interested offerors," meaning that even those that had not received funding awards during the competition could seek to submit a bid for the procurement. *Id.* at 438.

Addressing SpaceX's contention that jurisdiction was proper under the ADRA, the Court of Federal Claims first looked to the awards issued as a result of the competition. *Id.* at 442. Although those awards did not themselves support ADRA-based jurisdiction, the court nonetheless examined whether the awards were sufficiently "in connection with" the Phase 2 Procurement to support exercising jurisdiction over the action. *Id.* at 443. The court reasoned that they were not because: (1) the competition and the Phase 2 Procurement "involve[d] separate and distinct solicitations;" (2) the competition and the Phase 2 Procurement "involve[d] different acquisition strategies," including the legal requirements that governed each solicitation; (3) the competition "did not involve the procurement of any goods or services ... the [government] will not purchase or own these prototypes;" and (4) despite the fact that competition winners would receive federal funding, placing them in an advantageous position for the Phase 2 Procurement, the competition awards would not be outcome-determinative for the Phase 2 Procurement which remained a "fully open competition" and would not be limited to competition award recipients. *Id.* at 443–45. Acknowledging that the question before it was "a close one," the court found that the competition awards were simply too attenuated to the Phase 2 Procurement to confer jurisdiction. *Id.* at 445; *see also Protect Lake Pleasant LLC*, 609 F. Supp. 2d at 898–915 (explaining that a challenge to a solicitation for a concession agreement was not made in connection with a procurement even though the solicitation was authorized by an agreement that amounted to at least a partial procurement).

****8** ***1013** The facts surrounding the Army's decision to reject the Proposal at issue here demonstrate that the present objection relates far more directly to an eventual procurement than the solicitation at issue in *Space Exploration Technologies*. The very reason the Army embarked upon the FARA CP program was an identified lack of aircraft with "the ability to conduct armed reconnaissance, light attack, and security with improved stand-off and lethal and non-lethal capabilities with a platform sized to hide in radar clutter and for the urban canyons of mega cities." (Doc. 36-3 at 3). Thus, the entire purpose of the Army's "prototyping and testing effort" is to "support a decision to enter into a formal program of record for full system integration, qualification and production as a rapid acquisition." (*Id.*). Importantly, and quite unlike the solicitation at issue in *Space Exploration Technologies*, at each progressive stage of the FARA CP program the Army will down-select among the Performers who participated at the previous stage. (Doc. 36-3 at 4–6). Thus, a decision excluding a Performer (or, in MDHI's case, a would-be Performer) from any phase of the FARA CP program would be outcome-determinative because only entities that are "selected for the preceding phase of the FARA CP program shall be eligible for any subsequent phases," and thus any eventual procurement. (Doc. 36-3 at 4) Further unlike *Space Exploration Technologies*, the FARA CP program does not involve two distinct solicitations. Indeed, the Solicitation anticipates possibly awarding a "follow-on production contract or transaction *without the use of competitive procedures*" under 10 U.S.C. § 2371b(f) to Performers who successfully complete the prototype project. (Doc. 36-3 at 6) (emphasis added).

As its final argument in favor of jurisdiction, the Army asserts that "[i]t is legally presumed that Congress would not have used the term 'other transactions' if it had meant 'procurements' within the meaning of the Tucker Act, FGCAA, and CICA." (Doc. 70 at 12). It is generally true that "Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts." *Aectra Ref. & Mktg. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009). But what should be clear by now, and what this and the parties' other arguments have glossed over, is that the ADRA's applicability does not depend on the present existence of an actual procurement contract so long as the challenged action bears a sufficient connection to a procurement. Because the

Court's resolution of this issue does not depend on any characterization of the OT agreement as a "procurement," there is no disharmony between the ADRA and the other laws that the Army identifies.

[11] To be sure, the Solicitation employs contingent language regarding Phase 4 of the FARA CP program, the point at which any procurement will occur. It is nonetheless clear that the Army's decision to issue the Solicitation, to reject the Proposal, and to award OTs to other Performers, all took place within the procurement process. As indicated, the main purpose of the FARA CP program is to develop data to support a decision to integrate the next generation of light attack helicopter into the armed forces. Thus, the actions that MDHI objects to took place within the "process of determining a need for acquisition" of advanced helicopters such that the objection falls within the plain language of the ADRA.

Accordingly, the Court concludes that it lacks jurisdiction under the ADRA's sunset provision.

*1014 III. CONCLUSION

Based on the foregoing,

IT IS ORDERED that this case is dismissed, without prejudice, for lack of jurisdiction in this Court. The Clerk of the Court shall enter judgment 15 days after the date of this Order unless, prior thereto, a party moves for reconsideration (*see* L.R. Civ. 7.2(g)) or to transfer this case to another court. [4]

4 This Order creates no presumption that transfer is appropriate. Thus, any motion to transfer must cite and apply the controlling legal authority on transfer.

IT IS FURTHER ORDERED that the motions for summary judgment (filed at Docs. 135, 136 and lodged at Docs. 132 and 134) are denied without prejudice for lack of jurisdiction.

IT IS FURTHER ORDERED that because, for purposes of this Order, the Court did not consider any sealed materials, the Motions to Seal are denied as moot (Docs. 131, 133, 137, 139, 144, and 145); however, all the related documents (Docs. 132, 134, 138, 140, 143, and 146) shall remain lodged and sealed.

IT IS FINALLY ORDERED that the Clerk of the Court shall file this Order under seal. The parties must, within 14 days of the date of this Order, file a motion to seal this Order which must attach a proposed redacted version of this Order to be filed in the public record. Any motion to seal must identify why the information sought to be redacted satisfies the "compelling reasons" standard articulated in *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The Court retains discretion to accept or reject each redaction proposed by the parties. If no motion to seal is filed within 14 days, the Clerk of the Court shall unseal this Order. [5] The motion at Doc. 149 is GRANTED to the limited extent specified herein.

5 Because the Court did not rely on any sealed information in this Order, the Court does not anticipate a motion to seal. The Court has included this provision out of an abundance of caution.

All Citations

435 F.Supp.3d 1003, 2020 WL 516469

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

SPACE EXPLORATION TECHNOLOGIES CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

REDACTED PUBLIC VERSION

Case No. _____

[redacted]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Space Exploration Technologies Corp. ("SpaceX") respectfully challenges the Air Force Space and Missile Systems Center's (the "Agency") evaluation of proposals and portfolio award decision under the Launch Service Agreement ("LSA") Request for Proposals, Solicitation No. FA8811-17-9-0001 (the "LSA Solicitation") as arbitrary and capricious and contrary to law. (*See generally* LSA Solicitation, Ex. A.) In challenging the Agency's LSA award decision, SpaceX does not seek any advantage, but only the opportunity to compete for national security missions on a fair and level playing field. SpaceX understands the importance of these missions and thus does not also challenge the related National Security Space ("NSS") Launch Phase 2 Launch Service Procurement ("Phase 2 RFP Competition").[1]

[1] The Agency issued the final Solicitation for the Phase 2 RFP Competition, Solicitation No. FA8811-19-R-002 ("Phase 2 RFP"), on May 3, 2019. The Phase 2 RFP Competition will result in two requirements contract awards to provide launch services for the NSS missions during the five to eight year performance period. (Phase 2 RFP, Att. 5 at 2, Ex. B.) One awardee will receive approximately 60% of all NSS launch orders and the other will receive approximately 40%, as allocated by the Agency. (Phase 2 RFP, Model Contract at 30-31, Ex. C.)

[redacted]

I. INTRODUCTION

1. The Agency wrongly awarded LSAs to a portfolio of three unproven rockets based on unstated metrics, unequal treatment under the procurement criteria, and opaque industrial planning. This result occurred despite the Agency determining that SpaceX "not only has more strengths than ULA [United Launch Alliance ("ULA")[2]]" (the winner of the largest LSA award), "but [SpaceX's] strengths are qualitatively more beneficial to the Government than ULA's strengths." (Portfolio Recommendation at 21, Ex. D.) By any reasonable measure, SpaceX earned a place in the LSA portfolio. For the overwhelming majority of planned NSS missions, SpaceX offered operational rockets already certified to carry the Nation's most important payloads, yet the Agency inexplicably deemed SpaceX's offering the "highest risk." (*Id.* at 20-22.) Likewise, the Agency did not equally apply certain pricing criteria to ULA, significantly understating ULA's cost by hundreds of millions of dollars. The improper LSA awards, which provide developmental funding and Agency cooperation for launch systems that SpaceX's competitors are proposing in the on-going Phase 2 RFP Competition, disadvantage SpaceX and impede Congress's mandate to maintain assured access to space. Accordingly, SpaceX challenges the Agency's LSA award decision.

2. SpaceX has demonstrated an unmatched commitment to the Agency and the broader NSS community for providing reliable, affordable, and innovative space launch. SpaceX has done so through years of effort and billions of dollars of its own capital investments to meet the demanding requirements of the United States' National Security Space Launch ("NSSL")

[2] ULA is a joint venture between The Boeing Company ("Boeing") and Lockheed Martin ("Lockheed").

[redacted]

program, formerly known as the Evolved Expendable Launch Vehicle ("EELV") program.[3] To date, SpaceX has successfully launched its Falcon 9 and Falcon Heavy launch vehicle systems more than 70 times in support of NSS, civil space, and commercial space customers, including recent missions for the Agency and the National Reconnaissance Office ("NRO"). In December of 2018, SpaceX successfully launched the first of the next generation Global Positioning System ("GPS") III satellites to orbit, helping the Department of Defense ("DoD") start a new era for the critically important GPS constellation and mission. In parallel with its national security mission, SpaceX has worked tirelessly to become the global leader in commercial launches, conducting more launches than any other commercial launcher over the past two years, with a record twenty-one launches in 2018 alone. This commercial business and cadence of flight eliminates the burden to the United States Government ("Government") of shouldering the full fixed costs of the launch provider's business, which the Government has been forced to do with legacy providers.

3. SpaceX's commitment to the Nation's space enterprise has yielded extraordinary results for the Government and the taxpayer: in competitive launch services procurements for national security missions, SpaceX has won multiple competitive awards at price levels that have saved the DoD hundreds of millions of dollars versus the prior sole source status quo. At the same time, SpaceX's launch systems have radically advanced the state-of-the-art for rocket technology through reusability and operational responsiveness—a key advantage for the Nation as the space domain becomes increasingly contested—demonstrating the unique ability to maintain a launch cadence of roughly two launches per month. This cadence is set to increase even further to support

[3] The Agency renamed the EELV program as the "National Security Space Launch program," effective March 1, 2019. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1603, 132 Stat. 1636, 2105-06 (2018). For ease of reference, this Complaint will refer to the program as the EELV program, which was the common shorthand for the program during its first twenty-five years.

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the rapid deployment of critical space assets. Beyond its commitment to innovating launch vehicle technology, SpaceX has consistently made private capital outlays to enable its launch vehicle systems to meet the unique and expensive national security launch requirements that yield no commercial benefit; and, it has borne the expense of certifying its vehicles for NSS missions both in time and money. SpaceX has shown, throughout, a core commitment to the Agency's crucial space mission, and to the mission assurance needs and processes inherent in NSS launch campaigns.

4. SpaceX competed under the LSA Solicitation to be included in the award portfolio. In late 2018, the Agency excluded SpaceX and awarded hundreds of millions of dollars in development funding to each and every one of SpaceX's direct domestic competitors – including the long-term monopoly provider of national security launches, ULA – despite determining that SpaceX offered launch systems qualitatively more beneficial to the Government. (Portfolio Recommendation at 21, Ex. D.) Each of the LSA awardees received funding ranging from $500 million to $967 million, even while their proposed launch systems have never flown and, indeed, are still early in their design phase. Yet, each LSA awardee claimed their launch system would be ready starting in 2021 and certified by the Agency to perform NSS missions by 2022.

5. By contrast, SpaceX bid its existing, operational Falcon 9 and Falcon Heavy vehicles for all missions set to occur before late 2025 and a newer, even more capable and cost effective system, the Big Falcon Rocket (now Starship), for a tiny fraction of NSS missions to launch no earlier than late 2025. The Agency's Source Selection Authority ("SSA") nonetheless determined that SpaceX's one developmental launch vehicle rendered the entire SpaceX portfolio the "highest risk" and chose the portfolio that best served the needs of ULA, the long-standing incumbent. (Award Decision at 9, Ex. I.) This appraisal of risk is counter to the stated evaluation

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criteria and, by any objective measure, unreasonable. As a consequence, the Agency made significant awards to ULA and the two offerors that are currently developing major components for ULA's new rocket—in effect, the Agency made awards to ULA and two subcontractors for its new, proposed launch vehicle system.

6. By selecting for its LSA portfolio three unbuilt, unflown systems—all of which share major common systems relative to the ULA vehicle—the Agency has tilted the playing field steeply in favor of unproven rockets that clearly will not be certified for *any* NSS launches on the timeframes dictated in the LSA Solicitation, risking assured access to space and defeating the very objectives of the LSA Solicitation. In addition, the LSA awardees have not demonstrated commercial viability, which ostensibly was a requirement for award. In fact, two of the awardees (ULA and Northrop Grumman) have recently and repeatedly acknowledged that their LSA vehicles are "purpose-built" for NSS launches and are unlikely to be commercially viable.[4] This in turn risks perpetuating the same critical problems that have plagued the EELV program for decades: uncontrolled costs and a lack of competition based on commercial viability.

[4] *See* Sandra Erwin, *ULA CEO Bruno: Launch industry challenged by tougher national security missions*, SpaceNews (May 7, 2019), at https://spacenews.com/ula-ceo-bruno-launch-industry-challenged-by-tougher-national-security-missions/; *see also* United Launch Alliance, *Vulcan Centaur: Purpose-Built for National Security Space*, YouTube (May 2, 2019), at https://www.youtube.com/watch?v=UVblBykNvdw; Press Release, United Launch Alliance, United Launch Alliance Progresses Towards Purpose-Built Vulcan Centaur for National Security Space Missions: First Flight Hardware Being Manufactured and Launch on Track for 2021 (Apr. 8, 2019), https://www.ulalaunch.com/about/news/2019/04/08/united-launch-alliance-progresses-towards-purpose-built-vulcan-centaur-for-national-security-space-missions; Emre Kelly, *Northrop Grumman is ready to 'start cutting metal' at KSC for new Omega rocket*, Florida Today (April 9, 2019), at https://www.floridatoday.com/story/tech/science/space/2019/04/09/northrop-grumman-time-start-cutting-metal-ksc-new-omega-rocket/3404407002/; Sandra Erwin, *For OmegA, U.S. Air Force launch competition is a must-win*, SpaceNews (April 8, 2019), at https://spacenews.com/for-omega-u-s-air-force-launch-competition-is-a-must-win/.

[redacted]

7. Had the Agency properly applied its own criteria to make the LSA awards, SpaceX most certainly would have been deemed "the most advantageous in achieving the Government's goal of assured access to space" and earned an LSA award. (LSA Solicitation at 26, Ex. A.)

II. BACKGROUND

8. The LSA Solicitation is part of the Agency's ongoing procurement of launch services to place the United States' national security satellites into orbit. Put simply, the Agency designed the LSA Solicitation to fund the development of launch systems by awarding LSAs under its Other Transaction ("OT") authority, and the LSA awardees are then expected to propose those taxpayer-funded launch systems for the Phase 2 RFP Competition, which solicits two requirements contracts for launch services.

9. An overarching goal of the LSA Solicitation is to transition from the outdated, unaffordable legacy launch vehicles that the EELV program's long-time monopoly provider ULA has used for more than two decades to perform EELV missions: the Russian-engine-powered Atlas V and the Delta IV Heavy. The LSA Solicitation also expressly identified the following specific objectives for this transition: (1) to maintain assured access to space;[5] (2) to end reliance on Russian rocket engines; and (3) to leverage commercial launch systems to reduce the time and cost of launch systems development and reduce the cost of launch. (LSA Solicitation at 1, Ex. A.)

10. The Agency awarded LSAs committing Government investments valued at: (a) $967 million to ULA; (b) $792 million to Northrop Grumman ("Northrop"); and (c) $500

[5] Assured access to space means "the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of Defense or the Director of National Intelligence as a national security payload." 10 U.S.C. § 2273(b)(1). Notwithstanding its statutory obligation to maintain assured access to space, the Agency has never maintained assured access for the heaviest EELV payloads as only ULA's Delta IV Heavy could perform such missions.

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million to Blue Origin. (Portfolio Recommendation at 19, Ex. D.) The only offeror denied an LSA was SpaceX.[6] *The Agency's decision to exclude SpaceX from an LSA award undermines every one of the LSA Solicitation's express objectives.*

11. First, the award decision thwarts assured access to space because SpaceX was the only competitor to propose currently operational, commercially viable launch vehicles. As of the award decision, SpaceX's Falcon 9 had flown 61 successful missions—including 35 consecutive missions in 2017 and 2018 alone—and was certified by the Agency and able to carry most missions on the EELV manifest.[7] SpaceX's Falcon Heavy had already flown once,[8] successfully, has a series of launches scheduled in near term, and is already EELV-certified (with open work). The one design-phase rocket that SpaceX put forth—Starship—was proposed solely for so-called Payload Category C missions, which comprise a minute fraction of the EELV manifest (only one of 31 missions at the time of the LSA award), with the first Category C mission launching no earlier than September 2025. Conversely, each of the three awardees proposed *only* one new rocket, all of which are still in the design phase, for all EELV missions starting in April 2022. And unlike SpaceX, not one of the awardees has demonstrated the ability to develop and manufacture new rockets rapidly. In fact, it took ULA's parent companies, Lockheed Martin and Boeing, seven years to complete development of the Atlas V and Delta IV Heavy vehicles, even though they were

[6] SpaceX was also the only offeror not proposing to develop a major component of ULA's new "Vulcan" launch system: Blue Origin is supplying Vulcan's main first stage engine, and Northrop is supplying Vulcan's strap-on side boosters, which are necessary for ULA's vehicle to meet EELV performance requirements. As a result of these relationships, all three LSAs subsidize the development of a single new launch vehicle offered by ULA, the former monopoly provider and now favored incumbent in the EELV program.

[7] In the space launch industry, a "manifest" refers to the schedule of missions. The management of satellite systems, including replacing satellites as they reach the end of their planned life, involves long lead planning, and launches are often scheduled—and put on the manifest—years in advance.

[8] The Falcon Heavy has successfully performed a second mission since the LSA award decision.

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developmental iterations of existing vehicles and also significantly financed by the U.S. Government. The LSA award decision thus undermines assured access to space because, unlike the fully operational launch vehicles that SpaceX proposed, which can already perform every EELV mission scheduled before September 2025, it is not clear when, if ever, the LSA awardees' conceptual rockets will be certified and operationally-ready to perform *any* EELV missions.[9]

12. Second, the LSA award decision will not end the United States' reliance on Russian rocket engines. The Agency knew that none of the design-phase rockets it chose for LSA award has a meaningful chance of being ready in time for the Phase 2 RFP performance period (i.e., ready to order in 2020 and launch Payload Category A and B missions by April 2022). Indeed, the Phase 2 RFP acknowledges this operational risk arising from the LSA awards by permitting LSA awardees to offer launch vehicles *other than* the ones they are being paid hundreds of millions of dollars to develop in the near-certain event those launch vehicles are not ready in time. There should be no doubt that ULA—as well as Northrop and Blue Origin, given their subcontractor relationships with ULA—will propose to use ULA's Atlas V as their "secondary launch vehicle" until each awardee's developmental vehicle is ready (whenever that might come to pass). (Phase 2 RFP, Model Contract at 26, Ex. C.) So, while awarding an LSA to SpaceX would have ensured the quickest end to the United States' reliance on Russian engines, the award decision essentially

[9] In addition, as noted, the awardees' proposed rockets share major subsystems: Blue Origin's "New Glenn" and ULA's Vulcan will both use Blue Origin's BE-4 first stage engine, and Northrop's "OmegA" and ULA's Vulcan will both use Northrop's GEM 63XL solid side boosters and the same RL-10C upper stage engine. If the Agency were to award Phase 2 contracts to ULA and either of the other LSA awardees, this overlapping use of critical propulsion systems—a key risk area for new launch vehicle development—will ensure that a problem with a single subsystem in the development phase, or a single launch failure, could ground the United States' ability to launch any NSS payloads for long periods of time; this is the opposite of assuring access to space.

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guarantees such reliance will continue years beyond the Congressionally-mandated end date of December 31, 2022.

13. Third, the LSA award decision does not leverage commercial launch systems. Unlike SpaceX, whose Falcon 9 flies more commercial missions than any rocket in the world, none of the LSA awardees has ever demonstrated commercial viability. Boeing's and Lockheed's inability to win commercial launches is the very reason they had to merge to form ULA and acquire a monopoly in the EELV market in the first place, and on the rare occasion that ULA has won a commercial contract, its offering was heavily subsidized by anticompetitive "launch capability" contracts through which U.S. taxpayers have long covered ULA's overhead (to the tune of some $1 billion per year). More to the point, ULA has expressly acknowledged that the launch system it proposed for the LSA Solicitation—the Vulcan—is not designed to succeed in the commercial market. As ULA's CEO Salvatore Bruno recently explained: "Vulcan was purpose built for [NSS] requirements, it was a deliberate choice that we made.... *Had we designed our rocket to be optimized for the commercial marketplace, it would have been smaller.*"[10] Northrop has no commercial launch business at all.[11] And in nearly 20 years of existence, Blue Origin has yet to

[10] Sandra Erwin, *ULA CEO Bruno: Launch industry challenged by tougher national security missions*, SpaceNews (May 7, 2019), https://spacenews.com/ula-ceo-bruno-launch-industry-challenged-by-tougher-national-security-missions/ (emphasis added). *See also United Launch Alliance, Vulcan Centaur: Purpose-Built for National Security Space*, YouTube (May 2, 2019), available at https://www.youtube.com/watch?v=UVbIBykNvdw; Press Release, United Launch Alliance, United Launch Alliance Progresses Towards Purpose-Built Vulcan Centaur for National Security Space Missions: First Flight Hardware Being Manufactured and Launch on Track for 2021 (Apr. 8, 2019), https://www.ulalaunch.com/about/news/2019/04/08/united-launch-alliance-progresses-towards-purpose-built-vulcan-centaur-for-national-security-space-missions.

[11] Northrop recently merged with Orbital ATK and thereby acquired the "Antares," a medium-class launch vehicle developed by Orbital ATK; even the Antares—which is not qualified to perform NSS missions—has never won a commercial contract.

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reach orbit, let alone put a commercial payload into orbit.[12] Choosing these awardees cannot credibly be said to leverage any commercial launch solutions, certainly not in comparison to SpaceX's offering.

14. In addition to undermining its own stated objectives, the LSA award decision was based on material and demonstrable deviations from the stated evaluation criteria and prejudicial unequal treatment. For example:

(a) The Agency determined that SpaceX's proposal presented a higher risk in the most important EELV Approach factor than the others even though SpaceX's proffered rockets can already launch nearly every payload on the EELV manifest, and indeed *every* EELV payload scheduled to launch before late 2025. To reach this conclusion, the SSA determined that Starship—the one developmental launch vehicle that SpaceX offered to launch only one or two planned Category C payload missions that will launch no earlier than late 2025 (and potentially much later)—rendered the entire SpaceX solution higher risk than the three design-phase rockets that the awardees proposed to use for *all* mission categories needed for launch by April 2022.[13] This finding, which provides greater weight to Payload Category C solutions than the LSA Solicitation will permit, is particularly unreasonable in that the underlying evaluation made a false comparison to the Space Shuttle development and ignored SpaceX's demonstrated ability—unique among the offerees—to design reliable, reusable and cost-effective launch vehicles rapidly from the ground up. Equally anticompetitive, the high risk determination also resulted from unwarranted findings based on deviations from the stated evaluation criteria.

(b) The Agency understated the Government's total investment in ULA's LSA solution by hundreds of millions of dollars by failing to account for the significant contract awards the Government has made, and continues to make, to ULA to pay for the launch infrastructure and integration facilities that ULA proposed to leverage for the LSA. This prejudicial error reflects an unequal evaluation because, opposite to its treatment of ULA, the Agency increased SpaceX's proposed price by the contract value of a

[12] Blue Origin's lack of commercial success is perhaps why its founder, the richest man in the world by most accounts, injects billions of dollars of his own money into the company; he has even stated that he may need to manage that company as a "non-profit." Eugene Kim, *Jeff Bezos Says Amazon Will Announce HQ2 Decision Before the End of the Year*, CNBC (Sept. 14, 2018), www.cnbc.com/2018/09/13/jeff-bezos-speaks-at-the-economic-club-in-washington-dc.html.

[13] This determination was particularly odd given the Agency's significant, multi-year investment—via the Rocket Propulsion System program—into SpaceX's development of the Raptor engine that will power the Starship.

[redacted]

separate Agency mission that SpaceX proposed to leverage [redacted]

(c) The Agency also overstated SpaceX costs to the Government by over [redacted], upwardly adjusting SpaceX's proposed price to include both the East Coast and West Coast vertical integration options, even though the Phase 2 RFP confirms that the Agency has no need for vertical integration on the West Coast. And, having increased SpaceX's proposed price by the vertical integration options, it was unreasonable and unfair for the Agency also to assign a schedule risk to SpaceX by assuming a delayed exercise of the East Coast option. SpaceX cannot reasonably be burdened with both an evaluated risk and the cost of overcoming that risk.

(d) The Agency also failed to assess the serious risks arising from the fact that all three LSA awardees effectively serve one launch vehicle because ULA's proposed Vulcan depends upon critical components built by the two other LSA awardees for their own proposed launch vehicles. The Agency dismissed the fact that this overlap of critical-but-undeveloped systems proliferates these systems' substantial risks across all current LSA awardees' proposed launch vehicles, reasoning that the LSA Solicitation—which required the Agency to assess risk of the proposed approach—did not include an express criterion related to use of common components.[14]

15. In sum, the Agency's evaluation and award decision were so flawed as to be arbitrary and capricious, and contrary to the competitive procedures required by law and the LSA Solicitation.

III. STATEMENT OF FACTS

A. EELV Program Before SpaceX: Non-Competitive And Highly-Subsidized

16. "Competition is fundamental to our free enterprise system": "[i]t is the single most important source of innovation, efficiency, and growth in our economy."[15] But it is precisely the lack of competition that has bedeviled the EELV program and anti-competition procedures that resulted in the arbitrary and capricious LSA award decision.

[14] The Agency also ignored the impact that these relationships—which mean that a Phase 2 RFP award for ULA is also a win for the other two LSA awardees—could have on competition.

[15] Memorandum from Ronald Reagan on Competition in Federal Procurement to the Heads of Departments and Agencies (Aug. 11, 1983), https://www.reaganlibrary.gov/research/speeches/81183f.

[redacted]

17. The EELV program was initiated more than two decades ago to achieve affordable, assured access to space for national security payloads.[16] The approach then was similar to the approach the Agency is using now: through OT agreements, the Government gave money to Boeing[17] and Lockheed to develop launch systems—the Delta IV and Atlas V, respectively—and related infrastructure that they would then use to compete with each other for EELV missions, giving the Agency the direct benefits of head-to-head competition.

18. The success of the approach, however, was premised on Boeing and Lockheed winning commercial launches to spread their overhead costs and keep their suppliers busy, and neither proved capable of securing any meaningful commercial business, even with their taxpayer-funded launch systems. This left both Boeing and Lockheed to rely exclusively on U.S. Government launches to cover their respective overhead, support a supply chain, and still generate a return on the modest investments they themselves made in their launch systems. To make matters worse, Boeing won numerous competed EELV missions using misappropriated Lockheed pricing data. The Agency was forced to reallocate the missions (at great cost), and Boeing was barred from competing for 20 months.[18] So after investing well over one billion taxpayer dollars to help Boeing and Lockheed develop launch systems on the premise that they would compete to provide affordable EELV launches,[19] the Agency ended up with no commercially or competitively-viable launch systems and a massive fraud to clean up.

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[16] Steven Hildreth, Cong. Research Serv., R44498, National Security Space Launch at a Crossroads 2 (2016), https://fas.org/sgp/crs/natsec/R44498.pdf.

[17] The award was made to McDonnell Douglas, which was later acquired by Boeing in 1997.

[18] Press Release, Dep't of Justice, Boeing to Pay United States Record $615 Million to Resolve Fraud Allegation (June 30, 2006), https://www.justice.gov/archive/opa/pr/2006/June/06_civ_412.html.

[19] From the start of the EELV program until Boeing and Lockheed merged their launch businesses to create ULA, the Government invested approximately $1.27 billion into Boeing ($696.983

[redacted]

19. The inability of both companies to win commercial launches (and the malfeasance of Boeing) forced the Agency to abandon any hope for true competition between Boeing and Lockheed, and instead to let them merge their launch businesses in 2006 to form ULA. After that, ULA enjoyed a complete monopoly in the EELV program, with the Agency awarding all missions to ULA on a sole source basis.

20. In addition, because ULA was not commercially viable, the Agency was forced to cover ULA's entire overhead. It did so using an unusual and complicated two-part contracting mechanism.[20] Specifically, one contract line item, called the EELV Launch Services ("ELS"), paid ULA for the launch vehicles for each mission and the other contract line item, called the EELV Launch Capability ("ELC"), paid ULA an annual subsidy that has—for ULA's entire existence and to this day—covered all of its overhead, costing taxpayers nearly $1 billion per year regardless of whether ULA performs a single launch. This structure has made it essentially impossible for anyone, even the Agency or the Government Accountability Office ("GAO"), to calculate precisely how much ULA actually charges for each EELV launch.[21] What is known,

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million) and Lockheed ($569.853 million). The Government spent an additional $124.695 million in Research, Development, Test, and Evaluation oversight. Dep't of the Air Force Fiscal Year (FY) 2009 Budget Estimates Research, Development, Test and Evaluation (RDT&E) Descriptive Summaries, Volume II Budget Activities 4-6 (Feb. 2008) at 974, available at https://www.saffm.hq.af.mil/Portals/84/documents/FY09/AFD-080130-061.pdf?ver=2016-08-22-141512-193 (listing "Total Prior to FY 2007 Costs" of System Development and Demonstration for EELV program).

[20] Indeed, former Under Secretary of Defense for Acquisition, Technology, and Logistics Frank Kendall told the Senate Armed Services Committee in 2016 that he was aware of no other such contracting instrument in the entire DoD portfolio. *Hearing on Military Space Launch and the Use of Russian-Made Rocket Engines Before the S. Comm. on Armed Services*, 114th Cong. 14 (2016) (statement of Frank Kendall, Under Secretary of Defense for Acquisition, Technology and Logistics), available at https://www.govinfo.gov/content/pkg/CHRG-114shrg25116/pdf/CHRG-114shrg25116.pdf

[21] *See generally* U.S. Gov't Accountability Office, GAO-14-377R, Space Launch Vehicle Competition: The Air Force's Evolved Expendable Launch Vehicle Competitive Procurement (2014), available at http://www.gao.gov/assets/670/661330.pdf; U.S. Gov't Accountability Office, GAO-11-641, Evolved Expendable Launch Vehicle: DOD Needs to Ensure New Acquisition

[redacted]

however, is that the billion-dollar-a-year ELC subsidy has undermined full and open competition in both the national security and civil space launch markets by enabling ULA, with U.S. taxpayers covering its overhead, to offer launch services at artificially low prices.[22] What is also known is that this billion-dollar annual subsidy is what enables Boeing and Lockheed to rake in profits,[23] because ULA would operate at a substantial loss without it. This ELC contract structure is so problematic that Congress ordered the Agency to end it.[24]

21. The results of ULA's monopoly were predictable: costs skyrocketed and innovation stagnated.[25] For example, ULA still performs the large majority of EELV launches with its Atlas V, which is powered by the Russian-designed and Russian-made RD-180 engine. When Lockheed first proposed using the RD-180 more than two decades ago, it was subject to a DoD requirement that the engines be manufactured domestically within four years. That never happened, and more

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Strategy is Based on Sufficient Information (2011), available at http://www.gao.gov/new.items/d11641.pdf.

[22] *See* S. Rep. No. 114-49, at 259-60 (2015).

[23] *See* The Boeing Co., 2017 Annual Report 31 (2018) ("BDS earnings from operations include equity earnings of $183 million, $249 million and $202 million primarily from our ULA joint venture in 2017, 2016 and 2015"), available at http://s2.q4cdn.com/661678649/files/doc_financials/annual/2017/2017-Annual-Report.pdf; Lockheed Martin Corp., 2017 Annual Report 42 (2018) ("Total equity earnings recognized by Space (primarily ULA) represented approximately $205 million, $325 million and $245 million, or 21%, 25% and 21% of this business segment's operating profit during 2017, 2016 and 2015"), available at https://www.lockheedmartin.com/content/dam/lockheed-martin/co/documents/annual-reports/2017-annual-report.pdf.

[24] *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1608, 129 Stat. 726, 1100-01 (2015).

[25] GAO reports show that ULA's per launch prices averaged $366.6 million in 2016, which represented a 256% increase over original estimated pricing. U.S. Gov't Accountability Office, GAO-16-329SP, Defense Acquisitions: Assessment of Selected Weapons Programs at 135 (2016), available at https://www.gao.gov/assets/680/676281.pdf; *see also* U.S. Gov't Accountability Office, GAO-17-333SP, Defense Acquisitions: Assessment of Selected Weapons Programs at 137 (2017), available at https://www.gao.gov/assets/690/683838.pdf. Spiraling cost growth in the program has triggered Nunn-McCurdy breaches, most recently in 2012. U.S. Gov't Accountability Office, GAO-16-329SP, Defense Acquisitions: Assessments of Major Weapon Programs at 79 (2016), available at https://www.gao.gov/assets/680/676281.pdf.

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than twenty years later ULA still performs most EELV missions using engines developed and manufactured in Russia. And with the LSA award decision, it is likely that ULA will continue to do so—contrary to the Agency's stated objectives and Congressional mandates—through at least 2024.

B. SpaceX's Limited Entry Into The EELV Program

22. While ULA was enjoying massive taxpayer subsidies to maintain its capability and a sole-source monopoly for launches in the EELV program, SpaceX was developing innovative and successful launch solutions and winning more launches than any other launch services provider in the competitive global commercial launch market.

23. SpaceX was also actively seeking Agency approval to compete for EELV missions. But only days before SpaceX's final Falcon 9 EELV certification launch,[26] the Agency sole-sourced to ULA a 28-mission block buy and then cut the number of missions available for competition in half, thus minimizing any competition in the EELV program for many years. At that point, SpaceX was compelled to file a complaint in this Court challenging the block buy award and seeking the opportunity to compete for EELV launch contracts.[27] On January 23, 2015, the Agency settled SpaceX's legal challenge by agreeing to "expand[] the number of competitive opportunities for launch services" going forward.[28]

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[26] To perform EELV missions, a launch system must be certified by the Agency. The Agency set up a rigorous, lengthy, and expensive process for SpaceX to get Falcon 9 and Falcon Heavy certified to perform EELV missions.

[27] *See generally* Am. Complaint, *Space Exploration Technologies, Corp. v. United States et al.*, No. 14-354C (Fed. Cl. May 19, 2014), ECF No. 53, available at https://www.spacex.com/sites/spacex/files/spacex_amended_complaint.pdf.

[28] Christian Davenport, *Elon Musk's SpaceX Settles Lawsuit Against Air Force*, The Washington Post (Jan. 23, 2015), https://www.washingtonpost.com/business/economy/elon-musks-spacex-to-drop-lawsuit-against-air-force/2015/01/23/c5c8ff80-a34c-11e4-9f89-561284a573f8_story.html?noredirect=on&utm_term=.490c207c883e.

[redacted]

24. Once SpaceX was allowed to compete for EELV missions, it became increasingly clear that the ELC payments to ULA created an uneven playing field. As a key Agency official acknowledged in Congressional testimony:

> The EELV Launch Capability (ELC) was created in 2005 by the Air Force to augment a fragile domestic industrial base and maintain a national capability to launch national security payloads as set forth in the National Security Presidential Directive-40 (NSPD-40). Since 2005, the Air Force has spent billions of dollars supplementing the infrastructure and capacity of the incumbent launch provider. Also since 2005, new launch providers have entered the market and created competition. The committee believes that with the introduction of space launch competition, launch capability subsidies inappropriately inhibit fair competition and are no longer necessary. The Commander of Air Force Space Command testified to this point before Congress on March 25, 2015 when he stated "I don't think you can have fair competition with [the ELC] contract in place."[29]

As a result, Congress required the Agency to discontinue the ELC payments to ULA by Fiscal Year ("FY") 2020.[30]

25. Congress also raised significant concerns regarding ULA's continued reliance on Russian rocket engines for EELV launches, and directed DoD to "develop a next-generation rocket propulsion system that enables the effective, efficient, and expedient transition from the use of non-allied space launch engines [i.e., Russian-made rocket engines] to a domestic alternative for national security space launches."[31] In response, ULA reported that it purchased an additional 20 RD-180 engines in 2015 to keep the Atlas V flying national security launches into the early

[29] S. Rep. No. 114-49, at 259-60 (2015).

[30] *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1608, 129 Stat. 726, 1100-01 (2015).

[31] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1604, 128 Stat. 3292, 3623 (2014); *see also* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1603, 130 Stat. 2000, 2582-84 (2016).

[redacted]

2020s.[32]

26. If there were any doubts that the EELV program would benefit from competition, they were quickly put to rest. Although the block buy from ULA kept the vast majority of EELV missions from being competed, the Agency has competed a handful of missions. Notably, SpaceX, offering a fully burdened price without the benefit of the billions in ELC subsidies that ULA has received, has still proposed launch services at substantially lower prices than ULA in these competitions. Specifically, SpaceX has offered to provide the same services at an approximately [redacted] cost savings. For example, while the Agency paid ULA some $380 million per launch in the block buy, through competition, the Agency has awarded SpaceX seven missions using its Falcon 9 for less than [redacted] each, and the Agency recently purchased a launch service utilizing the Falcon Heavy for [redacted]

27. As explained to Congress by Elon Musk, Chief Executive Officer and Chief Designer for SpaceX:

> With respect to the EELV program . . . the Air Force and other agencies are simply paying too high a price for launch. The impacts of relying on a monopoly provider since 2006 were predictable, and they have borne out. Space launch innovation has stagnated, competition had been stifled, and prices have risen to levels that General Shelton has called "unsustainable."
>
> When the merger between Boeing and Lockheed's business occurred, the merger promised, in the press release, $150 million of savings. Instead, there were billions of dollars of cost overruns and a Nunn-McCurdy breach for the program exceeding 50 percent of its cost projections.
>
> According to congressional records, in fiscal year 2013, the Air Force paid an average of $380 million for each national security launch, while subsidizing ULA's

[32] *See generally* Space Foundation, Fact Sheet: Russian Rocket Engines Used by the United States, https://www.spacefoundation.org/sites/default/files/reports/RussianRocketEnginesUsedByTheUnitedStates.pdf. In 2016, Congress passed legislation phasing out any contractor's ability to use Russian rocket engines for NSS missions by the end of December 31, 2022 and capping the use of such engines to 18 total for NSS launches. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1602, 130 Stat. 2000, 2582 (2016).

[redacted]

> fixed costs to the tune of more than $1 billion a year, even if they never launch a rocket.
>
> By contrast, SpaceX's price is well under $100 million, meaning a savings of almost $300 million per launch, which in many cases would pay for the launch and the satellite combined. So if you took something like a GPS satellite, which is about $140 million, you could actually have a free satellite with the launch. So our launch plus the satellite would costs less than just their launch, which is an enormous difference. And we seek no subsidies to maintain our business.
>
> To put this into perspective, had SpaceX been awarded the missions ULA received under its recent noncompeted 36-core block buy, we would have saved the taxpayers $11.6 billion.[33]

28. Unsurprisingly, competition has had a salutary impact on ULA's pricing. For example, in FY 2012, the Agency was paying ULA around $190 million per mission for the ELS component of each launch (plus over $200 million per launch under the ELC for a total average launch cost of nearly $400 million per mission).[34] In the recent head-to-head competitions with SpaceX, ULA is bidding around $145 million per mission for the ELS component (ULA continues to receive ELC payments through 2019 and will receive payment for some ELC-like costs in 2020 and beyond).[35]

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[33] *Hearing on National Security Space Launch Programs Before the S. Subcomm. of the Comm. on Appropriations*, 113th Cong. 19-20 (2014) (statement of Elon Musk, Chief Executive Officer and Chief Designer of SpaceX), available at https://www.govinfo.gov/content/pkg/CHRG-113shrg49104594/pdf/CHRG-113shrg49104594.pdf.

[34] *See generally* Dep't of Defense Fiscal Year (FY) 2013 President's Budget Submission, Missile Procurement, Air Force, Justification Book Volume 1 at 219 (Feb. 2012), available at https://www.saffm.hq.af.mil/Portals/84/documents/FY13/AFD-120207-052.pdf?ver=2016-08-24-090237-167.

[35] *See* Press Release, U.S. Air Force, Air Force Awards $739M Launch Services Contracts (Feb. 22, 2019), https://www.af.mil/News/Article-Display/Article/1764306/air-force-awards-739m-launch-service-contracts/; *see generally* Dep't of Defense Fiscal Year (FY) 2019 Budget Estimates, Space Procurement, Air Force, Justification Book Volume 1 of 1 at 67 (Feb. 2018), available at https://www.saffm.hq.af.mil/Portals/84/documents/FY19/Proc/Air%20Force%20Space%20Procurement%20FY19.pdf?ver=2018-02-12-190223-850.

[redacted]

C. The EELV Program's Next Phase—Multi-Step Procurement Of Domestic Commercially-Viable Launch Services

29. In 2015, the Agency detailed a four-phased approach for its next procurement of EELV launch services structured to address Congressional concern over reliance on Russian-powered rockets:

> The Air Force's strategy is a four step approach to transitioning to domestic propulsion while assuring access to space. Step 1, started last year, matures the technology to reduce the technical risk of engine development. . . . Step 2 initiates investment in rocket propulsion systems in compliance with the fiscal year 2015 NDAA. The Air Force will partner with propulsion system or launch system providers by awarding multiple contracts that co-invest in on-going development efforts. In step 3, the Air Force will continue the public-private partnership approach by entering into agreements with launch system providers to provide domestically powered launch capabilities. In step 4, the Air Force will compete and award contracts with certified launch providers for launch services for 2018 and beyond....[36]

30. Subsequently, the Agency completed the second step of its four-step procurement approach to eliminate reliance on Russian-powered rockets by awarding four domestic Rocket

[36] *Hearing on Department of Defense Appropriations for Fiscal Year 2016 Before the S. Subcomm. of the Comm. on Appropriations*, 114th Cong. 61 (2015) (statement of Hon. Ashton Carter, Secretary), available at https://www.govinfo.gov/content/pkg/CHRG-114shrg59104641/pdf/CHRG-114shrg59104641.pdf; *see also Hearing on Assuring National Security Space: Investing in American Industry to End Reliance on Russian Rocket Engines Before the H. Subcomm. of the Comm. on Armed Services*, 114th Cong. 175 (2015), available at https://www.govinfo.gov/content/pkg/CHRG-114hhrg95320/pdf/CHRG-114hhrg95320.pdf ("The Air Force has developed a four step plan to partner with industry and invest in domestic, commercially-viable launch services. Step 1 is funding the up-front technical maturation and risk reduction. Step 2 is shared investment in industry's proposed rocket propulsion systems. Step 3 expands this shared investment to encompass the entire launch system. Step 4 is to award launch services to certified providers. These four components are not mutually exclusive, and aspects of each may overlap or be conducted in parallel with the others. The goal of this plan is to ensure two or more domestic, commercially viable launch providers that also meet National Security Space requirements and are available as soon as possible but no later than the end of Phase 2 (FY22) or earlier.").

[redacted]

Propulsion Systems ("RPS") agreements.[37] SpaceX and Orbital ATK (now Northrop)[38] each received an award[39] and ULA partnered with Blue Origin and Aerojet Rocketdyne, respectively, for the other two awards.[40] These RPS agreements formed part of the technology maturation process for launch systems proposed by SpaceX, ULA, Northrop, and Blue Origin for the LSA Solicitation.

D. The LSA Solicitation—Investing In Commercial, Domestic Launch Systems For Phase 2 RFP Competition

31. In October 2017, the Agency issued the LSA Solicitation to "quickly transition from the use of non-allied space launch engines, implement sustainable competition for National Security Space (NSS) launch services, and maintain assured access to space." (LSA Solicitation at 1, Ex. A.)

32. The LSA Solicitation expressly sought "to leverage industry's commercial launch solutions" for a "future selection of two NSS launch services providers for Phase 2 launch service procurements, starting in FY20." (*Id.* at 1.) Accordingly, the Agency advised that each LSA would "be tailored to each launch service provider's needs in order to enable commercial launch systems to meet all NSS requirements." (*Id.*)

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[37] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1604, 128 Stat. 3623 (2014) (directing DoD to "develop a next-generation rocket propulsion system that enables the effective, efficient, and expedient transition from the use of non-allied space launch engines to a domestic alternative for national security space launches").

[38] Because Northrop acquired Orbital ATK, this Complaint will hereafter use Northrop to refer to Orbital ATK as well as Northrop Grumman.

[39] Press Release, Air Force Space Command, Air Force Awards Two Rocket Propulsion System Prototype OTAs (Jan. 13, 2016), https://www.afspc.af.mil/News/Article-Display/Article/730913/air-force-awards-two-rocket-propulsion-system-prototype-otas/.

[40] Marcia Smith, *ULA Wins Big with Two AF Propulsion Contracts, One with Blue Origin, One with Aerojet Rocketdyne*, Space Policy Online (Feb. 29, 2016), https://spacepolicyonline.com/news/ula-wins-big-with-two-af-propulsion-contracts-one-with-blue-origin-one-with-aerojet-rocketdyne/.

[redacted]

33. The LSA Solicitation sought shared public-private investment in fully-developed and certified launch systems for the Phase 2 RFP Competition, including the development and test of any required propulsion systems, the "launch vehicle and its subsystems, infrastructure, manufacturing processes, test stands, and other items required for industry to provide domestic commercial launch services that meet all NSS requirements," as well as the "associated operation and support services and personnel that provide the capability to perform all EELV missions." (*Id.* at 2.)

34. The LSA Solicitation explained that through the Phase 2 RFP Competition, the Agency "intends to competitively award [FAR-based] firm fixed price (FFP) contracts to two launch providers … as soon as possible, but no later than 2020 for 2022 launches." (*Id.* at 2.) It further outlined the Agency's vision that this procurement approach would reduce the Agency's costs by spreading their overhead and supply chain costs to commercial and civil space customers: "allow[ing] launch system fixed costs to be shared across more launches, including commercial and civil," would serve the Agency's goal of "reduc[ing] the overall cost to the Air Force." (*Id.* at 1-2 (emphasis added).)

35. The LSA Solicitation identified nine EELV reference orbits that each proposed commercial launch system must meet to satisfy the Agency's requirements, dividing the missions into those involving Payload Categories A, B, and C, reflecting the size of the payload involved:

[redacted]

Table 10: Reference Orbits

Orbit Description	Apogee Altitude (nmi)	Perigee Altitude (nmi)	Inclination (deg)	Mass to Orbit (lbm)	Payload Category*		
					A	B	C
LEO	500	500	63.4	15,000	X	X	--
Polar 1	450	450	98.2	15,500	X	X	--
Polar 2	450	450	98.2	37,500	--	--	X
MEO Direct 1	9,815	9,815	50.0	11,750	X	X	--
MEO Transfer 1	10,998	540	55.0	9,000	X	X	--
GTO	19,323	100	27.0	18,000	X	X	--
Molniya	21,150	650	63.4	11,500	X	X	--
GEO 1	19,323	19,323	0.0	5,000	X	X	--
GEO 2	19,323	19,323	0.0	14,500	--	--	X

* In order to standardize terms with respect to payload size, SIS Rev C is implementing payload categories. Reference EELV SIS Rev C, Section 3.1.1.4.

- Payloads in Category A fit within a 4-meter envelope
- Payloads in Category B fit within a 5-meter envelope
- Payloads in Category C fit within an extended 5-meter envelope

(*Id.* at 27.)

36. Seven of the nine reference orbits carry Category A/B payloads and two carry Category C payloads. (*Id.*) The LSA Solicitation advised offerors that the Phase 2 RFP Competition would cover launch services for Payload Category A and B and noted expressly that the Agency may procure Payload Category C launch services separately. (*Id.* at 2.)

37. The LSA Solicitation identified the dates when Agency-certified launch capabilities would be needed—i.e., the Initial Launch Capability ("ILC") date—as April 2022 for all Category A/B payload missions and September 2025 and October 2026, respectively, for the two Category C payload missions. (*Id.* at 29.)

E. The LSA Solicitation's Stated Criteria

38. The Agency advised offerors that it sought to award at least three LSAs, but "reserve[d] the right to award any number of agreements." (LSA Solicitation at 4, Ex. A.)

39. The LSA Solicitation called for the award to a portfolio of solutions that, based on the three evaluation factors (EELV Approach, Technical, and Investment Cost), "are most

[redacted]

advantageous in achieving the Government's goal of assured access to space via two or more domestic commercial launch service providers that also meet NSS requirements." (*Id.* at 26.)

40. The LSA Solicitation provided the following factor weighting: EELV Approach is more important than Technical, and Technical and Investment Cost are of equal importance and when combined, more important than EELV Approach. (*Id.* at 22, 24-25.) The Technical factor consists of two subfactors, Technical Design and Technical Schedule, with the former more important than the latter. (*Id.* at 24-25.)

41. For the most important EELV Approach factor, the LSA Solicitation required the Agency to evaluate the extent to which each offeror's development and qualification approach demonstrates that it will meet the following requirements, not one of which directs offerors to propose specific Government facilities or adopt Government concept of operations for Category C payload integration:

> (1) The ability to meet all EELV reference orbits defined in Table 10 at the orbital insertion accuracy required in [System Performance Requirements Document] 3.2.4[41]
>
> (2) The ability to support up to five NSS launches per year
>
> (3) The ability of the launch system to meet the payload orientation requirements in SPRD 3.2.7
>
> (4) The ability of the launch system to meet the basing requirement in SPRD 3.2.11
>
> (5) The ability of the launch system to meet the EELV mated payload protection requirements in the SPRD 3.3.2
>
> (6) The ability of the launch system to meet the payload envelope requirement in [Standard Interface Specification] 3.1.1[42]

[41] The EELV System Performance Requirements Document, or SPRD, sets forth certain requirements for EELV-certified launch vehicles.

[42] The EELV Standard Interface Specification, or SIS, defines the standard interface between the payload and the EELV launch system and standardizes equipment, processes and services across launch providers.

[redacted]

(7) The proposed mission assurance approach to ensure low risk and high confidence in launching NSS missions

(8) The ability to slow or surge production to accommodate uncertain NSS, commercial, and civil launch forecasts.

(*Id.* at 22-24.)

42. The LSA Solicitation also did not require offerors to launch [redacted] In response to offeror questions, the Agency expressly confirmed the absence of [redacted] (*See* Response to Industry Comment [redacted] Ex. F (emphasis added).) In LSA Solicitation Amendment 2, the Agency specifically removed [redacted] Category C payloads. (*See* LSA Solicitation, Amend. 2 at [redacted], Ex. G (removing the phrase [redacted]).)

43. For each factor and subfactor, the LSA Solicitation called on the Agency to assess either (i) strengths and weaknesses to determine the adjectival Technical rating, or (ii) weaknesses to determine the risk rating, or both. The LSA Solicitation defined a "significant weakness" as a "flaw that appreciably increases the risk of unsuccessful agreement performance," i.e., a flaw in the proposed approach that will degrade performance of the LSA. (LSA Solicitation at 22, Ex. A.)

44. For the Technical Schedule factor, the LSA Solicitation provided only for a risk assessment:

[redacted]

> The Government will evaluate the Offeror's schedule to determine the risk of delayed development for:
>
> 1. Launch system(s) capable of launching Category A and Category B payloads by 1 April 2022 from Cape Canaveral Air Force Station/Kennedy Space Center or Vandenberg Air Force Base
>
> 2. Launch system(s) capable of launching Category A and Category B payloads from Vandenberg Air Force Base by 1 October 2024
>
> 3. Launch system(s) capable of launching Category C payloads to Polar 2 by 1 September 2025.

(*Id.* at 25.)

45. The LSA Solicitation required the Agency to evaluate the Investment Cost factor based on five equally-weighted criteria: (1) Total Government Investment (i.e., "the total dollar amount of Government investment requested by the offeror"); (2) Total Non-Government Investment (i.e., "the total dollar amount of non-Government investment provided by the offeror"); (3) Total Combined Investment; (4) Industry Cost Share (i.e., "the proportion of the Combined Total Investment that will be funded by Non-Government sources"); and (5) Time Phasing of Government Investment. (*Id.* at 25.)

F. The LSA Proposals

46. On September 17, 2018, SpaceX submitted its Final Updated Proposal of a launch system comprising: (i) the EELV-certified Falcon 9 which is capable of performing more than 70% of the missions identified for launch between 2017 and 2026; (ii) the EELV-certified (with open work) Falcon Heavy for certain Category A/B missions which is capable of performing almost all of the remaining missions; and (iii) Starship for the small number of Category C missions not planned for launch until September 2025 at the earliest.[43]

[43] It appears the Falcon 9 and Falcon Heavy can perform all but possibly one of the 34 missions the Agency expects to order through the Phase 2 RFP Competition. Although only the Payload Category C missions require the super heavy lift capabilities introduced by Starship, this launch

[redacted]

47. The Falcon 9 has successfully performed 69 missions since 2010, including 41 consecutive missions in 2017, 2018, and 2019 alone. It is the first intermediate launch vehicle ever to employ a reusable first stage, and it is far and away the most cost effective intermediate-lift launch vehicle available today. (Final Updated Proposal (Excerpts), Executive Summary at I-1, Ex. H.) The Falcon Heavy has launched twice, both times successfully, and is the most powerful operational rocket in the world; it is capable of lifting more than twice the payload of ULA's Delta IV Heavy [redacted][44] Starship leverages technologies developed for the Falcon 9 and Falcon Heavy as well as SpaceX's Dragon spacecraft and provides the lowest mission cost of any Category C capable launch vehicle. (*Id.* at I-3.)

48. ULA, Northrop, and Blue Origin all proposed only conceptual "paper" rockets: Vulcan, OmegA, and New Glenn, respectively.

49. As noted above, both the Vulcan and New Glenn rely on Blue Origin's BE-4 first stage booster engine, which is still in development and has yet to demonstrate the ability to reach orbit, and both the Vulcan and OmegA rely on Northrop's GEM63 XL solid side boosters, which also are still in development, and on Aerojet Rocketdyne's RL-10C upper stage engine. (*See* Award Decision at 8, Ex. I.) Selecting a portfolio of awardees that rely on common propulsion systems is the opposite of assured access to space because a developmental delay or a failure in a common system would ground multiple providers.

50. The Agency recognized both that SpaceX was the only LSA offeror to propose currently operational launch vehicles and that SpaceX had demonstrated the ability to achieve an

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vehicle will also be capable of providing assured access to space for Category A and Category B missions served by the Falcon 9 and Falcon Heavy vehicles under SpaceX's LSA approach.

[44] SpaceX, Falcon Heavy, https://www.spacex.com/falcon-heavy.

[redacted]

"unprecedented launch rate . . . clearly exceeding the Government[']s five per year [launch] requirement." (Final Evaluation at 5, 18-19, Ex. J.)

G. The Agency's Anticompetitive Evaluation

1. Factor 1: EELV Approach Evaluation

51. With the currently operational, EELV-certified Falcon 9 and Falcon Heavy capable of launching the vast majority (if not all) of the manifested Phase 2 RFP missions, and the developmental Starship required (if at all) only for missions scheduled to launch in late 2025 or after, SpaceX proposed the least risky approach for the Agency's needs and the assured access to space objective.

52. Under the most important EELV Approach factor, SpaceX earned an Outstanding Technical rating, demonstrating that SpaceX's proposal offered "an exceptional approach and understanding of the requirements and contains multiple strengths." (LSA Solicitation at 23, Ex. A; Award Decision at 6, Ex. I.) The evaluators identified seven technical strengths, three that provided a "significant benefit to the Government." (Award Decision at 6, Ex. I.)

53. The seven strengths identified for SpaceX's proposed EELV Approach are:

- All three launch vehicles offered performance that exceed requirements, which could reduce Government costs by enabling the manifesting of multiple payloads per launch and reduce the risk of inaccurate orbital insertion. (Final Evaluation at 2, Ex. J.)
- Starship offered "potentially groundbreaking technology" [redacted] and "provide unheard-of mass-to-orbit capacity and orbit insert flexibility." (*Id.* at 2.)
- SpaceX has demonstrated the ability to exceed five missions per year and offered multiple [redacted], which provides "sufficient infrastructure to maintain the Government's requirements while servicing demand from the commercial and civil markets." (*Id.* at 5.)
- Starship offered [redacted] providing the Agency with "increased resiliency, schedule flexibility and

[redacted]

responsiveness [redacted] (*Id.* at 9.)

- Starship offered [redacted] that exceeds Government requirements by a significant margin, which offers flexibility in the future design of spacecraft for national security payloads. (*Id.* at 12.)
- SpaceX proposed an approach that "focuses on the initial and evolving designs for low risk and high reliability," as well as a certification approach that will drive a "high level of reliability. (*Id.* at 13.)
- SpaceX, unlike the other offerors, has a successful civil and commercial launch business, and thus provides the Government "assured access to space . . . regardless of global launch market fluctuations or increased competition for Category A/B missions utilizing the Falcon family of rockets." (*Id.* at 14.)

54. The redacted evaluation reports reveal that SpaceX's technical merit surpassed the other LSA recipients under the EELV Approach factor. For instance, the Agency stated that SpaceX "not only has more strengths than ULA, but its strengths are qualitatively more beneficial to the Government than ULA's strengths." (Portfolio Recommendation at 21, Ex. D.)

55. The Agency, however, unfairly nullified SpaceX's advantage by improperly attributing two "significant weaknesses" and one "weakness," all related to SpaceX's approach to launching Category C payloads, resulting in a High risk rating. (*Id.* at 22; Final Evaluation at 4-10, 16-18, Ex. J.)

56. The Agency based the first "significant weakness" on an unstated criterion focused on the Government's current facilities and processes omitted from the LSA Solicitation requirements: "The Government assessed [SpaceX's] design approach for [Starship] against the current processing requirements for Government reference missions to include [G]overnment facilities, Government and LSP tooling, facility throughput capacity, spacecraft design requirements, and spacecraft integration CONOPS [i.e., concept of operations] driven by both spacecraft and launch vehicle design approaches." (Nov. 5, 2018 Response to Add'l Debriefing Question No. 8a, Ex. K (emphasis added).) This approach directly contradicts the LSA

[redacted]

Solicitation's stated purpose of leveraging industry's commercial launch systems, and the Agency's statements that each "public-private agreement[] will be tailored to each launch service provider's needs in order to enable commercial launch systems to meet all NSS requirements." (LSA Solicitation at 1, Ex. A.) The Agency's unstated evaluation focus on current Government processes and facilities clearly favors Government-specific launch systems like ULA's Vulcan, which ULA itself says is "purpose-built" for NSS missions.[45]

57. The evaluators based the second "significant weakness" on an unstated requirement as well. Specifically, the Agency assessed a High risk based on SpaceX's proposal to [redacted] (Final Evaluation at 17-18, Ex. J), even though the LSA Solicitation was revised expressly not to require [redacted] The evaluators also ignored SpaceX's commitment to work with the Government to determine the optimal [redacted] (Final Updated Proposal (Excerpts), SOW at § 2.7.1.2, Ex. L.)

58. The one "weakness" the Agency assessed to SpaceX under the EELV Approach factor—that SpaceX [redacted] (Final Evaluation at 4, Ex. J)—misreads SpaceX's proposal, which proposed to perform [redacted] SpaceX's approach provides nearly [redacted] of schedule margin, well in excess of the margin offered by the other offerors for their launch vehicle concepts. (*See* Portfolio Recommendation at

[45] United Launch Alliance, *Vulcan Centaur: Purpose-Built for National Security Space*, YouTube (May 2, 2009), https://www.youtube.com/watch?v=UVblBykNvdw ("Vulcan Centaur—a rocket purpose-built to meet all of the requirements of our nation's national security space launch needs.").

[redacted]

25, Ex. D (stating that Blue Origin's schedule margin was "approximately 11 months," ULA's schedule margin was "approximately 10 months," and Northrop's schedule margin was "approximately 7 months").)

59. All three of these weaknesses that resulted in the flawed High risk rating pertain to Category C missions. Thus, the flawed EELV Approach risk assessment that eliminated SpaceX from the portfolio of LSAs centered on a capability that the Agency will not need until September 2025 at the earliest (if at all for Phase 2) and failed to advise the selection official that SpaceX offered the lowest risk for the Agency's most frequent and most imminent launch needs, namely Payload Category A and B missions that heavily predominate the EELV manifest.

2. Factor 2, Subfactor 2: Technical Schedule

60. The evaluators assessed a "significant weakness" and Moderate risk to SpaceX under the Technical Schedule subfactor by repeating the same erroneous (and unequal) concerns regarding [redacted] and misreading when SpaceX offered to perform [redacted]

61. The Agency premised the single "weakness" assessed to SpaceX under Subfactor 2 on the evaluators' erroneous finding that if the Agency executed the option for vertical integration on the earliest date of the ordering period, [redacted], which the evaluators claimed was [redacted] (Final Evaluation at 43-44, Ex. J.) But SpaceX's proposal allowed the parties to exercise the vertical integration option [redacted] "to provide greater schedule confidence." (Final Updated Technical Proposal (Excerpts) at III-76, Ex. M; *see also* Final Updated Proposal (Excerpts), Model Agreement at § II.B.6.d, Ex. N [redacted].)

[redacted]

62. With respect to the Agency's assessment of schedule risk, it is worth noting that immediately after receiving their awards, all three awardees announced delays in the development of their proposed launch systems, and Blue Origin has even publicly called for delaying the Phase 2 RFP Competition by "at least 12 months" to enable the awardees time to develop their systems.[46]

3. Factor 3: Investment Cost

63. SpaceX proposed to cover [redacted] of the launch system solution costs, the highest Industry Cost Share of all offerors. (Debriefing Slides at 8, Ex. O.) When calculating SpaceX's Total Evaluated Price, the Agency added to SpaceX's baseline proposal: (i) [redacted] associated with a separate mission [redacted][47] and (ii) [redacted] for SpaceX's proposed vertical integration option at the Eastern Range launch complex ("LC-39A") and [redacted] for SpaceX's proposed vertical integration option at the Western Range launch complex, despite instructing SpaceX during discussions to price the vertical integration efforts out separately as "options." (*Id.*) Consequently, the Agency calculated a Total Evaluated Price of [redacted] for SpaceX with an Industry Cost Share of [redacted] yielding a Total Government Investment of [redacted]. (*Id.*)

64. The Agency did not similarly account for Government monies paid to the other offerors when calculating the Total Evaluated Price for their proposals. For example, although ULA proposed to leverage the infrastructure and vertical integration facilities that it built and continues to maintain using hundreds of millions of Government dollars, the Agency did not add

[46] *See* Sandra Erwin, *Blue Origin Urging Air Force to Postpone Launch Competition*, Space News (April 8, 2019), https://spacenews.com/blue-origin-urging-air-force-to-postpone-launch-competition/.

[47] [redacted] (*See* Final Updated Proposal (Excerpts), EELV Approach at II-2, Ex. P.)

[redacted]

any of the those amounts to ULA's proposed price, a necessary step to compare each offeror's Total Evaluated Price on an equal basis.

H. The Award Decision

65. After completing its evaluation, the Agency assigned ratings to each offeror's proposal:

	EELV Approach Technical & Risk	**Technical Design Risk**	**Technical Schedule Risk**
ULA	Outstanding / Low	Low	Low
Blue Origin	Outstanding / Moderate	Moderate	Moderate
Northrop	Good / Low	Low	Moderate
SpaceX	Outstanding / High	Moderate	Moderate

(Award Decision at 8, Ex. I.)

66. The Agency found each offeror's proposed Investment Cost to be both "COMPLETE" and "REASONABLE." (*Id.*)

67. The Agency compared SpaceX's Total Evaluated Price of approximately [redacted] against ULA's Total Evaluated Price of $1.080 billion, Northrop's Total Evaluated Price of $795 million and Blue Origin's Total Evaluated Price of $500 million. (*Id.*)

68. Based on the Total Evaluated Price calculations and its purported funding limitations, the Agency elected to fund Blue Origin, Northrop, and ULA because they proposed the three lowest "overall total Government investment" options. (Portfolio Recommendation at 26, Ex. D.)

69. Notably, the Agency elected not to exercise its right to negotiate with the offerors to obtain the cost allocations, and ultimately the portfolio of LSAs, that best met the Agency's assured access to space needs. (*See* Response to Industry Comment No. 40, Ex. Q; LSA Solicitation at 26, Ex. A.) Instead, the Agency chose the portfolio that best served the needs of

[redacted]

ULA, the long-standing incumbent, by awarding an LSA to ULA and an LSA to each of the two offerors that are currently developing major components for ULA's system.

70. The LSA award decision to invest in three launch solutions concepts that depend on common critical systems is at odds with the LSA Solicitation's stated objective, per national policy, "to ensure that there are two reliable sources for all national security launches." (LSA Solicitation at 2, Ex. A.)

71. In a procurement focused on investing in solutions to meet the Phase 2 RFP schedule and mission needs, the Agency elected to invest only in paper rockets and Government-specific solutions instead of including in the portfolio the single commercially-viable launch services provider that is operational and can today meet nearly every Government mission need, including all imminent mission needs.

72. Moreover, given that the reasonably anticipated delay in the development of new, untested launch systems would lead to a gap in readiness to meet the Phase 2 RFP mission requirements, Government investment in the Falcon 9 and Falcon Heavy launch systems offered by SpaceX would have best served Congress's mandate for "rapid, responsive, and reliable" commercial launch services at lower cost and acceptable risk levels. The Agency has acknowledged this gap and the risk it creates by allowing Phase 2 RFP Competition awardees to offer other launch vehicles after contract award to mitigate schedule risk associated with the development of their new launch systems:

> Outcome 2: If the Government determines one Contractor is unlikely to meet the Reference Mission's required launch date with its Primary Launch Vehicle Segment due to an unacceptable LSMAP schedule maturity score, or if after LSMAP completion, a grounding event, the Contractor may offer a Secondary Launch Vehicle Segment. If the Contractor does not offer a Secondary Launch Vehicle Segment then the associated Reference Mission will be assigned to the Contractor that can meet the Reference Mission launch date with its Primary Launch Vehicle

[redacted]

> Segment, or Secondary Launch Vehicle Segment if that Contractor's Primary Launch Vehicle Segment is unlikely to meet the Reference Mission launch date due to an unacceptable LSMAP schedule maturity score, or if after LSMAP completion, a grounding event. If either Contractor offers its Secondary Launch Vehicle Segment, that Contractor shall honor its Primary Launch Vehicle Segment's pricing needed for that Reference Mission and honor any mission unique item pricing required for that Mission Set, in accordance with Attachment 8, Pricing Tables. Offering of Secondary Launch Vehicle Segments by either Contractor is only allowed in FY20 and FY21.

(Phase 2 RFP, Model Contract at 27 (emphasis added); *id.* at 26 (defining "secondary launch vehicle" as "[t]he Certified Launch Vehicle Segment that mitigates schedule risk while meeting the mass to orbit requirement for the orbit defined for the reference mission in the applicable ordering period FY20 or FY21, but is not the Primary Launch Vehicle Segment.").)

73. An LSA award to SpaceX also would further 10 U.S.C. § 2273's stated goal of facilitating a robust base of commercial launch providers available to support the Government's missions in order to reap the benefits of competition—lower costs, better quality, and innovation—as well as the purpose of the LSA Solicitation, which sought to invest in solutions that would position the Agency to share launch costs across commercial, civil, and NSS missions.

74. None of the three awardees proposed to leverage commercial launch solutions modified for the NSS requirements necessary to meet the Agency's stated goal. Instead, each of their proposals require the Government to invest in the development of launch systems designed specifically for Government missions.[48] The LSA award decision thus repeats the Agency's past

[48] ULA's Chief Executive Officer Tory Bruno recently described the Vulcan as "purpose-built" for national security space missions, and Northrop has said it will not continue developing its OmegA rocket without Government funding. *See, e.g.*, United Launch Alliance, *Vulcan Centaur: Purpose-Built for National Security Space*, YouTube (May 2, 2009), https://www.youtube.com/watch?v=UVblBykNvdw; *see also* Press Release, United Launch Alliance, United Launch Alliance Progresses Towards Purpose-Built Vulcan Centaur for National Security Space Missions: First Flight Hardware Being Manufactured and Launch on Track for 2021 (Apr. 8, 2019), https://www.ulalaunch.com/about/news/2019/04/08/united-launch-alliance-progresses-towards-purpose-built-vulcan-centaur-for-national-security-space-missions.

[redacted]

mistake of investing significant taxpayer dollars into launch vehicle systems that are not commercially viable and will thus rely exclusively on Government contracts and will likely require taxpayer subsidies to stay in business.

I. Post LSA-Award Schedule Shift

75. Within hours of receiving their LSA awards, Blue Origin and Northrop announced lengthy delays to their respective schedules for the development of their new launch systems.[49] Days later, ULA announced a lengthy delay of its own.[50] Meanwhile, Blue Origin has been actively lobbying the Congress to force the Agency to delay the Phase 2 RFP Competition for "at least twelve months" because its rocket will lack the technical maturity when the Agency makes the award decision under the Phase 2 RFP.[51]

J. SpaceX's Agency-Level Objection To LSA Evaluation And Award

76. On December 10, 2018, SpaceX timely filed with the Agency its objection to the evaluation of proposals and award decision, in accordance with the process provided in the LSA Solicitation. (LSA Solicitation at 4, Ex. A.)

77. Both prior to and following the submission of its objection, SpaceX sought to engage the Agency in Alternative Dispute Resolution ("ADR") with a third party neutral to resolve

[49] *USAF Awards $792m LSA to Northrop's OmegA Rocket Development,* Air Force Technology (Oct. 11, 2018), https://www.airforce-technology.com/news/usaf-eelv-lsa-northrop-omega/; Alan Boyle, *Blue Origin Resets Schedule: First Crew to Space in 2019, First Orbital Launch in 2021,* GeekWire, (Oct. 10, 2018) https://www.geekwire.com/2018/blue-origin-resets-schedule-first-crew-space-2019-first-orbital-launch-2021/

[50] *See* Jeff Foust, *ULA Now Planning First Launch of Vulcan in 2021,* Space News (Oct. 25, 2018), https://spacenews.com/ula-now-planning-first-launch-of-vulcan-in-2021/.

[51] *See* Sandra Erwin, *Blue Origin Urging Air Force to Postpone Launch Competition,* Space News (Apr. 8, 2019), https://spacenews.com/blue-origin-urging-air-force-to-postpone-launch-competition/.

[redacted]

its concerns with the LSA competition and mitigate the prejudicial impact on SpaceX's ability to compete fairly in the Phase 2 RFP Competition.[52]

78. The Agency refused to engage in ADR.

79. On April 18, 2019, the Agency sent SpaceX a six-page letter rejecting all of SpaceX's arguments in summary fashion. Although it had five months to consider and resolve SpaceX's objections, the Agency's decision did "not detail [the] analysis on every objection ground" and instead "summarized" its "analysis of some of the objection grounds." (Agreements Officer's Decision at 3, Ex. R.) By addressing only a few objections and even then, in a cursory manner, the Agency reinforced that the process did not comply with the stated procedures and competition principles set forth in the LSA Solicitation.

80. SpaceX timely files this challenge at this Court following the Agency's denial of SpaceX's objection.

K. The Phase 2 RFP Competition

81. The Agency issued the Phase 2 RFP on May 3, 2019.

82. The Phase 2 RFP proposes to split the Agency's requirement for NSS launch services for FY 2020 through FY 2024 between "two requirements contract awards." (Phase 2 RFP, Att. 5 at 2, Ex. B.) The "Requirement 1" provider will perform approximately 60% of the launch services while the "Requirement 2" provider will perform approximately 40% of the launch services. (Phase 2 RFP, Model Contract at 30-31, Ex. C.)

83. The Agency intends to "select for award the two Offerors that, when combined, represent the overall best value to the Government." (Phase 2 RFP, Att. 6 at 2, Ex. S.) The Phase

[52] Air Force Policy Directive 51-12 and the Air Force Federal Acquisition Regulation Supplement 5333.2(b) direct acquisition personnel to use ADR to the maximum extent practicable to resolve challenges to award decisions.

[redacted]

2 RFP is silent as to what is meant by "when combined," and whether that is different than the first and second ranked offerors under the evaluation criteria. The Phase 2 RFP states that of the two awardees, "the one who provides the overall best value to the Government will be awarded the requirements contract for 'Requirement 1'" and "[t]he other Offeror will be awarded the contract for 'Requirement 2.'" (*Id.*)

84. As noted above, to address its well-founded concerns that the conceptual launch systems funded by the LSAs will not be operational in time for the Agency's mission needs expressed in the Phase 2 RFP, the Agency is permitting the LSA awardees to propose their respective LSA solution and a secondary launch vehicle, which will not be technically evaluated. (Phase 2 RFP, Model Contract at 26, Ex. D ("The Certified [Secondary] Launch Vehicle Segment that mitigates schedule risk while meeting the mass to orbit requirement for the orbit defined for the reference mission in the applicable ordering period FY20 and FY21, but is not the Primary Launch Vehicle Segment.").) The only available "secondary launch vehicle" is ULA's Russian-powered Atlas V rocket. This provision in the Phase 2 RFP will permit ULA—and likely the other LSA awardees, given their subcontracting relationships with ULA—to propose the Atlas V even though the very purpose of the Government's significant LSA investments was to end reliance on Russian-powered rockets for NSS missions. Indeed, provisions in the Phase 2 RFP expressly tie the secondary vehicle to one employing Russian rocket engines, permitting the use of secondary launch vehicles for precisely the time frame during which the Atlas V (and its Russian rocket engine) can legally be used. (*Id.* at 28.)

85. Proposals are due in response to the Phase 2 RFP on August 1, 2019. (Phase 2 RFP, Att. 5 at 7, Ex. B.)

[redacted]

L. Harm To SpaceX, Public Interest, And Lack Of Harm To The Agency

86. The balance of harms and public interest favor the injunctive relief SpaceX seeks.

87. Absent injunctive relief, SpaceX will suffer the irreparable harm of being deprived of the opportunity to compete fairly with competitive procedures to the maximum extent practicable for an LSA. *See, e.g.*, *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 291 (2016), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018); *Magnum Opus Techs., Inv. v. United States*, 94 Fed. Cl. 512, 544 (2010). The Government's flawed decision not to invest in SpaceX's proposed launch system solutions based on unstated criteria and unequal treatment will also cause substantial competitive harm to SpaceX in the final phase of this procurement (the Phase 2 RFP Competition), as SpaceX's competitors will have the benefit of Government investment dollars and Government cooperation in the development and certification of the competing offerors' approaches.

88. Under the circumstances, there is no adequate remedy other than an injunction preventing further investment and performance of the LSAs.

89. Conversely, amending the LSA Solicitation and evaluating all offerors in an equal manner will cause no harm to the Agency but will serve the public's interest in ensuring Government business is conducted with open, honest, and fair competitive procedures. *See generally, ARxIUM, Inc. v. United States*, 136 Fed. Cl. 188, 209 (2018) (granting permanent injunction against arbitrary Government award decision).

IV. THE PARTIES

90. Plaintiff SpaceX is a pioneering space technology provider. It delivers space launch services to the United States and commercial customers worldwide. To date, SpaceX has successfully completed more than 70 commercial, civil space, and national security missions. In less than 20 years of existence, SpaceX has transformed the space launch industry and dramatically

[redacted]

lowered the cost of access to space in all markets, for example by pioneering the ability to return first stages from orbit for rapid and cost-effective refurbishment and reuse.

91. The defendant is the United States acting through the Agency (i.e., the Air Force Space and Missile Systems Center). The Agency manages the EELV program, implemented in the mid-1990s to achieve affordable, assured access to space (and renamed the "National Security Space Launch program," effective March 1, 2019).[53] The Agency has stated publicly the program's intent of making launch services "more agile and effective for the warfighter," as well as "leverag[ing] the U.S. commercial launch industry."[54]

V. JURISDICTION AND VENUE

92. Venue is proper pursuant to 28 U.S.C. § 1491.

93. The Court has jurisdiction over SpaceX's challenge pursuant to 28 U.S.C. § 1491(b)(1), which provides broad jurisdiction over "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

94. The Agency awarded the LSAs using its OT authority for prototype projects under 10 U.S.C. § 2371b.

95. The LSA Solicitation defines the prototype as a complete launch service capability, expressly describing the "Prototype" covered by the agreement as "[a] fully developed and certified EELV Launch System," which includes "[a]ll activities from initial concept up to, and including production," and covers not only the launch vehicle that meets the full range of the EELV mission

[53] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1603, 132 Stat. 1636, 2105-06 (2018).

[54] Sandra Erwin, *EELV is no more. It is now 'National Security Space Launch'*, Space News (Mar. 3, 2019), https://spacenews.com/eelv-is-no-more-it-is-now-national-security-space-launch/.

[redacted]

requirements but "associated operation and support services and personnel that provide the capability to perform all EELV missions." (LSA Solicitation at 2, Ex. A.)

96. The Agency held the competition and awarded the LSAs in connection with, and for the purpose of, the FAR Part 12 procurement for NSS launch services covered by the Phase 2 RFP.

97. The Federal Circuit repeatedly has held the phrase "in connection with a procurement" in § 1491(b)(1) is "very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1288-89 (Fed. Cir. 1999); *see also Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1380-81 (Fed. Cir. 2012) (affirming § 1491(b)'s "broad grant of jurisdiction"). Indeed, the courts have broadly defined "procurement" in the context of § 1491(b), to include, "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008) (emphasis added); *see Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1244 (Fed. Cir. 2010) (explaining that "procurement or proposed procurement" as used in § 1491(b) "includes all stages of the process of acquiring goods or services."); *see also* 10 U.S.C. § 2302(3)(A).

98. The LSA competition was the penultimate step of a multi-step procurement effort to acquire domestic launch services for EELV missions:

> The Air Force's strategy is a four step approach to transitioning to domestic propulsion while assuring access to space. Step 1, started last year, matures the technology to reduce the technical risk of engine development. . . . Step 2 initiates investment in rocket propulsion systems in compliance with the fiscal year 2015 NDAA. The Air Force will partner with propulsion system of launch system providers by awarding multiple contracts that co-invest in on-going development efforts. In step 3, the Air Force will continue the public-private partnership approach by entering into agreements with launch system providers to provide domestically powered launch capabilities. In step 4, the Air Force will compete and

[redacted]

award contracts with certified launch providers for launch services for 2018 and beyond.[55]

99. Consistent with the Agency's statements to Congress, the LSA Solicitation notified offerors that the LSA competition (step 3 above) served as the precursor phase to complete the final procurement phase (step 4 above) of the FAR Part 12 competition for launch services in the EELV program. Specifically, the LSA Solicitation confirmed that the Agency conducted the LSA competition in order to select multiple awardees to mature their launch systems for the next procurement phase: a multiple-award FAR Part 12 acquisition for NSS launch services. (LSA Solicitation at 1, Ex. A) ("The Launch Service Agreements (LSAs) facilitate development of at least three EELV Launch System prototypes as early as possible, allowing those launch systems to mature prior to a future selection of two NSS launch service providers for Phase 2 launch service procurements, starting in FY20.").)

100. The LSA Solicitation makes the Agency's intent plain, noting expressly that the LSA awards served "to allow the Air Force to competitively procure launch services in the future from domestic commercial launch service providers that meet EELV requirements." (*Id.*) The Agency thus made the LSA awards in connection with the Phase 2 RFP Competition, the final step of a multi-step procurement for domestic, commercially-viable launch service providers.

101. SpaceX alleges that the Agency decision not to award an LSA to SpaceX violated at least two statutes and these violations occurred in connection with a procurement for NSS launch

[55] *Hearing on Department of Defense Appropriations for Fiscal Year 2016 Before the S. Subcomm. of the Comm. on Appropriations*, 114th Cong. 61 (2015) (statement of Hon. Ashton Carter, Secretary), available at https://www.govinfo.gov/content/pkg/CHRG-114shrg59104641/pdf/CHRG-114shrg59104641.pdf.

[redacted]

services, and these statutory violations will irreparably harm SpaceX's ability to compete fully and fairly in the final step of the procurement, the Phase 2 RFP Competition.

102. First, the basis for the Agency's selection decision and the decision itself were arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, in violation of the substantive standards for agency action set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The APA requires the Government to evaluate proposals and make an award that is both reasoned and consistent with the "competitive procedures" required by law. *See* 5 U.S.C. § 706(2).

103. Second, the LSA evaluation and selection decision violated 10 U.S.C. § 2371b(b)(2) because, contrary to the requirement to use "competitive procedures" to "the maximum extent practicable," the Agency deviated from the LSA Solicitation criteria and treated the offerors unequally in several material ways to SpaceX's competitive prejudice. *See* 10 U.S.C. § 2371b(b)(2).

104. Among the anticompetitive procedures and errors, the Agency applied an unstated preference for reliance on existing Government processes and facilities—the reverse of what the Agency announced in the LSA Solicitation—rather than investing in commercial systems that were adaptable to the Government's needs as required by the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2018.[56]

105. The Agency also weighed purported EELV Approach risks contrary to the terms of the LSA Solicitation to SpaceX's competitive prejudice. For example, the Agency assigned the greatest risk for SpaceX's proposed solution to a mission capability (performance of Payload

[56] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1605, 131 Stat. 1283, 1724 (2017).

[redacted]

Category C missions) that the Government said it would not need until late 2025 at the earliest if at all during the Phase 2 RFP ordering period, based on deviations from the stated criteria. As a result, the Agency irrationally discounted SpaceX's clear advantage of proposing the only currently operating and proven launch system solution that is already capable of performing the Agency's most frequent and most imminent launch capability needs (Category A/B payloads).

106. The Agency also evaluated the offerors' schedules and Total Evaluated Prices unequally. For instance, SpaceX's proposal has no risk of schedule delay for the overwhelming majority of missions (Category A/B) contemplated in the LSA Solicitation and provided nearly [redacted] of schedule margin for the Category C capability—a margin that far surpasses the margin provided by other offerors (11 months (Blue Origin), 10 months (ULA), and 7 months (Northrop)) for all mission categories. Yet, the Agency inexplicably found these other offerors, each of which announced significant schedule delays almost immediately after award, to have lower schedule and overall risk than SpaceX.

107. The Agency also awarded ULA what amounts to a nine-figure discount on its Total Evaluated Price. Although the Agency included in SpaceX's Total Evaluated Price the value of a current Agency contract that SpaceX proposed to leverage, the Agency did not similarly increase ULA's Total Evaluated Price by the hundreds of millions of dollars the Government will pay for the launch infrastructure and integration facilities that ULA proposed to leverage. Had the Agency equally included the Government dollars that ULA proposed to leverage, ULA's Total Evaluated Price would have been nearly double the Total Evaluated Price reported to the selection authority, rendering ULA's LSA proposal far more expensive than SpaceX's Total Evaluated Price.

108. Accordingly, the Agency's anticompetitive evaluation process and the flawed LSA award decision fall within the Court's § 1491(b) jurisdiction.

[redacted]

VI. STANDING

109. SpaceX is an interested party with standing to bring this challenge to the anticompetitive process adopted by the Agency, which resulted in a flawed selection decision committing the Government to invest hundreds of millions of taxpayer dollars into the development of new launch systems by three of SpaceX's competitors, while excluding SpaceX. *See* 28 U.S.C. § 1491(b)(1).

110. "To qualify as an 'interested party,' a protester must establish that: (1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008).

111. SpaceX, one of the leading commercial launch vehicle service providers in the world, undoubtedly has a direct economic interest in the LSA competition. SpaceX timely submitted a competitive proposal that offered an Outstanding EELV Approach and lowest Government investment percentage. But for the errors preventing a fair competition, SpaceX would have a substantial chance of receiving an LSA award. *See Info. Tech. & Apps. Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003).

112. Without an LSA award, SpaceX, a company that less than five years ago filed an action in this Court to break ULA's stranglehold on the EELV program and to compete, will not be able to compete fairly under the Phase 2 RFP to provide the solicited NSS launch services to the Government.

VII. TIMELINESS

113. SpaceX timely challenges the LSA evaluation and award decision.

[redacted]

114. SpaceX timely requested a debriefing and engaged in the Agency's extended debriefing process.

115. In accordance with the LSA Solicitation's stated objection process, SpaceX timely filed its objection to the evaluation of proposals and the award decision with the Agency on December 10, 2018 and sought ADR to resolve SpaceX's objections to the LSA selection decision and the competitive disadvantage that will befall SpaceX in the related Phase 2 RFP Competition.

116. The Agency did not agree to an ADR process and denied SpaceX's objection on April 18, 2019, requiring SpaceX to seek relief in this Court to maintain the right to compete fairly for the Agency's launch service needs that SpaceX fought so hard to obtain approximately five years ago.

COUNT I: THE AGENCY BASED THE LSA AWARDS ON AN ARBITRARY AND UNEQUAL INVESTMENT COST EVALUATION

117. SpaceX incorporates paragraphs 1 through 116 of the Complaint by reference.

118. This Court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4). The Court must also set aside any agency action that fails to use the "competitive procedures" required "to the maximum extent practicable" under 10 U.S.C. § 2371b(b)(2).

119. The statutory requirement to use "competitive procedures" "to the maximum extent practicable" is itself a material limit on agency discretion. *See, e.g.*, *SMS Data Products Grp., Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988) (interpreting "shall," "to the maximum extent practicable" obtain competition when reprocuring following a default termination to mean that "the contracting officer did not have unbridled discretion in conducting the reprocurement, but was required to conduct the reprocurement in the most competitive manner feasible"); *Palantir*

[redacted]

USG, Inc. v. United States, 129 Fed. Cl. 218, 269 (2016) ("The word 'maximum' in the phrase 'to the maximum extent practicable,' therefore, should not be ignored and read out of the statute. Given the congressional choice of the word 'maximum,' even when coupled with words like 'practicable' and 'appropriate,' agencies cannot ignore or superficially comply with the requirement . . . ."), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018).

120. The "competitive procedures" requirement incorporated by Congress into the DoD's prototype OT authority is used throughout the Title 10 procurement provisions as an analog for the competitive procedures required by the Competition in Contracting Act ("CICA").

121. "[I]t is beyond peradventure that a contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria." *Banknote Corp. of Am. v. United States*, 56 Fed. Cl. 377, 383 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004); *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 490 (2013). "Moreover, agencies must apply the stated evaluation factors in a fair and evenhanded manner across competing proposals." *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 536 (Fed. Cl. 2010).

122. Affording disparate treatment to offerors competing under the same competition ground rules is clearly arbitrary and capricious behavior that must be set aside under the APA standard. 5 U.S.C. § 706.

123. The Agency's evaluation of the Investment Cost factor violated these bedrock principles of competitive procedures in two material ways and delivered an unfair advantage to ULA.

124. First, the Agency understated the Total Government Investment in ULA's proposed solution, to SpaceX's significant competitive disadvantage, by treating ULA and SpaceX unequally in the Total Evaluated Price calculation.

[redacted]

125. Specifically, the Agency included [redacted]—which SpaceX proposed to leverage [redacted]—as part of the Total Government Investment and counted this amount toward the Government's percentage cost share. The Agency, however, did not include the much larger amount the Government has given and will continue to give to ULA to build and maintain the launch infrastructure and integration facilities that ULA proposed to leverage under its LSA.

126. ULA's "costs of maintaining launch infrastructure and a skilled workforce, came through a contract vehicle with the Government known as the EELV Launch Capability Arrangement, otherwise known as the ELC."[57] Although Congress directed the Agency to discontinue the ELC in the FY 2016 NDAA, the Agency issued an $876 million modification to the services contract in September 2018, covering launch site and range operations, and launch infrastructure maintenance and sustainment, and increasing the total value of ULA's ELC subsidies to over $9.76 billion.[58]

127. ULA has acknowledged publicly that it intends to use as part of its LSA solution the launch pads and vertical integration facilities that it developed and continues to maintain using ELC monies:

> The other thing that's happening is the pad modifications. ***We intend to fly Vulcan and Atlas off the same launch pad and they're going to overlap for a number of years,*** so we needed to have a launch pad that could go back and forth, because the rockets are different sizes. The diameters are significantly different and Vulcan is also a little bit longer, so we are modifying our launch tower and launch pad so

[57] *Hearing on Military Space Launch and the Use of Russian-Made Rocket Engines Before the S. Comm. on Armed Services*, 114th Cong. 5 (2016) (statement of Hon. Deborah Lee James, Secretary of the Air Force), available at https://fas.org/irp/congress/2016_hr/engines.pdf.

[58] *Compare* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1608, 129 Stat. 726, 1100-01 (2015) *with* Press Release, Dep't of Defense, Release No. CR-187-18, Contracts for September 27, 2018 (Sept. 27, 2018), https://dod.defense.gov/News/Contracts/Contract-View/Article/1647166/. Note, this total only reflects the unclassified Agency contribution to ELC; classified ELC contributions for NRO are not public.

[redacted]

> platforms can go up and down, because normally they're fixed. You design your rocket and then you build a pad to fit your rocket, that's how it's always been done.
>
> ***[The vertical integration facility] is where all these platforms are, and there's holes in them so you can walk around them and do your work. So those are all being made to be backwards compatible, so you can fly a Vulcan, then you can fly an Atlas and go back and forth.*** So that's kind of a neat engineering problem for our teams, because I'm not sure I can point to an integration facility that is designed to go back and forth between different-sized rockets, so it's kind of a unique thing to do.
>
> ***Why did you decide to modify the pad versus getting a second pad for the rocket?***
>
> The pad is capable of flying both, and ***obviously, that saves a bunch of money***. The vertical integration facility, it was cheaper to modify that to go backwards compatibility, like I just described, than to build a new one . . . .[59]

128. ULA may be right that its LSA approach "saves a bunch of money," but most of the money it is saving is ULA's, because those facilities and sustainment costs were not free to the Government or taxpayers who continue to pay for those facilities.

129. The Agency did not include the significant Government dollars paid to ULA (and that will continue to be paid to ULA) for the launch pads and related infrastructure in the ULA Total Government Investment the Agency calculated for the LSA evaluation and selection decision, and the Agency fails to confront this inequity in denying SpaceX's objection to the LSA awards.[60] (Debriefing Slides at 20, Ex. O; Agreements Officer's Decision at 5-6, Ex. R.) Rather than explain the rationale for not calculating the Total Evaluated Prices and Total Government

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[59] Jacqueline Klimas, *Lockheed-Boeing Space Launch Venture Seeks to Maintain Edge*, Politico (May 4, 2018), https://www.politico.com/story/2018/05/04/lockheed-boeing-space-launch-venture-568498 (emphasis added); *see also* United Launch Alliance, *Developing Vulcan Centaur: The Strategic Partnerships Powering ULA's Next-Generation Vulcan Centaur Rocket* (Apr. 8, 2019), https://www.ulalaunch.com/docs/default-source/evolution/190408_ulapanel_all_compressed.pdf.

[60] The Agency budgeted $737.273 million for ULA's ELC in FY 2017 and $918.609 million in FY 2018—these amounts do not include the other 25% of ELC costs paid by the NRO. Air Force, DoD FY2018 Budget Estimates, Justification Book Volume 1 of 1 at 105 (May 2017), available at https://www.saffm.hq.af.mil/Portals/84/documents/Air%20Force%20Space%20Procurement%20FY18.pdf?ver=2017-05-23-155547-107.

[redacted]

Investment in an equal manner by including ULA's significant ELC payments in the calculation, the Agency recasts SpaceX's argument as an untimely solicitation challenge.

130. SpaceX, however, does not challenge the ground rules; SpaceX challenges the inequitable application of those rules. By ignoring ULA's inability to operate without massive taxpayer subsidies and ULA's decision to leverage facilities and infrastructure paid for with those dollars, the Agency reveals that it did not evaluate the offerors on an equal basis to the favor of ULA and the competitive prejudice of SpaceX.

131. Had the Agency equally included the taxpayer dollars the Agency paid to build and maintain the launch infrastructure that ULA proposed to leverage for the LSA, then ULA's Total Evaluated Price would have been significantly higher than the Total Evaluated Price reported to the selection official, rendering ULA's proposed cost unreasonable and unaffordable.

132. Second, the Agency overstated SpaceX's Total Evaluated Price by [redacted] by adding the costs of vertical integration options for both the Eastern and Western Range launch complexes. (Debriefing Slides at 16, Ex. O.) But the Phase 2 RFP expressly states that there is no need for West Coast vertical integration during the entire performance period, making clear that only one of SpaceX's proposed options would conceivably be exercised. (Phase 2 RFP, Att. 1 at 23, Ex. U.) Absent the improper inclusion of the [redacted] option for West Coast vertical integration, SpaceX's Total Evaluated Price would have been lower than ULA's.

133. The Agency's addition of the costs of both options [redacted] to SpaceX's Total Evaluated Price reflects another prejudicial error: the Agency's discussions with SpaceX were misleading and not meaningful. In discussions, the Agency directed SpaceX to separate the vertical integration costs from its proposed costs as "options," leading SpaceX to understand incorrectly that the Agency did not equate the options to the proposed price. But for this

[redacted]

misdirection to differentiate the options, SpaceX would have lowered its proposed price. *See Q Integrated Co., LLC v. United States*, 126 Fed. Cl. 124, 146 (2016) (holding that agency "had an obligation to disclose information" reducing protester's chance of receiving contract award and its failure to do so was prejudicial); *Raytheon Co. v. United States*, 121 Fed. Cl. 135, 166 (2015) (holding that agency silence misled protester and that "it was the [Agency's] duty to ensure that all three contractors were competing on a level playing field").

134. Third, the Agency focused its Investment Cost evaluation entirely on the Total Government Investment associated with each LSA proposal, without considering the relative Industry Cost Share and Total Non-Government Investment associated with each LSA proposal contrary to the LSA Solicitation.

135. The LSA Solicitation instructed each offeror to "provide the projected total costs to complete the EELV Launch System prototype, including all scope proposed in the SOW" and to "identify the proposed dollar amounts between Non-Government and Government funding sources." (LSA Solicitation at 12, Ex. A.)

136. The Agency stated that it would evaluate each offeror's proposed Investment Cost against five criteria: (1) Total Government Investment, (2) Total Non-Government Investment, (3) Total Combined Investment, (4) Industry Cost Share and (5) Time Phasing of Government Investment. (*Id.* at 25.) The Total Government Investment represents "the total dollar amount of Government investment requested by the Offeror" and the Industry Cost Share represents "the proportion of the Combined Total Investment that will be funded by Non-Government sources." (*Id.*)

137. Based on the stated criteria, SpaceX proposed an [redacted] Industry Cost Share (i.e., SpaceX proposed to fund nearly [redacted] of its LSA solution). Specifically, SpaceX proposed to

[redacted]

contribute [redacted] in Total Non-Government Investment in its LSA solution, leaving the Government to contribute [redacted] of the Total Investment Cost, for [redacted] in Total Government Investment. (Debriefing Slides at 8, Ex. O.)

138. SpaceX thus proposed the most advantageous Industry Cost Share, i.e., the lowest proportion of the Total Investment Cost to be funded by Government sources. SpaceX's proposed Investment Cost would thus afford the Agency the greatest return on the lowest percentage of investment by the Government.

139. Rather than evaluate proposed investment costs according to the five equally-weighted criteria set forth in the LSA Solicitation, the Agency mechanically ranked offerors based solely on which had the lowest, second lowest and third lowest "overall total Government investment" (as miscalculated by the Agency) and made the award decision on that basis. (Portfolio Recommendation at 26, 29-31, Ex. D); *but see Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 230 (1992) (holding that "plaintiff could assume that the subfactors would be equally weighed" where solicitation did not specify otherwise).

140. Equally prejudicial, the Agency never advised SpaceX during discussions that the Agency (i) had changed the evaluation to consider and weigh only the Total Government Investment, and (ii) had apparent concerns that its funding limitations would not permit an award both to SpaceX and ULA. Instead, the Agency assured SpaceX during discussions that the Agency "did not find any reasonableness issues" with SpaceX's proposal (Evaluation Notice 333 at 2, Ex. T), and later rejected SpaceX's proposal as "unaffordable given the Government's funding limitations." (Portfolio Recommendation at 29, Ex. D.) Consequently, the Agency's investment cost discussions were misleading and not meaningful to SpaceX's competitive prejudice.

[redacted]

141. The Agreements Officer's Decision wrongly claims that "the SSA did not place improper emphasis on Total Government Investment in making the award decision." (Agreements Officer's Decision at 6, Ex. R.) This statement ignores the plain language of the Portfolio Recommendation, which rated offerors according to the Total Government Investment (i.e., the overall Government cost investment) without considering the other four factors, and the fact that the SSA agreed with the Portfolio Recommendation. (Portfolio Recommendation at 26, Ex. D; Award Decision at 9, Ex. I.)

142. Because the LSA Solicitation did not advise offerors that the most important criteria for assessing each offeror's proposed Investment Cost was the Total Government Investment, it was an error for the Agency to treat it as such without first amending the LSA Solicitation and permitting offerors to submit updated proposals consistent with the revised weighting of the five criteria. *See Info Scis. Corp. v. United States*, 73 Fed. Cl. 70, 114 (2006) (granting judgment in favor of unsuccessful offeror because agency evaluation violated terms of the solicitation).

143. But for these anticompetitive errors in the Agency's Investment Cost evaluation and discussions that were misleading and not meaningful, the Agency would have calculated a significantly higher evaluated price for ULA, a lower price for SpaceX, and SpaceX would have proposed a lower price to account for the inclusion of vertical integration, all of which would have altered the competitive landscape, giving SpaceX a substantial chance of receiving an LSA award.[61]

[61] The common elements in the systems proposed by the three LSA awardees raises another issue with the award decision under the Investment Cost factor. The Agency either has permitted ULA to spread the development costs of its proposed solution across three proposals (thus understating the total development costs for ULA and the percentage of Government investment), or the Agency has included the same costs in more than one LSA, thus overstating the total costs for the portfolio. With an inflated assumption about the costs of the portfolio awarded, the SSA was not able to

[redacted]

144. Finally, when determining the best value, and given that the LSA Solicitation allowed flexibility for the Agency to fund less than what an offeror proposed, it was an error for the Agency to focus only on funding three awards completely, without giving any consideration to how that portfolio of awardees, if successful, would impact the ultimate cost to the Government of obtaining launch services. In so doing, the Agency failed to consider its statutory mandate to prioritize "lower[ing] the costs of launching a national security space system." 10 U.S.C. § 2273.

145. SpaceX embodies the statutory mandate of lowering costs and self-sufficiency, whereas ULA represents the opposite. It is indisputable that, even without the benefit of significant Government subsidies, SpaceX has offered launch service pricing far less expensive than ULA with its annual billion dollar subsidy. Had the Agency considered how its portfolio would impact the future cost of launch services, it would have recognized that investing in SpaceX was far more likely to result in the type of savings that Congress directed the Agency to prioritize, than creating a portfolio of three LSAs that excludes SpaceX.

WHEREFORE, SpaceX respectfully requests that the Court grant judgment in favor of SpaceX on Count I and (a) declare that the LSA awards violate the requirement for competitive procedures because the Agency based the awards on an Investment Cost evaluation that was unequal and deviated from the stated requirements and also resulted from misleading and not meaningful discussions; (b) enjoin any further investment by the Government under the LSAs and any further performance by ULA, Blue Origin, and Northrop under the LSAs; (c) reopen the competition, engage in meaningful discussions, and evaluate Investment Cost consistent with the LSA Solicitation and equally treat all offerors against those ground rules, and make a new award

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make an accurate and fully informed decision about which combination of awardees was the most advantageous, including the prospect of a fourth award.

[redacted]

decision, or revise the LSA Solicitation and reopen the competition and make a new award decision; and (d) provide such other relief as the Court deems just and appropriate.

COUNT II: THE AGENCY BASED THE LSA AWARDS ON AN UNEQUAL RISK ASSESSEMENT THAT CONTRAVENES THE LSA SOLICITATION AND THE AGENCY'S ACTUAL NEEDS

146. SpaceX incorporates paragraphs 1 through 145 of the Complaint by reference.

147. This Court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4).

148. "[A] contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria." *Banknote Corp. of Am. v. United States*, 56 Fed. Cl. 377, 383 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004); *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 490 (2013). "Moreover, agencies must apply the stated evaluation factors in a fair and evenhanded manner across competing proposals." *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 536 (Fed. Cl. 2010).

149. The fundamental requirement to evaluate offerors equally against stated ground rules is not limited to competitions subject to the CICA, but necessarily extends to any competition subject to "competitive procedures," such as the LSA competition. *See* 10 U.S.C. § 2371b(b)(2). Moreover, affording disparate treatment to offerors competing under the same ground rules in the same competition is arbitrary and capricious behavior that must be set aside under the APA standard. 5 U.S.C. § 706.

150. The Agency deviated from the risk paradigm in the LSA Solicitation and the Agency's actual needs by giving predominant, disproportionate weight in the best value comparative assessment to risks associated with Category C launch capabilities. SpaceX proposed

[redacted]

the least risky solution for the Agency's most numerous and imminent needs (Category A and B payload launch capabilities), and the evaluation irrationally favored the offerors that present the greatest risk to those needs.

151. The LSA Solicitation contemplates a risk assessment based on the quantity and timing of the mission needs. To inform each offeror's proposed EELV Approach, the Agency identified the reference orbits in Table 10 and the Significant EELV Dates in Table 13 of the LSA Solicitation. Of the nine reference orbits listed in the LSA Solicitation, seven fall under Category A/B payloads that have an ILC date of April 2022. (*See* LSA Solicitation at 27, 29, Ex. A.)

152. Importantly, only two Category C payload orbits are referenced in the LSA Solicitation Tables (one tentative and one firm), and they are scheduled to launch years later than the other categories (ILC dates in September 2025 and October 2026). (*Id.* at 29.) Thus, the LSA Solicitation specifies that all but a minimal number of missions, including all launches before at least September 2025, will involve only Category A/B payloads.

153. The Agency, however, skewed its risk assessment under the most important EELV Approach factor arbitrarily in favor of offerors that purportedly present lower Category C risk, even though those offerors present significantly greater risk for the Category A/B payload launches that comprise most of the reference orbits and the Agency's greatest and nearest-in-time needs. Consequently, the Agency broke from the stated criteria and unreasonably made its LSA investment decisions based on unwarranted risks assessed to SpaceX for the fewest and most distant future Category C missions. Equally significant, the Agency ignored the fact that SpaceX offered the best value solution for the Agency's vastly more numerous and imminent Category A and B payload mission needs.

[redacted]

154. Of the competing offerors, only SpaceX offered a proven commercial launch system already capable of launching all Category A/B payloads. But the Agency irrationally and unequally assigned a lesser risk to conceptual launch system designs that have no proven ability to launch ***any*** payloads (Category A/B or C), relative to the already-operational SpaceX approach, which has essentially no risk regarding the ability to launch Category A/B payloads.

155. In the debriefing, the Agency acknowledged that the stated LSA Solicitation evaluation process does not prioritize Category C missions or otherwise indicate that the evaluation of Category C risks would drive the Agency's investment decisions. Yet, during the debriefing the Agency stated what was not in the LSA Solicitation: that the Agency had in fact considered the offerors' proposals for meeting the Category C payload missions to be the "absolute . . . driving factor" of the EELV Approach evaluation. (Debriefing Audio File at approx. 35:15 through 36:50 ("The other overarching goal has to [INAUDIBLE] the missions effectiveness is to get off the Delta IV Heavy because [INAUDIBLE] beyond these three purchases that we are doing sole source for the Delta IV Heavy, if we can't get off the Delta IV Heavy we have to decide between launching fewer missions [INAUDIBLE] on the Delta IV Heavy, or finding a replacement for it and launching as many missions as we actually want to do. So it was an absolute, like, driving factor in this RFP . . . .").)

156. Neither the LSA Solicitation announced nor the Agreements Officer's Decision addressed the Category C payload approach as a "driving factor." To the contrary, the Agency agreed in the Agreements Officer's Decision that the evaluation criteria did not advise offerors that the Agency intended to weigh more heavily, or even equally, potential risks related to the offerors' solutions for launching Category C payloads relative to the solutions for launching Category A/B payloads. (Agreements Officer's Decision at 4-5, Ex. R.) Instead, the EELV Approach factor

[redacted]

required the Agency to evaluate each offeror's ability to "support up to five NSS launches per year" and "to meet all EELV reference orbits" in the LSA Solicitation, all but two of which fall under Payload Category A/B and with those two exceptions scheduled for launch no earlier than September 2025.

157. "It is black letter law that agencies must evaluate offerors' proposals based on the evaluation criteria stated in the solicitation." *Lab. Corp. of America Holdings v. United States*, 116 Fed. Cl. 643, 650 (2014) (holding that agency decision lacked rational basis when it adopted a "'critical element' in scoring proposals" and "the predominant differentiator," but solicitation did not indicate that agency would evaluate offerors on that basis). Here, however, the Agency's risk assessment under the most important factor flipped the implicit importance of capabilities, giving greatest emphasis to the few (if any) distant Payload Category C missions and least emphasis to the largest number of and most imminent Payload Category A/B missions.

158. Had the Agency properly weighed the risks inherent in the competing solutions based on the mission needs in the LSA Solicitation (both in quantity and time), the Agency would have determined that investment in SpaceX's Falcon 9 and Falcon Heavy best meets the requirements for "rapid, responsive, and reliable" services at lower cost and acceptable risk levels. 10 U.S.C. § 2273.

159. Alternatively, had SpaceX known that the "absolute . . . driving factor" of this competition and the Agency's investment decision was the Category C payload capability, SpaceX would have proposed differently. The law requiring "competitive procedures" does not permit the Agency to announce its needs in the LSA Solicitation and then evaluate in a manner inconsistent with those stated needs. *Dubinsky v. United States*, 43 Fed. Cl. 243, 259 (1999) ("making offerors

[redacted]

aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition").

160. The competitive harm to SpaceX from the Agency having inflated the weight of Category C risk beyond what the LSA Solicitation contemplated was magnified by the Agency's failure to account equally for the significant Category A/B risk of the remaining offerors.

161. The Agency recognized that ULA's schedule to meet the Category A/B certification flight reflected a very narrow margin before the first scheduled mission—truncated significantly more than the margin SpaceX proposed. (Award Decision at 3, Ex. I.) Blue Origin also proposed an "insufficient schedule margin for the last Category A/B certification flight," as did Northrop. (*Id.* at 4, 5.) Yet, the Agency failed to weigh these risks of timely and successfully developing a Category A/B launch system properly in the EELV Approach evaluation, assigning each competitor a more favorable Low or Moderate risk rating than the rating SpaceX received. (*Id.* at 3-5.)

162. The Agency's reliance upon ULA, Northrop and Blue Origin and their narrow scheduling margins is fraught with peril. The weaknesses the Agency noted for each awardee—that "may adversely affect their ability to meet the Government launch requirements" or "potentially cause disruption of schedule, increased cost, or degradation of performance"—have program-wide implications and should have been weighed as such in the evaluation and LSA award decision. (*Id.* at 2-6.) A development delay for each of the awardees would have a cascading effect across a significant number of missions, jeopardizing not just the few later-in-time Payload Category C launches, but also the near-term Payload Category A/B launches, which again constitute the vast majority of EELV missions (and the orbits referenced in the LSA Solicitation).

[redacted]

WHEREFORE, SpaceX respectfully requests that the Court grant judgment in favor of SpaceX on Count II and (a) declare the LSA award decision violates the requirement for competitive procedures because the Agency based the awards on an EELV Approach risk assessment at odds with both the stated criteria and the Agency's actual needs, and reflected unequal treatment of the offerors; (b) enjoin any further investment by the Government under the LSAs and any further performance by ULA, Blue Origin, and Northrop under the LSAs; (c) reevaluate the LSA proposals in accordance with the stated evaluation criteria and the Agency's needs and make a new award decision, or revise the LSA Solicitation and reopen the competition and make a new award decision; and (d) provide such other relief as the Court deems just and appropriate.

COUNT III: THE AGENCY BASED THE LSA AWARDS ON AN ARBITRARY AND UNEQUAL EELV APPROACH EVALUATION

163. SpaceX incorporates paragraphs 1 through 162 of the Complaint by reference.

164. When using competitive procedures to invest Government dollars in a private company, an agency must evaluate proposals and make the award decision based only on the solicitation's stated criteria. An "agency's failure to follow its own selection process embodied in the [s]olicitation is . . . a prejudicial violation of a procurement procedure established for the benefit of offerors." *Hunt Bldg. Co., Ltd. v. United States*, 61 Fed. Cl. 243, 277 (2004); *see also OTI Am., Inc. v. United States*, 68 Fed. Cl. 646, 654–55 (2005) ("It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation.... [T]he government may not rely upon undisclosed evaluation criteria in evaluating proposals.").

165. The Agency's evaluation of SpaceX under the most important EELV Approach factor deviates from the stated LSA Solicitation criteria and misstates the contents of SpaceX's proposal.

[redacted]

166. The Agency found that SpaceX's payload integration approach met all LSA Solicitation requirements, and rated SpaceX's proposed launch system solution Outstanding under the EELV Approach factor, reflecting an "exceptional approach and understanding of the requirements." (Award Decision at 6, Ex. I.) The evaluators identified seven technical strengths. (Final Evaluation at 15-16, Ex. J.)

167. The discrepant risk evaluation, which assessed SpaceX a prejudicial High risk rating based on two significant weakness findings that contravene the LSA Solicitation and one weakness finding that misstates SpaceX's proposed approach, failed to comply with the competitive procedures required by law.

168. First, the Agency improperly assigned a significant weakness to SpaceX's proposal because SpaceX did not tailor its Category C launch system to the Government's current payload integration practices and infrastructure:

[redacted]

(*Id.* at 17.)

169. This evaluation finding contravenes the LSA Solicitation, which did not require offerors to adopt current Government concept of operations for payload integration but rather advised offerors that the Agency sought to "leverage industry's ongoing efforts to develop new and/or upgraded commercial launch systems," and that the Agency would "tailor[]" the public-private agreements "to each launch service provider's needs in order to enable commercial launch systems to meet all NSS requirements." (LSA Solicitation at 1, Ex. A (emphasis added).)

[redacted]

170. To remedy this significant error, the Agency must reevaluate SpaceX's proposal based on the stated criteria and award SpaceX an LSA contract or revise the LSA Solicitation so that SpaceX can fairly compete for an LSA award. If the Agency considered its existing Category C payload processing procedures, concept of operations, and infrastructure critical to its objectives, then the Agency had an obligation to amend the LSA Solicitation to include these procedures in the requirements so that SpaceX could compete fairly against the ground rules employed by the evaluators but not stated in the LSA Solicitation. As this Court has recognized, "making offerors aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition." *Dubinsky*, 43 Fed. Cl. at 259.

171. Second, the Agency's assessment of a significant weakness for SpaceX's proposal to [redacted] also deviated from the LSA Solicitation and ignored SpaceX's proposal. (Final Evaluation at 17-18, Ex. J.)

172. The Agency specifically removed any requirement that offerors [redacted] by LSA Solicitation Amendment 2. (*Compare* LSA Solicitation at [redacted] Ex. A *with* LSA Solicitation, Amend. 2 at [redacted] Ex. G.) The Agency further confirmed that "the Air Force does not require [redacted]" (Response to Industry Comment [redacted] Ex. F.) The Agreements Officer's Decision reaffirmed this and specifically stated that "the Government did not require [redacted] as evidenced by the fact that SpaceX was not found to be deficient for proposing to [redacted]" (Agreements Officer's Decision at 3, Ex. R.)

173. Nevertheless, the Agency contends that it was reasonable to rate SpaceX's approach High risk for not proposing what the LSA Solicitation did not require. Not so. The LSA Solicitation defines a significant weakness as "a flaw that appreciably increases the risk of

[redacted]

unsuccessful agreement performance." (LSA Solicitation at 22 (emphasis added), Ex. A.) The LSA Solicitation thus limits the assessment of risk to those proposal flaws that will impact the LSA performance, i.e., whether any risk exists to the offeror completing the development and certification of its EELV launch system. The Agency cannot reasonably advise offerors that they need not [redacted] and then assess a High risk for not proposing to do so. In essence, the Agency asserts that it may assess a weakness against SpaceX for failing to do something that the LSA Solicitation did not require. This is the definition of evaluating an offeror based upon unstated criteria contrary to the competitive process.

174. In any event, SpaceX specifically committed to [redacted] (Final Updated Proposal, SOW at § 2.7.1.2, Ex. L.)

175. To remedy this prejudicial error, the Agency must either remove the significant weakness and find SpaceX's solution Low risk under the EELV Approach factor and provide SpaceX an LSA award, or reopen the competition and revise the LSA Solicitation to reflect the Agency's actual requirements.

176. Third, the Agency improperly assigned SpaceX a weakness upon the mistaken belief that SpaceX [redacted] (Final Evaluation at 17-18, Ex. J.)

177. Contrary to this finding, SpaceX's proposal specifically states that [redacted]

[redacted]

[redacted] (SpaceX Category C Integrated Master Schedule, Unique ID #596, Ex. E; Final Updated Technical Proposal (Excerpts) at III-42, Ex. M.)

178. But for the Agency's failure to properly employ the legally-mandated competitive procedures, SpaceX would have received an LSA.

WHEREFORE, SpaceX respectfully requests that the Court grant judgment in favor of SpaceX on Count III and (a) declare the LSA award decision violates the requirement for competitive procedures because the Agency based the awards on an EELV Approach factor evaluation that deviated from the stated criteria and SpaceX's proposed approach, and held the offerors to different standards; (b) enjoin any further investment by the Government under the LSAs and any further performance by ULA, Blue Origin, and Northrop under the LSAs; (c) reevaluate SpaceX's proposal in accordance with the stated evaluation criteria and award SpaceX an LSA contract, or revise the LSA Solicitation and reopen the competition and make a new award decision; and (d) provide such other relief as the Court deems just and appropriate.

COUNT IV: THE AGENCY BASED THE LSA AWARDS ON A FLAWED AND UNEQUAL EVALUATION UNDER THE SCHEDULE SUBFACTOR

179. SpaceX incorporates paragraphs 1 through 178 of the Complaint by reference.

180. This Court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

181. In the schedule evaluation, the Agency attributed a significant weakness to SpaceX's solution for Category C payloads based on the same evaluation errors made in the EELV Approach factor evaluation.

182. Specifically, the evaluators raised the following concerns: (i) [redacted]

[redacted]

[redacted] (ii) completion of the Starship certification and "the Government's use of the [Starship] is dependent [redacted]; and (iii) the potential future [redacted] (Final Evaluation at 43, Ex. J.)

183. The Agency improperly based each of these concerns on either a misreading of SpaceX's proposed approach or on an unstated criterion that conflicts with the LSA Solicitation.

184. First, contrary to the evaluation, SpaceX's proposal clearly states that [redacted] and will afford SpaceX [redacted] schedule margin, far surpassing the schedule margin provided by the three awardees for their Payload Category A/B and Payload Category C capabilities. (SpaceX Category C Integrated Master Schedule, Unique ID #596; Final Updated Technical Proposal (Excerpts) at III-42, Ex. M.)

185. Second, SpaceX's proposal also contradicts the Agency's second stated rationale, providing expressly that the third Starship certification flight [redacted]

[redacted]

(Final Updated Technical Proposal (Excerpts) at III-43, Ex. M (emphasis added).)

186. Finally, it was irrational to assess a significant weakness to SpaceX under the Schedule subfactor for not adopting the Government's current Category C concept of operations and infrastructure because the LSA Solicitation did not require such, but rather encouraged offerors to propose and leverage their commercial solutions. (LSA Solicitation at 1, Ex. A.)

187. The evaluators also misreported to the selection official that "the Starship would complete development in 2026," rendering SpaceX late for the purported "1 Sept 2025 need date."

[redacted]

(Final Evaluation at 42, Ex. J.) Based on this finding, the SSA wrongly concluded that the greater capability the Government would receive from the small Government investment percentage proposed by SpaceX was outweighed by risk because "there is significant likelihood that [SpaceX] will not meet Government timelines, so the investment will not result in needed capability for Category C in 2025." (Award Decision at 9, Ex. I.)

188. Notably, however, the evaluators based their developmental timeline predictions not on the supporting information SpaceX provided, but on the eleven years it took for "development of the Space shuttle, . . . between the start of 1971 and the end of 1981." (Final Evaluation at 42, Ex. J.) This reliance on the decades-old Space Shuttle experience as a benchmark to assess the realism of SpaceX's proposed schedule lacks a rational basis.

189. SpaceX, a modern aerospace company, uses development technology and capabilities that were barely beyond science fiction in the early 1970s and that enable far more accurate, in-depth analysis and faster development. For example, modern engineers employ much more advanced computer aided design and analysis methods, including three-dimensional computational fluid dynamics ("CFD"), to enable design and test cycles orders of magnitude faster than possible in 1971. These are key capabilities for launch vehicle design. The first practically-applicable CFD had only just been realized at the start of Shuttle development. Today, SpaceX engineers employ far more powerful analysis methods for rapid design iteration. (*See, e.g.*, Final Updated Technical Proposal (Excerpts) at III-16 to III-17, Ex. M.) Miniaturized electronics and more capable flight computers also eliminate many of the restrictions and challenges that made computer hardware and software such a challenging aspect of the Space Shuttle development.

190. Like the awardees, SpaceX is building on lessons learned and actual technology developed during other launch vehicle development programs, including the Shuttle program. For

[redacted]

example, the Shuttle provided valuable lessons [redacted] The ability to learn from prior programs will only accelerate Starship's development timeline in comparison to earlier development programs.

191. The Starship vehicle configuration is also considerably simpler than that of the Space Shuttle. Starship has fewer [redacted] than the Shuttle did. Starship also has a [redacted] than that of the Shuttle. This results in lower relative complexity of design, test, and manufacture —obvious and material facts that the evaluation ignores.[62]

192. Finally, SpaceX has a proven record of developing a launch vehicle and a spacecraft in less than half the 11 years used for the Shuttle. Specifically, SpaceX needed only [redacted] to develop the Dragon spacecraft and less than that to develop the Falcon 9 launch vehicle, much more recent and relevant development efforts than the Space Shuttle.[63] (*See, e.g.*, Final Updated Proposal (Excerpts), EELV Approach at II-3, Ex. P; Final Updated Technical Proposal (Excerpts) at III-60, Ex. M.) SpaceX demonstrated the ability to recover the first stage of its Falcon 9 within

[62] This may be illustrated by the stark difference in development cost. SpaceX projects Starship development costs at [redacted], which the Agency found reasonable. Based on the initial development commitment of $5.15 billion in 1971 dollars for the Space Shuttle development, the non-recurring cost of that program would have been approximately $31.7 billion in 2017 dollars. *See* Humboldt Mandell, *Space Shuttle Cost Analysis: A Success Story?*, ICEAA Annual Conference at 4 (June 10-24, 2014), http://www.iceaaonline.com/ready/wp-content/uploads/2014/06/BA-9-Handout-Space-Shuttle-Cost-Analysis-A-Success-Story.pdf.

[63] Of note, ULA's Vulcan launch vehicle and Blue Origin's BE-4 engine already have been under development for longer than it took SpaceX to develop and fly the Falcon 9, and ULA recently announced the first flight of Vulcan is still not anticipated until at least 2021. Jeff Foust, *ULA Now Planning First Launch of Vulcan in 2021*, Space News (Oct. 25, 2018), https://spacenews.com/ula-now-planning-first-launch-of-vulcan-in-2021/. This confirms that SpaceX can develop and fly launch vehicles significantly faster than its current competitors, let alone in comparison to 1970s era development efforts.

[redacted]

[redacted] of its first launch, has successfully recovered 30 boosters to date, and reflown these almost 20 times. (Final Updated Proposal (Excerpts), EELV Approach at II-3, Ex. P.) SpaceX has also completed more than 70 successful launches using the Falcon 9 and Falcon Heavy and berthed its Dragon spacecraft with the International Space Station 17 times.

193. SpaceX is not only using common processes and hardware between Falcon 9, Falcon Heavy, Dragon, and Starship, [redacted] Starship design is well underway with experienced professionals building on their successes. In addition, while a host of subcontractors developed most of the Shuttle's systems, SpaceX is developing Starship in house. SpaceX's experienced team, together with SpaceX's lack of reliance on major subcontractors, constitute additional distinguishing features from the Shuttle program, making it a particularly inappropriate comparison for schedule estimation. Again, the Agency failed to consider any of these obvious and material facts in its evaluation, rendering the schedule risk assessment arbitrary and capricious.

194. The weakness assigned to SpaceX's proposal under the Schedule subfactor—risk of development delays for launch systems capable of launching Category A/B payloads by 1 April 2022 from Cape Canaveral or Vandenberg—also lacks reason because it conflicts with SpaceX's proposal and the Agency's cost evaluation.

195. The technical evaluators concluded that SpaceX's vertical integration option would not provide for Agency validation [redacted] which the evaluators deemed [redacted] (Final Evaluation at 38, Ex. J.)

196. The evaluators based this finding on a misreading of SpaceX's Model Agreement. According to the evaluators, under SpaceX's proposed approach the Agency can exercise the vertical integration option for LC-39A only if SpaceX receives a launch services contract under

[redacted]

the Phase 2 RFP that contract requires vertical integration. (*Id.* at 37.) But the Model Agreement's terms expressly permit [redacted] (Final Updated Proposal (Excerpts), Model Agreement at § II.B.6.d, Ex. N.) To this end, SpaceX's proposal states [redacted] to provide greater schedule confidence." (Final Updated Technical Proposal (Excerpts) at III-76, Ex. M.)

197. Given that the Agency included the costs of both vertical integration projects in the Total Evaluated Price of SpaceX's proposed approach, the Agency could have exercised the East Coast option and funded the LC-39A vertical integration project sooner than April 1, 2020 in order to address the Agency's schedule concerns. Having elected not to do so, it was unfair to assess a weakness to SpaceX's proposed approach when this option was available and would not require "close Government monitoring." (Award Decision at 7, Ex. I.) SpaceX cannot reasonably be burdened with both an evaluated risk and the cost of the option to overcome that risk.

198. Finally, the evaluation of SpaceX's proposal against the LSA Solicitation schedule criterion was not only irrational, it was also unequal to the detriment of SpaceX, assured access to space and the EELV program.

199. The Agency improperly favored ULA's purported leveraging of legacy hardware when it gave ULA a Low risk rating under the Schedule subfactor (and a commensurate Low risk under the EELV Approach). ULA "received a Low risk rating with no weaknesses due to an approach that leverage[d] heritage designs and experience executing NSS launches." (Portfolio Recommendation at 21, Ex. D (emphasis added).) The plain language of the Portfolio Recommendation reveals that the most important, and only identified reason ULA received a Low risk rating is that ULA purportedly is leveraging its legacy hardware and experience.

[redacted]

200. It is difficult to understand how the Agency concluded that ULA's Vulcan leverages legacy systems because the Vulcan is completely different from the Atlas V. As the chart below shows, the two launch vehicles use completely different first stage engines and propellants, side boosters, second stage engines, structures, and software, and they have different dimensions and performance characteristics.[64]

Atlas V and Vulcan Centaur – Some of Their Differences

	Atlas	**Vulcan**
Propulsion		
1st Stage Engine	1x RD-180	2x BE-4 engines
1st Stage Propellant	Kerosene/Liquid Oxygen (LOX)	LNG / LOX
Cryogenic 1st Stage Fuel	No	Yes
1st Stage Hydrazine Bottle	Yes	No
Solid Side Booster	0-5x AJ-60; GEM 63	0-6x GEM 63XL
2nd Stage Engine	1-2x RL10A-4; or 1x RL10C-1	2x RL10C-X
Vehicle Dimensions		
Length	58.3 m – 62.2 m	58.3 m
Diameter	3.81 m	5.4 m
Mass	334,500 kg – 590,000 kg	Up to 546,700 kg
Structures		

[64] *See, e.g.*, Ed Kyle, *ULA Announces Vulcan*, Space Launch Report (Sept. 29, 2018), https://www.spacelaunchreport.com/vulcan.html; United Launch Alliance, *Developing Vulcan Centaur: The Strategic Partnerships Powering ULA's Next-Generation Vulcan Centaur Rocket* (Apr. 8, 2019), https://www.ulalaunch.com/docs/default-source/evolution/190408_ulapanel_alt_compressed.pdf; Eric Berger, *Getting Vulcan Up to Speed: Part One of Our Interview with Tory Bruno*, Ars Technica (Dec. 11, 2018), https://arstechnica.com/science/2018/12/talking-rockets-with-tory-bruno-vulcan-the-moon-and-hat-condiments/; United Launch Alliance, *Rocket Rundown: A Fleet Overview* (Apr. 2018), https://www.ulalaunch.com/docs/default-source/rockets/atlas-v-and-delta-iv-technical-summary.pdf; John Elbon, United Launch Alliance, *Engineering Limitless Possibilities* (Oct. 24, 2018), https://www.ulalaunch.com/docs/default-source/commercial-space/elbon-von-braun-symposium_compressed.pdf; United Launch Alliance, *Atlas V Launch Services User's Guide Revision 11* (March 2010), https://www.ulalaunch.com/docs/default-source/rockets/atlasvusersguide2010.pdf; Rich DeRoy & John Reed, United Launch Alliance, *Vulcan, Aces and Beyond: Providing Launch Services for Tomorrow's Spacecraft* (AAS 16-052), https://www.ulalaunch.com/docs/default-source/evolution/vulcan-aces-and-beyond-providing-launch-services-for-tomorrows-spacecraft-(american-astronomical-society-2016).pdf; United Launch Alliance, Atlas V, https://www.ulalaunch.com/rockets/atlas-v; Vulcan, Gunter's Space Page, https://space.skyrocket.de/doc_lau/vulcan.htm; Press Release, United Launch Alliance, United Launch Alliance Selects L3 Technologies to Design Next-Generation Avionics System (Dec. 4, 2017), https://www.ulalaunch.com/about/news-detail/2018/01/09/united-launch-alliance-selects-l3-technologies-to-design-next-generation-avionics-systems.

[redacted]

	Atlas	**Vulcan**
Build Pattern	Orthogrid	Isogrid
Dual GTO Capability	No	Yes
Fairing Boattail	Yes	No
2nd Stage Tank	3.05 m	5.4 m

201. The Vulcan thus clearly comprises almost entirely new components and systems—often acquired from entirely new subcontractors like Blue Origin and Northrop—and the Agency's own award document acknowledges that receiving timely certifications for new systems in a compressed time period is risky. (Award Decision at 3, Ex. I ("The Offeror's proposal only has *approximately* 10 months margin, which is less than required based on the Government's historic experience. Any anomalies or outstanding certification liens have the potential to result in delays to the Government's ILC.") (emphasis in original).)

202. At the same time, SpaceX did not receive the same credit for leveraging legacy Falcon 9 and Falcon Heavy hardware or for its own string of successful NSS launches. In short, if the sole reason ULA received a Low risk rating is owed to leveraging its legacy hardware and experience, SpaceX's risk rating should reflect the same assessment. But SpaceX did not receive a Low risk rating.

203. The Portfolio Recommendation also states that a Low risk schedule typically has a 14 month margin between the last certification flight and the ILC need date. (Portfolio Recommendation at 12, Ex. D.)

204. As noted above, SpaceX offered [redacted] of schedule margin yet was deemed Moderate risk.

205. Although ULA proposed approximately 10 months of margin between the last Category A/B certification flight and the required ILC date of April 2022 for its developmental launch vehicle, four months less than the typical Low risk schedule, the Agency deemed ULA's

[redacted]

proposed approach Low risk, purportedly because ULA has experience executing NSS launches. (Award Decision at 3, Ex. I; Portfolio Recommendation at 21, Ex. D.) SpaceX, however received no such credit for its NSS launch experience. Equally troubling, although the Agency evaluators used a flawed benchmark (the Shuttle) for assessing SpaceX's development schedule, the evaluators did not draw on ULA's own history of taking seven years to develop the Atlas V and Delta IV vehicles, a simpler development effort involving an existing vehicle compared to the development of the new Vulcan rocket. Seven years from ULA's October 2018 LSA award would extend well past the April 2022 ILC deadline for category A/B missions.

206. Blue Origin proposed 11 months of margin between the last Category A/B certification flight and the required ILC date of April 2022 for its developmental launch vehicle, and the Agency deemed Blue Origin's proposed approach Moderate risk even though Blue Origin has no experience whatsoever putting any kind of satellites into orbit, let alone performing national security missions. (Portfolio Recommendation at 25, Ex. D.)

207. Northrop proposed only 7 months of margin between the last Category A/B certification flight and the required ILC date of April 2022 for its developmental launch vehicle, and the Agency deemed Northrop's proposed approach Moderate risk even though Northrop has no EELV experience. (*Id.* at 12.)

208. The record does not explain these disparate results. In fact, even when given the opportunity to explain a rationale for assessing a higher risk to SpaceX despite having a greater proposed margin of time between Category A/B launches and Category C, the Agreements Officer could not do so. (*See generally* Agreements Officer's Decision, Ex. R.)

209. The Agency's approach to schedule risk here is unreasonable, unequal, and irresponsible. It is unreasonable because the Agency is opting to dismiss its own evaluation criteria

[redacted]

concerning the reasonable margin of time between launches. It is unequal because the Agency is eliminating the one offeror that has reasonably proposed a margin [redacted], and the Agency has held SpaceX to higher standard than the other offerors. Finally, it is irresponsible because the Agency is introducing undue risk and uncertainty to the EELV program, as evidenced by the Agency's decision to permit the LSA awardees to use the Atlas V—Russian engines and all—as a back-up launch vehicle when their developmental rockets are inevitably not ready in time for Phase 2 RFP Competition (undercutting a key stated Agency goal of the LSA Solicitation).

210. In short, the awardees' proposed LSA solutions present greater schedule risk for most of the missions, all scheduled and near term, while the Agency saddled SpaceX with unwarranted risk related to (at most) two unscheduled missions in the distant future. Yet, the Agency found the awardees presented the lesser risk under the Schedule subfactor and overall, an unreasonable and unequal result. *See CliniComp Int'l, Inc. v. United States,* 117 Fed. Cl. 722, 741 (2014) ("Such uneven treatment 'goes against the standard of equality and fair-play that is a necessary underpinning of the federal government's procurement process and amounts to an abuse of the agency's discretion.'").

WHEREFORE, SpaceX respectfully requests that the Court grant judgment in favor of SpaceX on Count IV and (a) declare the LSA award decision violates the requirement for competitive procedures because the Agency based the awards on an Schedule subfactor evaluation that deviated from the stated requirements, ignored SpaceX's proposed approach, and held the offerors to disparate standards; (b) enjoin any further investment by the Government under the LSAs and any further performance by ULA, Blue Origin, and Northrop under the LSAs; (c) reevaluate the LSA proposals in accordance with the stated evaluation criteria and on an equal

[redacted]

basis and make a new award decision; and (d) provide such other relief as the Court deems just and appropriate.

COUNT V: THE LSA AWARD DECISION VIOLATES THE ASSURED ACCESS TO SPACE REQUIREMENTS

211. SpaceX incorporates paragraphs 1 through 210 of the Complaint by reference.

212. This Court will grant relief where an offeror demonstrates that the agency's conduct in connection with a procurement or proposed procurement violates applicable statutes or regulations. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A), (D); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004); *Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018) (affirming decision sustaining protest for failure to follow U.S. Code commercial item provision).

213. The LSA evaluation and selection decision thwarts Congress's mandate for assured access to space.

214. Section 2273 of title 10 requires the Secretary of Defense to sustain the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering the NSS payloads, a robust space launch infrastructure and industrial base, and the availability of rapid, responsive and reliable space launches to improve responsiveness, lower costs, and maintain acceptable risks. 10 U.S.C. § 2773(b).

215. As revealed by a long history of Congressional hearings, legislation, and the clear terms of the LSA Solicitation, the entire purpose of the LSA competition was to ensure the Agency has at least two providers of domestic and commercial launch services. (LSA Solicitation at 26, Ex. A.)

[redacted]

216. Despite the stated goal to ensure access to two domestic commercial launch service providers, the Agency eliminated from its LSA portfolio the only bidder that can reasonably be identified as a domestic, commercial launch provider.

217. SpaceX is the only offeror with existing launch vehicles that have a meaningful share of the commercial launch market (indeed the greatest share of any family of launch vehicles) and do not rely on Russian engines. None of the other offerors proposed a launch vehicle that is even operational, let alone commercially available. As the Agency recognized in its evaluation, SpaceX "is the only provider proposing use of a launch vehicle currently flying missions today, and has demonstrated their ability to accommodate more than three times the Government requirement in a given year." (Final Evaluation at 5, Ex. J.)

218. Contrary to the stated purpose of the LSA Solicitation and the mandate of the FY 2018 NDAA,[65] the Agency chose to invest in development of new, Government-specific launch solutions. (LSA Solicitation at 1, Ex. A.) Two of the three selected contractors—ULA and Northrop—are historic government contractors with little to no material commercial launch experience. The other one—Blue Origin—has no orbital launch experience whatsoever.

219. In other words, the Agency set out, as Congress directed, to invest in a portfolio of commercial launch providers that could satisfy the urgent need to provide launch services without relying on Russian engines. Yet, based on a flawed and unequal evaluation, the Agency decided to invest in every offeror except the one company that provides commercial launch services without Russian engines. The Agency selected a portfolio of concepts, which the offerors

[65] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1605, 131 Stat. 1283, 1724 (2017).

[redacted]

promised to develop to the Government's specifications based on Government investment of hundreds of millions of dollars.

220. Despite the glaring irrationality of this approach and its divergence from Congress's direction, the Agency's contemporaneously documented award decision never recognizes this issue nor the stated purpose of the LSA Solicitation: the "goal of the EELV acquisition strategy is to leverage commercial launch solutions in order to have at least two domestic, commercial launch service providers that also meet NSS requirements, including the launch of the heaviest and most complex payloads." (LSA Solicitation at 1, Ex. A.).

221. Although the award decision never addresses the issue, the Agreements Officer's post-award explanation of what the Agency believes it means to "leverage commercial launch solutions" is baffling: despite the LSA Solicitation's express and repeated focus on leveraging commercial launch systems, the Agreements Officer's Decision refused to recognize any difference between a commercial launch system and a Government launch system. (Agreements Officer's Decision at 3, Ex. R ("I reject the false distinction between 'commercial' and 'Government-specific' launch systems in SpaceX's objection.").) This refusal to distinguish between commercial and Government-specific launch systems raises the question of how the LSA Solicitation's reference to "commercial launch solutions" satisfies the Congressional mandate approving the funding for the LSA acquisition.

222. The Agency's award decision also fails to account equally for one of the most problematic risks associated with ULA's proposed EELV Approach: ULA's launch system relies on critical components still being developed by the two other LSA awardees, Blue Origin and Northrop.

[redacted]

223. ULA and Blue Origin rely on a common first-stage engine (BE-4) and ULA and Northrop rely on the same solid side booster system and upper stage (RL10) engine. Consequently, whatever risks were identified with regard to development of those components must also be attributed to ULA. In addition, there is further risk associated with ULA's lack of oversight and control regarding the development and integration of those key components into the system ULA proposes. This failure to account fully for ULA's risks renders the evaluation unequal and prejudicial to SpaceX.

224. Blue Origin's LSA proposal was assessed multiple significant weaknesses and Moderate risk ratings, but none of those concerns were attributed to ULA, despite ULA's dependence on Blue Origin's performance. (*See* Portfolio Recommendation at 7-10, Ex. D.) And, even leaving aside the specific risks assigned to Blue Origin's proposed system, ULA's dependence on coordinating its solution with this third-party competitor presents an additional measure of risk that deserved consideration yet received none.

225. In addition, the ULA and Northrop launch systems both depend on solid side boosters being developed by Northrop, further multiplying ULA's reliance on a competitor's efforts. Added to this amalgamation, both ULA and Northrop depend on significantly upgraded RL10 engines from Aerojet Rocketdyne for their upper stages. Thus, while the evaluators praised ULA for "an approach that leverages heritage designs"—a finding which itself finds no record support—the evaluators ignored the risks associated with ULA's reliance on the development efforts of two of its competitors that ULA will not control. (Portfolio Recommendation at 21, Ex. D.)

226. The Agency justifies accepting this risk on the grounds that the LSA Solicitation did not expressly prohibit such an approach, and the current Government approach has relied on a

[redacted]

common propulsion system (the Delta IV and Atlas V use the same second stage engine): "I have determined that the risk associated with two Offerors relying on a single engine development does not warrant a different portfolio outcome. . . . [T]he Government did not include an RFP evaluation criteria related to the use of common engines as part of the overall portfolio selection because it was not considered critical in assessing the design approaches or the likelihood of achieving the Government's objectives." (Award Decision at 9, Ex. I.) The Agreements Officer's Decision reaches the same conclusion quoting directly from the LSA award decision. (Agreements Officer's Decision at 5, Ex. R.) Both rationales are contrary to the competitive procedures requirement.

227. The first results in an unequal evaluation in which the Agency assigned the most risk to SpaceX's proposed solution based on unstated criteria and ignores the fact that the LSA Solicitation required the Agency to consider risk of the EELV Approach and Schedule risk. The second ignores the fact that selecting multiple contractors with common systems undermines the primary LSA Solicitation goal (and Congress's mandate) of maintaining assured access to space because a failure involving the common system could ground multiple providers.

228. ULA and Blue Origin both require that Blue Origin—which to date has never performed an orbital launch—successfully develop the BE-4, and likewise, ULA and Northrop both require that Northrop successfully develop the GEM 63XL solid side booster. If the development of either the critical path BE-4 or GEM 63XL encounters problems (and propulsion systems are among the most challenging and highest risk systems in rocket development), then two of three providers in which the Government intends to invest hundreds of millions of dollars will be unavailable for launch.

[redacted]

229. For this reason, the LSA award decision is also at odds with the LSA Solicitation's objective, and Congress's mandate, "to ensure that there are two reliable sources for all national security launches." (LSA Solicitation at 2, Ex. A.)

WHEREFORE, SpaceX respectfully requests that the Court grant judgment in favor of SpaceX on Count V and (a) declare the LSA award decision violates the Congress's mandate for assured assess to space by not investing in the only domestic, commercial offeror and instead investing only in those providers that create the greatest risk by relying on development of common components and systems; (b) enjoin any further investment by the Government under the LSAs and any further performance by ULA, Blue Origin, and Northrop under the LSAs; (c) reevaluate the LSA proposals in accordance with the stated evaluation criteria and the Agency's needs and make a new award decision; and (d) provide such other relief as the Court deems just and appropriate.

VIII. PRAYER FOR RELIEF

SpaceX, accordingly, respectfully requests that this Court:

A. Order the declaratory and injunctive relief set forth above; and

B. Provide such other and further relief as the Court deems just and proper.

Dated: May 17, 2019

Respectfully Submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

/s/ Craig A. Holman

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[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2019, I caused a true and correct copy of the foregoing Complaint to be served by electronic delivery on:

Tanya B. Koenig
U.S. Department of Justice – Civil Division
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Email: tanya.b.koenig@usdoj.gov

Counsel for Defendant

/s/ Craig A. Holman

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: DynCorp International, LLC

File: B-418594; B-418594.2

Date: June 23, 2020

Paul A. Debolt, Esq., Emily A. Unnasch, Esq., Chelsea B. Knudson, Esq., and Taylor A. Hillman, Esq., Venable, LLP, for the protester.
Stuart B. Nibley, Esq., Amy Conant Hoang, Esq., Erica L. Bakies, Esq., and Sarah F. Burgart, Esq., K&L Gates LLP, for Technica, LLC, the intervenor.
Jonathan A. Hardage, Esq., and Alex M. Cahill, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that protester's proposal failed to demonstrate compliance with the solicitation's requirements, rendering the proposal ineligible for award.

DECISION

DynCorp International, LLC, of McLean, Virginia, protests the Department of the Army's issuance of a task order to Technica, LLC, pursuant to request for proposals (RFP) No. W52P1J-19-R-0005, for logistics support services at Fort Bliss, Texas. DynCorp challenges various aspects of the agency's evaluation and source selection process, including the agency's determination that DynCorp's proposal failed to comply with the solicitation's requirements regarding small business participation.

We deny the protest.

BACKGROUND

On July 12, 2019, the agency issued the solicitation to contractors holding basic ordering agreements (BOA) under the Enhanced Army Global Logistics Enterprise

(EAGLE) program.[1] The solicitation contemplated the award of a cost-plus-fixed-fee task order for a 1-year base period and four 1-year option periods; provided that the successful offeror will be responsible for providing maintenance, supply, and transportation services at Fort Bliss; and established the following evaluation factors: technical, small business participation, past performance, and cost/price. AR, Tab 16, RFP at 2.

The solicitation provided that proposals would be evaluated under the technical and small business participation factors on an acceptable/unacceptable basis; assigned qualitative confidence ratings under the past performance factor;[2] and evaluated for reasonableness and realism under the cost/price factor. *Id.* at 110. The solicitation further provided that award would be based on the proposal offering the lowest reasonable/realistic cost/price evaluated as acceptable under the technical and small business participation factors with a past performance rating of substantial confidence. *Id.*

Of specific relevance to this protest, in order to be evaluated as acceptable under the small business participation plan, the solicitation required large-business offerors[3] to "provide three individual subcontracting reports (ISRs) for recent contracts that included a subcontracting plan," *id*. at 86, and advised that the agency "will evaluate the Offeror's . . . achievement on each goal stated within the subcontracting plan as reported on each ISR." *Id.* at 117. Further, the solicitation warned that a proposal would be rejected as unacceptable under the small business participation factor, and ineligible for award, if it did not "provide[] documentation showing its small business goals were met or exceeded for each recent reference." *Id.* at 117-18.

On or before the September 3 closing date, proposals were submitted by seven offerors, including DynCorp and Technica. In evaluating the ISRs submitted with DynCorp's proposal under the small business participation factor, the agency concluded that the contracts identified by DynCorp had been performed by corporate entities with commercial and government entity (CAGE) codes[4] other than the CAGE code of the

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[1] The EAGLE program is used to provide logistics services at Army installations around the world. Agency Report (AR), Tab 1, Contracting Officer's Statement/Memorandum of Law at 1-2.

[2] The solicitation provided that the agency would assign past performance confidence ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. RFP at 115.

[3] There is no dispute that DynCorp is a large business for purposes of this procurement.

[4] CAGE codes are assigned to discrete business entities to dispositively establish the identity of a legal entity for contractual purposes. *See, e.g., Gear Wizzard, Inc.,*

(continued...)

entity identified in DynCorp's proposal as the offeror. In this regard, the solicitation required that each proposal identify the offeror by providing, among other things, the CAGE code assigned to the offeror. RFP at 70. The solicitation further stated: "an Offeror is defined as the prime BOA Holder submitting a proposal under this RFP." *Id.* at 88.

In its proposal, DynCorp stated that the corporate entity that was the offeror in this procurement was identified by CAGE code [redacted]. *See* AR, Tab 75, DynCorp Proposal Standard Form 33 at Block 15a; Tab 95, DynCorp Proposal Vol 4, attach 5. Nonetheless, the ISRs DynCorp submitted with its proposal identified contracts that had been performed by entities identified by CAGE codes [redacted], [redacted], and [redacted]. AR, Tab 126, DynCorp Small Business Participation Evaluation Report at 4. Because none of the ISRs provided as part of DynCorp's proposal corresponded with the CAGE code of the offeror, the agency concluded that: "[DynCorp's proposal] has not provided documentation showing compliance with reporting requirements and has not provided documentation showing its small business goals were met." *Id.* at 5. The agency elaborated that DynCorp's proposal "did not provide an explanation" as to why DynCorp provided ISRs related to other corporate entities and, on this record, evaluated DynCorp's proposal as unacceptable under the small business participation factor. *Id. at 4-5.*

Following completion of the agency's evaluation, DynCorp's and Technica's proposals were rated as follows:[5]

	Technical	Past Performance	Small Business	Evaluated Cost/Price
DynCorp	Acceptable	Unknown Confidence[6]	Unacceptable	$186,784,992
Technica	Acceptable	Substantial Confidence	Acceptable	$181,708,285

AR, Tab 130, SSDD at 9.

(...continued)
B-298993, Jan. 11, 2007, 2007 CPD ¶ 11 at 2; *National Found. Co.*, B-253369, Sept. 1, 1993, 93-2 CPD ¶ 143 at 2 n.1.

[5] In addition, two other proposals were rated acceptable under the technical and small business participation factors and received past performance ratings of substantial confidence. AR, Tab 130, Source Selection Decision Document (SSDD) at 9-10.

[6] The agency similarly found that DynCorp's past performance references related to contracts performed by corporate entities with CAGE codes other than that of the offeror, leading to an assessment of unknown confidence under the past performance evaluation factor. AR, Tab 124, Past Performance Evaluation Report at 5-7.

Thereafter, the source selection authority selected Technica's proposal for award.[7] This protest followed.

DISCUSSION

First, DynCorp challenges the agency's evaluation of DynCorp's proposal under the small business participation factor.[8] In this regard, DynCorp asserts that the agency's assessment was unreasonable because the agency "narrowly construed the use of CAGE codes." Protest at 34. While acknowledging that the solicitation specifically stated that the agency "will evaluate the Offeror's . . . achievement on each goal stated within the subcontracting plan," DynCorp complains that the agency's evaluation "unfairly penalized" DynCorp and "improperly relied on trivial differences" by not accepting DynCorp's proffer of performance by entities with CAGE codes that were "merely different" from the CAGE code of the offeror. *Id.* at 37, 41. Finally, DynCorp asserts that the agency's application of the solicitation provisions was "overly restrictive" and reflected "an unduly strict and formalistic reading" of those provisions. DynCorp Comments, Apr. 30, 2020, at 2, 18.

The agency responds that the terms of the solicitation, along with applicable authority, provided a reasonable basis for the agency not to consider the prior performance of corporate entities with CAGE codes that differed from the CAGE code DynCorp provided in its proposal to establish its identity. In this regard, the agency notes that the solicitation specifically provided that the agency would evaluate "the offeror's" prior achievement of subcontracting goals; that DynCorp's proposal was unambiguous in establishing its identity as the offeror by referencing CAGE code [redacted]; and that the ISRs DynCorp submitted to establish compliance with the solicitation requirements identified contracts performed by entities with CAGE codes that differed from that of the offeror. Finally, the agency notes that DynCorp's proposal contained no additional information or explanation that addressed the differing CAGE codes.

In reviewing protests challenging the evaluation of an offeror's proposal, or, as here, the rejection of a proposal based on the agency's evaluation, it is not our role to reevaluate proposals; rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accordance with the solicitation criteria and applicable

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[7] The solicitation advised offerors that the agency intended to make award without conducting discussions, RFP at 88, and, consistent with that provision, the agency did not conduct discussions with any offeror.

[8] Additionally, DynCorp protests the agency's evaluation under the past performance and cost/price factors. Since, as discussed below, we conclude that the agency reasonably evaluated DynCorp's proposal as unacceptable under the small business participation factor, rendering DynCorp's proposal ineligible for award, DynCorp is not an interested party to further challenge the procurement. *See*, *e.g.*, *JSF Sys., LLC*, B-410217, Oct. 30, 2014, 2014 CPD ¶ 328 at 4. In any event, we have reviewed the entire record here and find no basis to sustain DynCorp's protest.

statutes and regulations. *Distributed Solutions, Inc.*, B-416394, Aug. 13, 2018, 2018 CPD ¶ 279 at 4. It is an offeror's responsibility to submit a well-written proposal that clearly demonstrates compliance with the solicitation, and where a proposal fails to do so, the offeror runs the risk that its proposal will be rejected. *CACI Techs., Inc.*, B-296946, Oct. 27, 2005, 2005 CPD ¶ 198 at 5. In this regard, we have recognized that an agency's uncertainty regarding corporate identity may reasonably form the basis for rejecting a proposal, *see, e.g.*, *Tele-Consultants, Inc.*, B-414738.4, Jan 29, 2019, 2019 CPD ¶ 73 at 3; *W.B. Constr. & Sons, Inc.*, B-405874, B-405874.2, Dec. 16, 2011, 2011 CPD ¶ 28/2 at 4, and we have specifically noted that CAGE codes are assigned to discrete business entities for a variety of purposes (for example, facility clearances, pre-award surveys, and tracking the ownership of technical data) to dispositively establish the identity of a legal entity. *URS Group, Inc.*, B-402820, July 30, 2010, 2010 CPD ¶ 175 at 4; *Gear Wizzard, Inc.*, B-298993, Jan. 11, 2007, 2007 CPD ¶ 11 at 2; *National Found. Co.*, B-253369, Sept. 1, 1993, 93-2 CPD ¶ 143.

Here, as discussed above, the solicitation specifically required DynCorp to provide recent ISRs for contracts with subcontracting plans; provided that the agency would use those submissions to assess "the Offeror's . . . achievement on each goal stated within the subcontractor plan as reported on each ISR"; and required that DynCorp submit the CAGE code of the "offeror." RFP at 117. Further, there is no dispute that DynCorp's proposal established its identity by referencing CAGE code [redacted]. There is also no dispute that the ISRs DynCorp submitted for purposes of establishing the acceptability of its proposal under the small business participation evaluation factor were for contracts performed by entities with CAGE codes ([redacted], [redacted], and [redacted]) that did not match the CAGE Code Dyncorp used to identify itself in its proposal. Finally, DynCorp's proposal provided no additional information or explanation on which the agency could rely to conclude that the entities for which the ISRs were submitted were the same as the offeror.

On this record, we find no basis to question the agency's assessment that DynCorp's proposal was unacceptable under the small business participation evaluation factor and, accordingly, was ineligible for award. That is, the agency reasonably concluded that DynCorp's proposal failed to provide sufficient information for the agency to make an assessment of acceptability under the small business participation evaluation factor. Further, since the solicitation specifically provided that only proposals rated acceptable under the small business participation factor were eligible for award, there is no basis for DynCorp to further challenge the exclusion of its proposal from consideration.

The protest is denied.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Connected Global Solutions, LLC

File: B-418266.4; B-418266.7

Date: October 21, 2020

James Y. Boland, Esq., Emily A. Unnasch, Esq., Christopher G. Griesedieck, Esq., and Taylor A. Hillman, Esq., Venable LLP, for the protester.
Kara M. Sacilotto, Esq., Tracye Winfrey Howard, Esq., Brian G. Walsh, Esq., Samantha S. Lee, Esq., Cara L. Lasley, Esq., Lindy C. Bathurst, Esq., and Adam R. Briscoe, Esq., Wiley Rein LLP, for American Roll-on Roll-off Carrier Group Inc., the intervenor.
Erika L. Whelan Retta, Esq., and Jason Smith, Esq., Department of the Air Force, for the agency.
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the contracting officer's affirmative determination of the awardee's responsibility is sustained where the record shows that the awardee's statements offered in the course of a second responsibility determination--that two affiliates implicated in criminal wrongdoing would not contribute to contract performance--contradicted the awardee's technical capability proposal.

2. Protest that the agency conducted unequal discussions regarding technical capability proposals is denied where the record does not support the protester's contention that discussions with the awardee unfairly focused on the technical proposal while discussions with the protester focused on price.

3. Protest that agency failed to adequately document oral presentations and the related discussions is sustained where the record demonstrates that the agency did not maintain a record of the oral presentations adequate to permit meaningful review.

4. Protest challenging the agency's conduct of discussions regarding oral presentations is sustained when the record does not provide a basis for finding that the discussions were fair.

5. Protest that agency unreasonably evaluated oral presentations is denied where the evaluation was consistent with the solicitation and procurement law and regulation.

6. Protest that the agency disparately evaluated technical capability proposals is sustained where the differences in the assignment of strengths cannot be attributed to differences in the proposals.

7. Although the best-value tradeoff analysis methodology was reasonable and consistent with procurement law and regulation, the allegation that the analysis was flawed is sustained due to errors identified in the evaluation of the technical capability proposals.

DECISION

Connected Global Solutions, LLC (CGSL)[1], of Jacksonville, Florida, protests the award of a contract to American Roll-on Roll-off Carrier Group, Inc. (ARC)[2], of Parsippany, New Jersey, under request for proposals (RFP) No. HTC711-19-R-R004, issued by the Department of Defense, U.S. Transportation Command (USTRANSCOM), for complete, global household goods (HHG) relocation services for DOD service members and civilians and U.S. Coast Guard members. CGSL challenges the agency's determination that the awardee is a responsible contractor, asserts that the agency conducted unequal discussions regarding technical capability proposals, and challenges the agency's evaluation of oral presentations. The protester further argues that many aspects of the agency's technical evaluations were unreasonable and asserts that the agency performed an improper best-value tradeoff analysis.

We sustain the protest.

BACKGROUND

For the first time, USTRANSCOM is seeking a contractor to perform household goods relocation services now performed by the government. The contractor will provide all personnel, supervision, training, licenses, permits and equipment necessary to perform household goods relocation transportation and storage-in-transit (SIT) warehouse services worldwide. Upon receipt of the customer's relocation requirement, the contractor will prepare, pick-up, and deliver shipments for relocation transportation and

[1] CGSL is a wholly-owned subsidiary of Crowley Maritime Corporation. The protester states that Crowley created CGSL to address the specific needs of this contract, bringing "together the best performing providers of Military [household goods] services today." Protest at 7. As TRANSCOM's partner in support of the current Department of Defense (DOD) Freight Transportation Service contract, CGSL asserts that it "has a proven track record of providing innovative, effective, and economic solutions to challenging logistic problems, and successfully operating large, full-service logistics contracts." *Id*.

[2] ARC is an affiliate of Wallenius Wilhelmsen ASA, a large multi-national corporation, and ARC's relationship to its affiliate companies will be discussed in some detail below.

storage, and will deliver personal property no later than the required delivery date. Agency Report (AR), Tab 15, Conformed RFP attach. 1, Performance Work Statement (PWS) at 2. From start to finish, the successful offeror in this procurement will be fully responsible for the movement of HHG.

To procure these services, the agency issued this RFP in accordance with Federal Acquisition Regulation (FAR) part 12, acquisition of commercial items, and part 15, contracting by negotiation. The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity contract referred to as the Global Household Goods Contract (GHC). AR, Tab 3, Conformed RFP at 17. The RFP included a 9-month transition period, a 3-year base period, three 1-year option periods, two 1-year award terms, and an option to extend the contract for 6 months. *Id*. at 3-8. Award would be made to the offeror deemed responsible in accordance with FAR part 9, contractor qualifications, and whose proposal represented the best value to the government. *Id.* at 17.

The RFP contained four evaluation factors: business proposal, technical capability, past performance, and price. The solicitation provided for evaluation of the business proposal and past performance factors as acceptable or unacceptable. *Id*. An unacceptable rating under the business proposal factor would render a proposal ineligible for award. *Id*. The technical capability factor was comprised of the following four equally-weighted subfactors: operational approach; capacity and subcontractor management; transition/volume phase-in; and information technology (IT) services. *Id*. The technical capability factor and its subfactors would be evaluated on an adjectival scale ranging from outstanding to unacceptable.[3] Price would be evaluated, but not rated. The RFP advised offerors that, in the best-value tradeoff analysis, the technical capability and price factors would be evaluated on an approximately equal basis. *Id*. at 17.

Offerors were to provide their proposals in four volumes, corresponding to the four evaluation factors: business proposal, technical capability proposal, past performance proposal, and price proposal. *Id*. at 17-21.

[3] The RFP provided that an outstanding rating indicates a proposal with an exceptional approach and understanding of the requirements and contains multiple strengths; a good rating indicates a proposal with a thorough approach and understanding of the requirements and that the proposal contains at least one strength; an acceptable rating indicates a proposal with an adequate approach and understanding of the requirements; a marginal rating indicates a proposal that has not demonstrated an adequate approach and understanding of the requirements; and an unacceptable rating indicates that the proposal does not meet the requirements of the solicitation and, thus, contains one or more deficiencies and is unawardable. *Id.* at 18.

Business Proposal

The RFP required offerors to include in their business proposals all documents and information required by the solicitation but not part of the technical capability, past performance, or price proposals. *Id*. at 80. The solicitation required offerors to be registered in the System for Award Management (SAM) database prior to the proposal due date and to remain registered for the duration of contract performance. *Id.*

Large business offerors were required to include a small business subcontracting plan in their business proposals. The RFP required the plan to be compliant with the requirements in FAR 19.704, FAR clause 52.219-9, Defense Federal Acquisition Regulation Supplement (DFARS) 219.7, and DFARS clause 252.219-7003. The plan was required to address all of the elements in FAR 19.704(a)(1) through (15) and to include goals focusing on the types of services and dollars to be subcontracted to small business concerns. *Id.* at 81.

The RFP included "suggested subcontracting target goals," but offerors were "encouraged to propose percentage goals greater than those listed."[4] Once the contracting officer had determined the small business subcontracting plan met the RFP's requirements, the plan would be incorporated into the contract. *Id*. The PWS included a separate small business utilization requirement. It required the contractor to ensure that a minimum of 40 percent of the total acquisition value of the domestic work would be subcontracted to small businesses. PWS at 3.

Technical Capability Volume

The RFP provided that the agency would assign each technical capability subfactor a technical rating and a risk rating. RFP at 18. The technical ratings--outstanding, good, acceptable, marginal, or unacceptable--would consider the offeror's approach and understanding of the requirements and an assessment of the strengths, weaknesses, significant weaknesses, and deficiencies of the proposal.[5] The RFP advised offerors

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[4] The suggested goals were as follows: small business, 23 percent; small disadvantaged business, 5 percent; women-owned small business, 5 percent; veteran-owned small business, 3 percent; service-disabled veteran-owned small business, 3 percent; historically underutilized business zone (HUBZone) small business, 3 percent. *Id*.

[5] The RFP defined a strength as an aspect of an offeror's proposal that had merit or exceeded specified performance or capability requirements in a way that would be advantageous to the government during contract performance. A weakness was defined as a proposal flaw that increased the risk of unsuccessful contract performance. A significant weakness was defined as a proposal flaw that appreciably increased the risk of unsuccessful contract performance. A deficiency was defined as a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level. *Id*. at 18.

that the agency would incorporate into the contract the strengths identified during source selection that exceeded the PWS requirements. *Id*. The assessment of technical risk would consider the potential for disruption of schedule, degradation of performance, the need for increased government oversight, or the likelihood of unsuccessful contract performance. *Id.* The risk rating would be heavily dependent on whether a proposal contained weaknesses, significant weaknesses, or deficiencies. *See id*. at 18-19. Possible risk ratings were low, moderate, high, and unacceptable. *Id*. A low risk proposal "may contain weakness (es) which have little potential to cause disruption of schedule, increased cost or degradation of performance." *Id.* at 18. In contrast, a proposal with a moderate or high risk rating "contains a significant weakness or combination of weaknesses." *Id.* at 18-19.

Under the operational approach subfactor, the RFP required each offeror to submit a detailed operational approach demonstrating how the offeror would meet all the PWS requirements identified under that subfactor, including personnel administration (PWS paragraphs 1.2.1. and 1.2.3), pre-move services (PWS paragraph 1.2.5), physical move services (PWS paragraph 1.2.6), and post-move services (PWS paragraph 1.2.7). *Id.* at 81-82. USTRANSCOM would evaluate whether the offeror's technical approach demonstrated how the offeror would meet the relevant PWS requirements. Whether offerors were required to address each discrete task varied from paragraph to paragraph. *Compare* RFP at 82 (requiring contractors to address PWS paragraphs 1.2.5.1 and 1.2.5.3 "and all subparagraphs") *with* RFP at 82 (requiring contractors to address PWS paragraph 1.2.6.15 without requiring the contractor to address all subparagraphs).

Under the capacity and subcontractor management subfactor, the RFP required offerors to submit a detailed plan demonstrating how the offeror would manage move capacity and subcontractors throughout contract performance. *Id.* at 82. The plan was required to identify and describe the offeror's approach to: securing capacity during peak and non-peak seasons; soliciting subcontractors, and the criteria for award of subcontracts; managing subcontractor performance; soliciting small business participation to meet or exceed the solicitation's requirements; and managing international shipments requiring air and ocean shipments. *Id*.

Under the transition/volume phase-in subfactor, the offeror was required to describe how it would meet the RFP's requirements during the transition period and the volume phase-in period. For the transition period, offerors were to explain how they would transition from the agency's legacy IT system to the offeror's system, including related requirements such as training and cybersecurity. For the volume phase-in period, offerors were to describe their approach and timelines for becoming fully operational, and providing complete global HHG relocation services. *Id.* at 82-83. The solicitation advised offerors that the agency "intend[ed] to transfer responsibility for complete, global HHG relocation services" to the awardee via a phased approach. AR, Tab 4, RFP append. A, Transition Phase-In/Phase-Out at 3-4. The phase-in was to be conducted in four steps, each step comprising 25 percent of the requirement. *See id*.

Under the IT services subfactor, the offeror was required to provide a technical approach to meet the web-based, mobile access requirements of PWS paragraph 1.2.2. The offeror was also required to provide a functional/operational design diagram of the proposed IT system capabilities. Offerors selected for the competitive range would have an opportunity to demonstrate, through 1-hour oral presentations, their IT and mobile capabilities, and to illustrate and amplify the capabilities set out in their written proposals. The oral presentations would be evaluated based on the same criteria as the written proposals. *Id*. at 83. At the conclusion of each oral presentation, the agency would "hold a Question and Answer (Q&A) session" of not more than one hour "to address the Government's questions and/or concerns regarding the Offeror's presentation/demonstration." *Id.* at 84.

Past Performance Volume

Each offeror's past performance proposal was to contain no more than three past performance references for the offeror--that is, the prime contractor or joint venture--and no more than nine subcontractor past performance references. All references were to involve work performed within the previous three calendar years and similar in nature to the current requirement. *Id.* Offerors were also required to submit past performance documentation demonstrating their ability to meet small business goals under contracts for which a subcontracting plan was required within the previous three calendar years. *Id.* at 84. The agency's evaluation of past performance is not at issue in this protest.

Price Volume

Offerors were required to complete RFP attachment 2, pricing rate table. *Id*. at 20. The pricing rate table instructed offerors to propose peak and non-peak service prices for various total evaluated price (TEP) and non-TEP tasks, including domestic and international transportation, packing and unpacking, and storage. *See* AR, Tab 16, RFP attach. 2, Pricing Rate Table, amend. 6. The agency would evaluate price for completeness, and the proposed price would be considered complete if the offeror entered a proposed price in all cells with a light blue background in the pricing rate table. RFP at 20. To be eligible for award, an offeror's TEP must have been considered fair and reasonable using one or more of the techniques set forth in FAR 15.404-1(b)(2). Prices not included in the TEP, as identified in the pricing rate table, would also be evaluated for fairness and reasonableness. The RFP advised offerors that the agency might find a price proposal unacceptable if the prices proposed were materially unbalanced. The solicitation advised that unbalanced pricing exists when, despite a fair and reasonable TEP, the price of one or more line items is significantly overstated or understated and poses an unacceptable risk to the agency. *Id.*

The agency received proposals from seven offerors, including CGSL, ARC, and HomeSafe Alliance, LLC. AR, Tab 68, Competitive Range Determination at 1-2. Following the initial evaluation, four offerors, including those three firms, were included in the competitive range for the purpose of holding discussions. *Id*. at 33.

ARC's proposal provides that the firm would rely upon the resources available to ARC through its affiliates.[6] The first page of ARC's initial technical capability proposal states that ARC "brings leadership as well as a global logistics network with substantial infrastructure that includes [DELETED] of assets worldwide, and substantial financial resources to provide liquidity and investment capacity to be the single point of accountability to drive quality, performance, and value." AR, Tab 50, ARC Technical Capability Proposal at 9. ARC's technical capability proposal further states that "ARC's vast resources (including our affiliated Wallenius Wilhelmsen ASA global network)" will be combined with the assets and experience of its teaming partners. *Id.* at 14.

The agency held numerous rounds of discussions with the competitive range offerors. After final evaluations, the agency determined that ARC's proposal represented the best value to the agency. Contracting Officer's Statement (COS) at 16. The contracting officer then proceeded to consider ARC's responsibility. In this regard, the FAR provides that, prior to contract award, the contracting officer must make a determination that the prospective awardee is a responsible contractor. FAR 9.103(b). In making the responsibility determination, the contracting officer must determine, among other things, that the contractor has adequate financial resources and "a satisfactory record of integrity and business ethics." FAR 9.104-1(a), (d).

As noted above, the solicitation required each offeror to be registered in SAM. ARC's SAM registration listed Wallenius Wilhelmsen Logistics AS (WWLAS)--not Wallenius Wilhelmsen Logistics ASA--as its parent company.[7] AR, Tab 328, ARC Responsibility Determination and Finding, attach. 4, Integrity and Business Ethics Memorandum for Record (MFR) at 6. (The two firms' names differ by just one letter; a missing "A" from the end of the firm's name.) ARC disclosed no ethical misconduct on the part of WWLAS, its misidentified owner.

The contracting officer reviewed ARC's responsibility and found ARC to be a responsible contractor. AR, Tab 324, First ARC Responsibility Determination. Following the responsibility determination, the agency made award to ARC. HomeSafe and CGSL protested that award with our Office.[8]

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[6] ARC's Dun and Bradstreet Report estimated ARC itself had 50 employees. AR, Tab 327, ARC Responsibility Determination and Finding, attach. 3, Dun and Bradstreet Report at 5. ARC is a subsidiary of ARC Group Holding AS, and ARC's highest-level owner is Wallenius Wilhelmsen ASA. Intervenor's Comments at 7.

[7] For ease of reference, this decision will use the acronym WWLAS to refer to Wallenius Wilhelmsen Logistics AS. In contrast, the decision will use the words Wallenius Wilhelmsen Logistics ASA--or, as it was renamed, Wallenius Wilhelmsen ASA--to refer to that company.

[8] Those two protests were not the first in this procurement. The first protest was a preaward challenge to the terms of the solicitation. GAO dismissed that protest when

First Protest and Corrective Action

CGSL asserted that the agency's technical evaluation was unreasonable, the agency's questioning of offerors after oral presentations was unfair, the conduct of discussions was misleading and unfair, and the agency's best-value tradeoff analysis was flawed. CGSL Protest, B-418266.2. HomeSafe challenged, in particular, the agency's responsibility determination asserting that, at the time of proposal submission and contract award, ARC identified WWLAS as its "Immediate Owner" in SAM, and WWLAS had a record of criminal activity that ARC failed to disclose. HomeSafe Protest, B-418266.3 at 37.

Prior to the due date for the agency report on CGSL's protest, the agency took corrective action. USTRANSCOM's notice of corrective action committed the agency to "re-evaluate proposals and make a new award decision and perform a new responsibility determination for ARC if it is the new best value offeror." AR, Tab 316, Corrective Action Notice, June 9, 2020, at 2. The corrective action notice also stated that the agency would "take any other form of corrective action that it deems appropriate." *Id.* Our Office dismissed both of the pending protests. *See Connected Global Sols., LLC*, B-418266.2, June 16, 2020 (unpublished decision); *HomeSafe Alliance, LLC*, B-418266.3, June 16, 2020 (unpublished decision).

Evaluation Ratings

As part of the agency's corrective action, USTRANSCOM reevaluated proposals. COS at 16 (noting that the agency conducted corrective action in accordance with its Notice of Corrective Action). The source selection evaluation board (SSEB) report summarized the final evaluation ratings for the proposals of CGSL and ARC, as shown below:

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the agency took corrective action by agreeing to revise the solicitation to address an ambiguity. *See Hi-Line Moving Servs., Inc.*, B-418266, Dec. 11, 2019 (unpublished decision).

Technical Capability Subfactors		CGSL	ARC
Subfactor 1: Operational Approach	Technical Rating	Good	Outstanding
	Risk Rating	Low	Low
	Strengths	8	7
Subfactor 2: Capacity & Subcontractor Management	Technical Rating	Good	Outstanding
	Risk Rating	Low	Low
	Strengths	13	10
Subfactor 3: Transition/Volume Phase-In	Technical Rating	Good	Good
	Risk Rating	Low	Low
	Strengths	2	3
Subfactor 4: IT Services	Technical Rating	Acceptable	Outstanding
	Risk Rating	Low	Low
	Strengths	3	5
Total Evaluated Price (TEP)		$[DELETED]	$19,993,626,842

AR, Tab 320, SSEB Report at 84.

Upon receipt of the SSEB Report, the source selection advisory council (SSAC) conducted a comparative analysis of the proposals. The SSAC noted that CGSL proposed the second lowest TEP at $[DELETED], which the SSAC calculated was a [DELETED] percent difference in price from ARC's TEP of $19,993,626,842. AR, Tab 321, SSAC Report at 4. The SSAC Report then set out a lengthy comparison of the proposals of ARC and CGSL. *See id*. at 27-36. The SSAC concluded that there was a "discernable difference" between the two offerors' proposals under three of the four technical capability subfactors--operational approach, capacity and subcontractor management, and IT services--favoring ARC's proposal over CGSL's in all three. *Id*. The SSAC concluded that the "Government can support paying a [DELETED]% price premium for ARC over [CGSL] because the superior technical capability [of ARC's proposal] outweighs the cost difference." *Id.* at 36. The SSAC therefore "determined that ARC's proposal is a better value than [CGSL's] proposal." *Id*.

After completing its comparative analysis of all the competitive range proposals, the SSAC also determined that ARC provided the best value to the government among all the offerors, price and other factors considered. Notwithstanding the "monetary tradeoff" of ARC's higher TEP, the report concluded that ARC's proposal represented the best value because it offered "substantially improved quality of service for the customer." *Id*. at 55. As a result, the SSAC concluded that, "[c]onsidering all factors addressed in this report and in the SSEB Report, ARC is clearly the best value and is recommended for award." *Id*.

The source selection authority (SSA) concurred. He "concluded that the benefits manifested in ARC's higher rated proposal, which HomeSafe's lower rated technical proposal does not provide, represent a substantial margin of service superiority and merit the price difference." AR, Tab 335, Source Selection Decision Document (SSDD)

at 8-9. In his view, this "price difference" is not a "price premium" because ARC's superior technical capability outweighed the difference in price. *Id.* at 9. In the SSA's opinion, "the benefits identified in ARC's proposal are the most advantageous to the Government and warrant[] the Government's decision to pay a higher price for a much higher rated proposal which has demonstrable superior advantages for the customers." *Id.* Specifically, the SSA concluded that ARC's proposal would "dramatically improve the HHGs program through [DELETED]." *Id.* The SSA also called the strengths in ARC's proposal "game changers" that "represent tangible value to our personnel and program execution and as such warrant the additional price premium." *Id*. In the SSA's view, "ARC clearly represent[ed] the best value for the Government in this acquisition," and he directed that contract award be made to ARC. *Id*. at 10.

Corrective Active Communications and Second Responsibility Determination

As noted above, the other protester challenging the outcome of this competition, HomeSafe, identified ARC's incorrect SAM registration in its first protest. HomeSafe Protest, B-418266.3 at 37-38. During the agency's corrective action, in a series of communications between the agency and ARC, ARC explained that its SAM registration had erroneously identified WWLAS as its parent company. According to ARC, that registration had been incorrect by one critical letter, and ARC intended to identify its parent company Wallenius Wilhelmsen Logistics ASA. AR, Tab 328, ARC Responsibility D&F, attach. 4, ARC Integrity and Business Ethics MFR at 5. ARC corrected its SAM registration to reflect its intended parent company. *Id.* at 6. Over the course of several email exchanges, ARC provided the agency with hundreds of pages of additional documentation. *See* AR, Tabs 329 & 330, Integrity and Ethics MFR, attach. 1, ARC Subsequent Responsibility Questions, and attach. 2, ARC Response to Responsibility Questions.

Using this new, updated information, the contracting officer made a second responsibility determination for ARC. *See* AR, Tab 324, ARC Responsibility Determination and Finding. As part of her responsibility determination, the contracting officer conducted an inquiry into information HomeSafe provided in its protest "about Sherman Anti-Trust Act convictions regarding an entity, and its principals, which was identified as ARC's parent company, Wallenius Wilhelmsen Logistics AS (WWLAS)." AR, Tab 328, ARC Responsibility D&F, attach. 4, ARC Integrity and Business Ethics Memorandum for Record MFR at 1.

The contracting officer noted that FAR 9.104-6 required her to review and consider the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), including FAPIIS information from the SAM Exclusions and the Contractor Performance Assessment Reporting System. The FAR required the contracting officer to consider information on the potential contractor and any immediate owner, predecessor, or subsidiary identified for that potential contractor in FAPIIS, as well as other past performance information on the potential contractor.

The contracting officer also noted that from February 2000 to September 2012, executives of WWLAS were alleged to have participated in suppressing and eliminating competition by allocating customers and routes, rigging bids, and fixing prices for international ocean shipping for roll-on, roll-off cargo. *Id.* at 2. In 2016, WWLAS agreed to plead guilty and to pay a $98.9 million dollar fine for Sherman Anti-Trust Act violations. The contracting officer thus investigated the relationship between ARC and WWLAS. She noted that ARC attested that it has never been owned by, controlled by, or part of the corporate structure of WWLAS. *Id.* Instead, a merger in 2016-2017 resulted in ARC and WWLAS both being ultimately owned by Wallenius Wilhelmsen Logistics ASA; in 2018, this company was renamed Wallenius Wilhelmsen ASA. WWLAS--the entity that had pled guilty to criminal misconduct and paid the fine--was restructured and renamed Wallenius Wilhelmsen Ocean or WWO. Thus, at the time of proposal submission, ARC and WWO had a common owner--Wallenius Wilhelmsen ASA. *Id.* at 4.

The contracting officer noted that ARC's proposal stated that "ARC's vast resources (including our affiliated Wallenius Wilhelmsen ASA global network)" would be united with "the unparalleled assets, [DELETED] experience of our Teaming Partners." *Id*. at 4, *quoting* AR, Tab 50, ARC Technical Capability Proposal at 14. She therefore sought to determine whether--and asked ARC whether--WWO would have any meaningful involvement in the performance of the contract or whether the resources of that firm would affect ARC's performance. *Id.* ARC responded "no" to both inquiries. *Id.*

The contracting officer found that the affiliate with criminal misconduct was not a parent company, predecessor, or subsidiary of ARC, nor would that affiliate have any meaningful involvement in the performance of the GHC requirement. *Id*. at 9. For that reason, the contracting officer concluded that the past criminal misconduct of WWO would not preclude a finding that ARC was a responsible contractor.

In the course of her investigation, the contracting officer learned that EUKOR, a company that also is a subsidiary of yet another entity, Wallenius Wilhelmsen International Holding, had paid civil penalties regarding allegations that it violated section 10(a) of the Shipping Act, 46 U.S.C. § 41102(b). *Id*. at 7. The contracting officer noted that because EUKOR is a subsidiary of Wallenius Wilhelmsen International Holding, which, in turn, is a subsidiary of Wallenius Wilhelmsen ASA--ARC's ultimate parent company--ARC and EUKOR could be considered affiliates.[9] *Id.* As she did with WWO, the contracting officer asked ARC whether EUKOR would have any meaningful involvement in contract performance, or whether the resources of that firm would affect ARC's performance. Again, ARC responded "no" to both inquiries, and therefore the contracting officer did not further consider EUKOR's integrity. *Id.* at 8.

[9] Wallenius Wilhelmsen ASA states that WWO and EUKOR are two of its five major brands.

At the end of this review, the contracting officer concluded that none of the affiliates of ARC's parent company with a record of criminal wrongdoing would have meaningful involvement in contract performance, nor would the resources of those affiliates affect ARC's performance. She concluded, finally, that "American Roll-On Roll-Off Carrier Group Inc., along with its immediate parent company, ARC Group Holding AS, and its ultimate parent company, Wallenius Wilhelmsen ASA, have a satisfactory record of integrity and business ethics." *Id.* at 9.

The agency again made award to ARC, AR, Tab 336, Notice of Award, June 29, 2020, and this protest followed.[10]

DISCUSSION

The protester challenges numerous aspects of the agency's conduct of the procurement and the evaluation results. CGSL protests the agency's determination that the awardee is a responsible contractor and argues that the agency conducted unequal discussions regarding technical capability proposals. CGSL asserts three challenges regarding oral presentations: the documentation of oral presentations was inadequate; the conduct of discussions regarding oral presentations was unfair; and the evaluation was unreasonable. The protester also argues that many aspects of the agency's technical evaluations were unreasonable and asserts that the agency performed an improper best-value tradeoff analysis.

As explained below, we sustain the challenge to the agency's responsibility determination and deny the protest that the agency conducted unequal discussions regarding technical capability proposals. We sustain both the challenge to the documentation of oral presentations and the conduct of discussions regarding oral presentations, but, notwithstanding those findings, we deny the allegation that the agency unfairly evaluated oral presentations. We sustain some of CGSL's challenges to the evaluation of technical capability proposals, and we sustain the challenge to the best-value tradeoff analysis because of the flaws in the technical evaluation.[11]

Admission of Consultant to GAO'S Protective Order

As a preliminary matter, during the protest, we admitted to the protective order issued in connection with this protest a consultant retained by the intervenor's counsel, notwithstanding the protester's objection to the consultant's admission; the agency did not object. CGSL objected to the admission of the consultant--a cost expert--because CGSL had not yet challenged any aspect of the cost or price evaluation. Thus, the

[10] HomeSafe also protested the award of this contract. That protest is the subject of a separate decision.

[11] We considered all of CGSL's allegations. We address the allegations that provide a basis to sustain the protest, and we do not discuss some that we found to have no merit. Any allegation not addressed was found to not have merit.

protester argued, neither GAO nor the intervenor required the consultant's assistance. Protester's Objection at 1. The protester further argued that the information the consultant would access was highly confidential and competition sensitive, and the intervenor already had nine attorneys admitted to the protective order. *Id.* at 2.

Absent any special concern over the sensitivity of the material or any reason to believe that the admission of an expert would pose an unacceptable risk of inadvertent disclosure, there is a strong policy in favor of permitting protesters to choose the assistance they deem necessary to pursue their protests. *Global Readiness Enters*., B-284714, May 30, 2000, 2000 CPD ¶ 97 at 2 n.1 (admitting accounting expert to protective order over objection of agency and intervenor "that the protester failed to show how the expert would provide any additional and necessary assistance in pursuing the merits of its protest" when those objections were "insufficient"). The number of individuals admitted under the protective order is not one of the factors GAO balances when considering the admission of a consultant to a protective order. *See Restoration and Closure Servs., LLC*, B-295663.6, B-295663.12, Apr. 18, 2005, 2005 CPD ¶ 92 at 4 (identifying factors to consider).

The intervenor noted that the consultant had been admitted to 64 GAO and Court of Federal Claims protective orders--including five in the past two years when engaged by protester's counsel--and had never been denied admission to a protective order. Intervenor's Response to Protester's Objection at 1. Because CGSL provided no basis to reasonably conclude that the admission of the consultant would pose an unacceptable risk of inadvertent disclosure of protected information, we admitted the consultant to the protective order over the protester's objection.

USTRANSCOM's Responsibility Determination of ARC

CGSL, in its most recent protest, also challenges the responsibility determination made here. Specifically, CGSL asserts that the agency's affirmative determination of ARC's responsibility failed to consider publicly available, relevant information concerning the conviction of ARC's affiliate for engaging in an antitrust conspiracy to rig bids and fix prices. Protest at 25. The protester contends that ARC's proposal should have been rejected for failure to meet the responsibility criteria set forth in the RFP and in the FAR. *Id*.

As noted above, the FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of the prospective awardee's responsibility. FAR 9.103(b). In making the responsibility determination, the contracting officer must determine, among other things, that the contractor has "a satisfactory record of integrity and business ethics." FAR 9.104-1(d). Further, "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility." FAR 9.103(b). In addition, FAR 9.105-2(b) requires that "[d]ocuments and reports supporting a determination of responsibility or nonresponsibility . . . must be included in the contract file." FAR 9.105-2(b).

In most cases, responsibility determinations involve subjective business judgments that are within the broad discretion of the contracting activity. *Mountaineers Fire Crew, Inc.*, *et al*., B-413520.5 *et al*., Feb. 27, 2017, 2017 CPD ¶ 77 at 10. GAO will review challenges to an agency's affirmative responsibility determination when the protester presents specific evidence that the contracting officer may have unreasonably ignored information that, by its nature, would be expected to have a strong bearing on whether the agency should find the awardee responsible. 4 C.F.R. § 21.5(c); *see Southwestern Bell Tel. Co*., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 10-11. The information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *IBM Corp*., B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 11. When the offeror discloses a parent/subsidiary relationship, the contracting officer should consider the organizational structure of the parent/subsidiary, the parent's involvement in performance, and whether the subsidiary would operate independently. *FCi Federal Inc.*, B-408558.4 *et al*., Oct. 20, 2014, 2014 CPD ¶ 308 at 6-11.

CGSL contends that ARC's parent company--Wallenius Wilhelmsen ASA--was also half owner of WWLAS--the company that in 2016 pled guilty and agreed to pay $98.6 million in fines for its involvement in a conspiracy to fix prices on international cargo shipments. Protest at 26. The protester argues that the connections between these two companies were evident in publicly available documents. CGSL asserts that USTRANSCOM unreasonably failed to consider this information when assessing ARC's responsibility, and, instead, summarily concluded that WWLAS was a separate company with a similar name that has no ownership or control over ARC and is a separate corporate entity from Wallenius Wilhelmsen ASA. Protest at 27. CGSL argues that "the agency superficially determined that ARC's erroneous representation was a mere 'mistake' when ARC selected the wrong parent company from a drop-down menu in SAM, and that this was insufficient to raise questions about ARC's responsibility." *Id.* The protester contends that the agency's conclusion was unreasonable and required USTRANSCOM to disregard evidence indicating that ARC concealed information concerning its corporate ownership. *Id.*

Finally, the protester contends that the contracting officer "unreasonably concluded that ARC's affiliates will have no influence on contract performance and failed to account for ARC's clarifications that contradicted its proposal representations." Comments & Supp. Protest at 86. CGSL argues that ARC's proposal stated that ARC "unites" its "vast resources (including our affiliated Wallenius Wilhelmsen ASA global network) with the unparalleled assets, [DELETED] experience of our Teaming Partner." *Id*. at 87, *quoting* AR, Tab 195, ARC Technical Capability Proposal, at [DELETED].

Moreover, even though Dun & Bradstreet lists ARC as having only 50 employees across all of its locations, CGSL notes that ARC stated in its proposal that it is a "global logistics network with substantial infrastructure that includes [DELETED]" and "over [DELETED] worldwide." Comments & Supp. Protest at 87, *quoting* AR, Tab 195, ARC Technical Capability Proposal at [DELETED]; *see also* AR Tab 330, ARC's Responses to Responsibility Questions, at 19 (noting, in Wallenius Wilhelmsen's ASA 2019 Annual

Report, that the company has “9,400 dedicated employees in 29 countries worldwide, headquartered in Norway”). When responding to the contracting officer’s responsibility questions, ARC later denied that two affiliates implicated in criminal wrongdoing--WWO and EUKOR--would be meaningfully involved in contract performance. CGSL argues that ARC’s later statements contradicted the protester’s technical capability proposal, which “in fact touted the benefits that its ‘vast’ corporate resources and corporate ‘global network’ would provide.” Comments & Supp. Protest at 87.

As noted above, it is well-settled that GAO will review an affirmative determination of responsibility in limited circumstances only, one of which is that the contracting officer failed to consider available relevant information that, by its nature, would be expected to have a strong bearing on a finding of responsibility. Here, there was an apparent inconsistency between ARC’s technical capability proposal and the awardee’s responses to the contracting officer’s questions regarding the possible involvement of WWO and EUKOR in contract performance. Either ARC was accurate in its technical capability proposal when it represented that it was drawing on the vast resources of its affiliates or ARC was accurate in its statement that WWO and EUKOR would have no meaningful involvement in contract performance.

Faced with this inconsistency, we think it was incumbent upon the contracting officer to investigate further whether ARC would rely on assets of Wallenius Wilhelmsen ASA for contract performance. In the circumstances here, the yes or no questions that the contracting officer asked, and her reliance on them, were clearly insufficient. We sustain the challenge to the agency’s responsibility determination because the contracting officer left unresolved a conflict in the record concerning whether ARC’s contract performance would include the involvement of affiliates with past engagement in criminal activities.

Discussions Regarding Technical Capability Proposals

CGSL alleges that USTRANSCOM engaged in misleading and unequal discussions regarding technical capability proposals. Protest at 108. CGSL claims that USTRANSCOM “failed to lead CGSL to improve portions of its technical proposal, but instead focused heavily--and unnecessarily--on price.” *Id.* at 109. CGSL further alleges that discussions were unequal because “the ultimate focus” of the agency’s best-value tradeoff determination was not on price--the subject of the agency’s evaluation notices (ENs) to CGSL--but instead on distinguishing factors in offerors’ non-price proposals--the focus of the agency’s ENs to ARC. *Id.* at 110.

The contracting officer contends that “the focus of CGSL’s ENs was neither solely on price nor was the focus of ARC’s ENs solely on non-price proposals.” COS at 113. USTRANSCOM issued CGSL three past performance ENs, six technical capability ENs, one business proposal EN, and twelve price ENs. *Id.*, *citing* AR, Tab 320, SSEB Report at 53-54. The 6 technical capability ENs, issued over 3 rounds of discussions, identified 19 discussion items, 9 weaknesses, 4 significant weaknesses, and 36 deficiencies. COS at 113, *citing* AR, Tabs 76, 119, & 158, CGSL Evaluation Notices. The contracting officer argues that the “fact that CGSL received ten ENs for non-price proposals and

twelve ENs for the price proposal substantiates USTRANSCOM's assertion that the focus of CGSL's ENs were not solely related to price." COS at 113.

In comparison, USTRANSCOM issued ARC four past performance ENs, five technical capability ENs, one business proposal EN, and ten price ENs. COS at 113, *citing* AR, Tab 320, SSEB Report at 40. The 5 technical capability ENs, issued over 3 rounds of discussions, identified 11 discussion items, 5 weaknesses, 4 significant weaknesses, and 21 deficiencies. COS at 113, *citing* AR, Tabs 71, 113, and 153, ARC Evaluation Notices. The contracting officer contends that ARC's ten ENs for non-price factors and ten ENs for price supports USTRANSCOM's assertion that the focus of ARC's ENs was "not solely related to non-price proposals." COS at 114. Because USTRANSCOM did not focus solely on price during its discussions with CGSL or solely on non-price items during its discussions with ARC, the contracting officer argues, "it is apparent that USTRANSCOM did not engage in misleading and unequal discussions." *Id*.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, the discussions must be sufficiently detailed and identify the deficiencies and significant weaknesses found in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. FAR 15.306(d)(3); *General Dynamics Info. Tech., Inc.*, B-417616.2, B-417616.3, Mar. 31, 2020, 2020 CPD ¶ 132 at 11.

We agree with the agency. The number of ENs by factor issued to CGSL and ARC did not differ significantly; CGSL received one more technical capability EN than ARC did, and two more price ENs. Those differences, given the number of discussion items addressed with both offerors, are unremarkable. This record provides no basis on which to sustain a protest that the agency's discussions with offerors unfairly focused on price or non-price factors.

Discussions Regarding Oral Presentations

CGSL contends that USTRANSCOM failed to make video or audio recordings of the oral demonstrations and the subsequent discussions, and that the lack of a contemporaneous record makes it impossible for the agency to demonstrate that its conduct during the oral demonstration discussions was fair and reasonable. Comments & Supp. Protests at 79. USTRANSCOM assigned a significant weakness to CGSL's proposal for failing to demonstrate [DELETED]. *See* AR, Tab 119, CGSL ENs at 31, Item 28 (noting that "in the oral presentation, [DELETED] the offeror demonstrated did not show [DELETED]"). The protester contends that, had the discussions been fair, CGSL would have been better able to address that significant weakness during the discussions following oral presentations. Comments & Supp. Protest at 81-82.

As an initial matter, the agency did not consider these exchanges with offerors following oral presentations to be discussions. MOL at 77-78 (arguing that because questions were limited to "clarifications of what was being presented," the communications were not discussions). Discussions occur when an agency communicates with an offeror for

the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal. *Kardex Remstar, LLC*, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 4; *see* FAR 15.306(d).

Clarifications, in contrast, are "limited exchanges" between the agency and offerors that may allow offerors to clarify certain aspects of proposals or "to resolve minor or clerical errors." FAR 15.306(a)(2). Where a mistake is minor, apparent, and easily correctable, we see no basis to conclude that an agency held discussions. *Pioneering Evolution, LLC*, B–412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 11. Where an agency seeks confirmation that is has correctly identified an error in a proposal, and the agency has also surmised, on its own, the correct answer, GAO may consider that exchange to be clarifications. *See Safal Partners*, B-416937, B-416937.2, Jan. 15, 2019, 2019 CPD ¶ 20 at 8-9; *Barbaricum LLC*, Dec. 3, 2018, B-416728, B-416728.2, 2019 CPD ¶ 153 at 6-7. The agency's characterization of a communication as clarifications or discussions is not controlling; it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. *Kardex Remstar, LLC*, *supra*.

Section 15.102(e) of the FAR requires the contracting officer to maintain a record of oral presentations to document what the agency relied upon in making the source selection decision. The source selection authority selects the method of recording the oral presentations, and FAR 15.102(e) gives the following examples of methods that may be used: videotaping, audio tape recording, written record, government notes, copies of offeror briefing slides or presentation notes. Whatever method is chosen, FAR 15.102(e), 15-305(a), and 15-308 establish an obligation to provide a reasonably adequate record of such presentations and the evaluation thereof. *J&J Main., Inc.*, B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106 at 3. Moreover, the principle of government accountability dictates that an agency maintain a record adequate to permit meaningful review. *Checchi and Co. Consulting, Inc.*, B-285777, Oct. 10, 2000, 2001 CPD ¶ 132 at 6.

The protest record contains two documents, both in the form of notes, memorializing the oral presentations of ARC and CGSL. *See* AR, Tab 348, ARC IT Demonstration Notes; Tab 349, CGSL IT Demonstration Notes. Those notes are relatively sparse, unsigned, and the only date appears to be the date and time of the oral presentation. It appears from the evaluation worksheets that the only deficiency in CGSL's oral presentation was with the protester's failure to demonstrate [DELETED]. *See* AR, Tab 323, CGSL Technical Capability Worksheet, IT Services. The agency's contemporaneous record of the protester's oral presentation contains no assessment of the [DELETED]. *See* AR, Tab 349, CGSL IT Demonstration Notes. The record also provides no evidence that the agency posed any discussion questions to CGSL regarding its system's [DELETED]. *See id*. The agency thus has no contemporaneous evaluation record on which GAO can rely to find reasonable the assignment of a significant weakness to CGSL's proposal for failing to demonstrate [DELETED]. We therefore sustain the protest on the

basis that the agency failed to adequately document oral presentations and the subsequent discussions.

With regard to whether the question and answer period constituted fair discussions, the record, such as it is, provides evidence that the questions and answers were not merely clarifications but, in fact, unfairly conducted discussions. Here is one question and answer--with perhaps a follow up question--following CGSL's oral presentation, as recorded in the agency's notes:

> [Question:] [DELETED]
> [Answer:] [DELETED]
> [DELETED]? [DELETED].

AR, Tab 349, CGSL IT Demonstration Notes at 3. The notes here show that the agency asked CGSL an open ended question about [DELETED]. Presumably, this is information that the protester had not included in its oral presentation. The information provided by CGSL supplemented the discussion of [DELETED] in its technical capability proposal. *See* AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. This kind of exchange constitutes discussions.

Moreover, the existing documentation does not support USTRANSCOM's contention that the agency's conduct of discussions regarding oral presentations was fair. The RFP stated that the question and answer session that followed the oral presentations "may be used to address the Government's questions and/or concerns regarding the Offeror's presentation/demonstration." RFP at 84. The RFP provided no other information on how the agency would conduct discussions. CGSL asserts that the questions USTRANSCOM asked ARC and the protester during oral presentations reflected disparate treatment, because the agency "guided ARC, through the questions posed, to amplify all areas of its written proposal for which the agency had questions." Protest at 102. The contracting officer maintains, however, that the RFP provision imposed no obligation on the agency to ask specific questions of offerors. COS at 101. USTRANSCOM did not bear the responsibility of "guiding the Offeror in any area which was inadequately demonstrated," the contracting officer argues. Instead, the contracting officer contends that the agency treated both offerors fairly by addressing shortcomings in their oral presentations through evaluation notices. *Id*.

USTRANSCOM assigned a significant weakness to CGSL's proposal for failing to demonstrate its system's [DELETED]. *See* AR, Tab 119, CGSL ENs at 31, Item 28 (noting that "in the oral presentation, the [DELETED] did not show [DELETED]"). The contracting officer argues that the agency likewise assigned a significant weakness to ARC's approach regarding possible confusion about [DELETED]. *See* AR, Tab 113, ARC ENs at 17, Item 4 (noting that, "as shown in your IT demo," ARC's proposal indicated [DELETED], and that [DELETED] could be confusing to the service member). The contracting officer asserts that "it is obvious that USTRANSCOM reasonably addressed flaws identified during both Offerors' demonstrations in an equal manner." COS at 101.

While offerors must be given an equal opportunity to revise their proposals, and the FAR prohibits favoring one offeror over another, discussions need not be identical. Rather, discussions are to be tailored to each offeror's proposal. FAR 15.306(d)(1), (e)(1); *WorldTravelService*, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. When conducting oral presentations, the agency "shall provide offerors with sufficient information to prepare them." FAR 15.102(d). That information may include "[t]he scope and content of exchanges that may occur between the Government's participants and the offeror's representatives as part of the oral presentations, including whether or not discussions (*see* 15.306(d)) will be permitted during oral presentations." FAR 15.102(d)(6). The FAR requires that, "[i]f, during an oral presentation, the Government conducts discussions," the agency comply with FAR 15.306 and 15.307, the requirements for fair discussions during negotiated procurements. FAR 15.102(g).

According to the record of the oral presentations, USTRANSCOM asked CGSL no questions concerning the [DELETED]. *See* AR, Tab 349, CGSL IT Demonstration Notes. As noted above, it appears from the evaluation worksheets that the only deficiency in CGSL's oral presentation was with the protester's failure to demonstrate [DELETED]. *See* AR, Tab 323, CGSL Technical Capability Worksheet, IT Services. Discussions following the oral presentations were not to exceed one hour. RFP at 84. Given the time allotted after oral presentations for the question and answer period and the lack of other deficiencies noted in the CGSL's oral presentation, it was unreasonable for the agency not to provide CGSL an opportunity to address the agency's perception that the protester's [DELETED]. We sustain the protest that the agency's conduct of discussions regarding oral presentations was not meaningful or fair.

Evaluation of Oral Presentations

The protester contends that the agency unreasonably "downgrad[ed]" CGSL's technical capability proposal under the IT services subfactor when USTRANSCOM applied an unstated evaluation criterion. Comments & Supp. Protests at 66. CGSL contends that the RFP stated that the oral presentation would "augment" an offeror's written technical proposal, but that the agency elevated the oral presentation to an independent evaluation factor. *Id*.

The RFP advised offerors that "[o]ral presentations will be used to augment Offeror's written technical proposal" for the IT services subfactor and to "illustrate and amplify" IT and mobile capabilities "narrated in the written proposal." RFP at 83. Oral presentations would not substitute for the written portion of an offeror's technical proposal. *Id*. The RFP further advised that "[d]emonstration from the Offeror's production, test, or training system is preferred over slides only," and that "[s]lides may be used outlining the oral process presented." *Id*. CGSL demonstrated how its mobile application would work [DELETED]. Comments & Supp. Protest at 69. The agency evaluation of CGSL's oral presentation stated that "[CGSL's] written proposal indicated that its system is hosted [DELETED]; however, it was noted that the demonstration did

not illustrate or amplify that approach and was [DELETED] which provides some representation of the customer's experience." AR, Tab 321, SSAC Report at 35. CGSL argues that the agency "has admitted that CGSL met all applicable requirements for the demonstration," but that USTRANSCOM "nevertheless downgraded CGSL's technical rating purely due to [DELETED]." Comments & Supp. Protest at 69.

While solicitations must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors set forth in the solicitation, agencies are not required to specifically list every area that may be taken into account, provided such areas are reasonably related to or encompassed by the stated criteria. *MicroTechnologies LLC*, B-403713.6, June 9, 2011, 2012 CPD ¶ 131 at 4.

USTRANSCOM evaluated CGSL's technical capability proposal as acceptable under the IT services subfactor; the agency recognized that the proposal met the RFP requirements. AR, Tab 320, SSEB Report at 84. As noted above, the RFP advised offerors that the agency's preferred method of demonstration would be "from the Offeror's production, test, or training system," in order "to illustrate and amplify" the IT and mobile capabilities that were "narrated in the written proposal." RFP at 83. CGSL states that the "purpose of [CGSL's] demonstration was merely to illustrate features of the application, not demonstrate a final, full-functioning product." Comments & Supp. Protest at 69. In other words, CGSL did not intend to amplify, through its oral demonstration, its IT and mobile capabilities. Although CGSL argues that the agency penalized the protester for the manner in which it conducted its oral presentation--and not for the content of CGSL's proposal and approach to IT services--the manner adopted cannot be easily separated from the content provided. The agency requested amplification of the written proposal, which some methods of oral presentation will be better able to provide.

The agency announced a preference for a demonstration approach that amplified the written proposal, and the agency evaluated proposals consistent with that preference. Given that CGSL's purpose in its demonstration was not to illustrate and amplify its narrated capabilities, but, rather, to illustrate features of the application, there is no basis on which to find unreasonable the agency's evaluation rating of acceptable under this subfactor. The allegation that the agency employed an unstated evaluation criterion, or preference, is without merit.

Evaluation of Technical Capability Proposals

The protester raises multiple challenges to the agency's evaluation of the offerors' technical capability proposals. As discussed below, we find some of CGSL's arguments to be meritorious, and others to lack merit.

Meritorious Challenges

We sustain four challenges to the agency's evaluation of technical capability proposals. In the first three instances, the differences in the evaluation could not reasonably be attributed to differences in the proposals.

In reviewing protests challenging an agency's evaluation of proposals, our Office will not reevaluate proposals, but rather will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement statutes and regulations. *Id*. A protester's disagreement with the agency's judgments, without more, is insufficient to render the evaluation unreasonable. *Armedia, LLC*, B-415525 *et al*., Jan. 10, 2018, 2018 CPD ¶ 26 at 4. When a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the proposals. *See Paragon Sys., Inc.; SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9.

First, CGSL argues that USTRANSCOM unreasonably failed to assign the protester's proposal a strength for a [DELETED]. Comments & Supp. Protest at 31. USTRANSCOM assessed a strength to ARC's proposal for "demonstrat[ing] a [DELETED] for the customer to communicate quickly and easily with the Single Point of Contact (SPOC)." AR, Tab 250, ARC Strengths at 7. The agency reasoned that "[t]his benefits the Government because it provides convenience to the customer, while improving the service member's experience." *Id*. The agency claims that ARC demonstrated this [DELETED] in its oral presentation; however, the record of ARC's demonstration notes that ARC has a [DELETED], but not [DELETED]. *See* AR, Tab 348, ARC Demonstration Notes. ARC's technical capability proposal did not reference a "[DELETED]." *See* AR, Tab 195, ARC Technical Capability Proposal.

In contrast, CGSL proposed a [DELETED]. The protester's proposal states that its "communication tools include: [DELETED]." AR, Tab 172, CGSL Technical Proposal at [DELETED]. The documentation of CGSL's oral presentation noted that a [DELETED] is available, which is all that the notes of ARC's presentation confirmed. *See* AR, Tab 349, CGSL Demonstration Notes at 1 ("[c]an always use [DELETED]") and 4 ("[DELETED] is also available"). The proposals and demonstration notes are evidence that CGSL alone explicitly provided a [DELETED] feature. Because the agency considered a [DELETED] to be a distinct strength, the assignment of such a strength to ARC's proposal, on this record, was unreasonable, as was the agency's failure to assign that strength to CGSL's proposal.

Second, CGSL argues that the agency disparately evaluated proposals when it assigned ARC's proposal two strengths for [DELETED] but assigned CGSL's proposal only one comparable strength. Comments on Supp. AR at 26-27. ARC's proposal stated that when a service member sets up a profile on ARC's app, the service member will provide "[DELETED]." AR, Tab 195, ARC Technical Capability Proposal at [DELETED]. The agency assigned ARC's proposal two strengths--under the operational approach subfactor and the IT services subfactor--for offering the customer [DELETED]. AR, Tab 250, ARC Strengths FPR at 1, 6. The strength under the IT

services subfactor stated: "You proposed offering customer [DELETED]. This benefits the service member by offering [DELETED], which in turn improves the service member's experience during the move process." *Id.* at 6.

CGSL's proposal states that, in the introductory email sent to service members informing them of counseling options, CGSL "[DELETED]." AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. Additionally, CGSL's proposal states that "[DELETED]." *Id.* at [DELETED]. The agency assigned CGSL's proposal a single strength--under the operational approach subfactor--for [DELETED]; USTRANSCOM did not assign CGSL's proposal a second strength under the IT services subfactor. *See* AR, Tab 253, CGSL Strengths FPR at 1. The agency disparately evaluated proposals when it failed to assign a comparable strength to CGSL's proposal under the IT services subfactor for providing service members [DELETED].

Third, CGSL contends that the two proposals set forth a comparable level of detail regarding allocating work to [DELETED], and that the agency unreasonably assigned only ARC's proposal a strength. Comments & Supp. Protest at 18. The agency argues that differences in proposals led to the different evaluation outcomes. Supp. COS/MOL at 27.

CGSL's proposal states that, for domestic and international moves,[12] "[s]ervice providers are allocated shipments based [DELETED]." AR, Tab 172, CGSL Technical Capability Proposal at [DELETED] (emphasis added). Thus, whether the move was domestic, or international, CGSL would allocate [DELETED].

ARC's proposal states that for [DELETED] moves, "we use [DELETED]." AR, Tab 195, ARC Technical Capability Proposal at [DELETED] (emphasis added). The agency argues that ARC's business allocation will better focus on [DELETED], because ARC's use of "[DELETED]" relates only to [DELETED] moves, while CGSL's qualifier of "[DELETED]" applies to [DELETED] moves. Supp. COS/MOL at 27.

We disagree. The agency ignores the fact that, with respect to [DELETED] moves, ARC's proposal states that "[DELETED] are considered." AR, Tab 195, ARC Technical Capability Proposal at [DELETED]. ARC's proposal does not state the relationship between "[DELETED]" and thus offers the agency no basis to conclude that, regarding [DELETED] service, the awardee's proposal more consistently rewards [DELETED]. *See id*. For [DELETED] moves, CGSL proposes to allocate [DELETED], while ARC proposes to consider "[DELETED]," without specifying the weight ARC will accord either factor. Without knowing the relative importance of [DELETED], the agency has no basis

[12] Domestic and international moves require different resources. Capacity for domestic relocations is provided by independent owner-operators transporting HHG by truck. See AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. In contrast, international relocations depend on the availability of vessels and aircraft. *See id*. at [DELETED]. Offerors' proposals, therefore, provided different methods for securing capacity, including a difference in [DELETED].

to assume that, when ARC is allocating [DELETED], it will [DELETED]. The language of the two proposals provides no support for the agency's contention that ARC could reasonably be expected to have more success [DELETED].

The agency further asserts that ARC's proposal provided [DELETED] so that USTRANSCOM would be able to understand the [DELETED] process. Supp. COS/MOL at 27. We note, however, that CGSL's proposal provided a comparable [DELETED]. *See* AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. ARC proposed to [DELETED]. *See* AR, Tab 195, ARC Technical Capability Proposal at [DELETED] ([DELETED]). In contrast, the measures proposed by CGSL tended to be more focused on [DELETED]. *See* AR, Tab 172, CGSL Technical Capability Proposal at [DELETED] (for example, [DELETED]). The criteria by which CGSL proposes to [DELETED] seem more aligned with the RFP interest in "improved service to the customer." RFP at 81.

The agency further argues that ARC will be more successful at [DELETED] because ARC's proposal [DELETED]. Supp. COS/MOL at 27. The agency offers no rationale for why this would be of benefit to the agency. ARC's proposal does not explain how many [DELETED] it expects would [DELETED]. The proposal makes no mention of how [DELETED]. Again, as noted above, for all domestic moves, ARC's proposal fails to state what role [DELETED] will play in [DELETED], except that both [DELETED] will be considered. For domestic moves, it is thus not clear that the [DELETED] are even relevant.

The record provides evidence that the two proposals offered comparable levels of detail and fails to show that CGSL's proposed approach would be less likely than ARC's to [DELETED]. For that reason, we find the agency's failure to award a comparable strength to CGSL's proposal to be unreasonable.

Fourth, the protester argues that the agency unreasonably assigned ARC's proposal a strength for a [DELETED] reweigh function [DELETED]. Comments on Supp. AR at 28. The RFP requirement was for offerors to provide service members the opportunity to request reweighs of their household goods. RFP at 82, *citing* PWS § 1.2.6.12. The agency assigned ARC's proposal a strength for demonstrating "a [DELETED] reweigh request for the customer to communicate quickly and easily." AR, Tab 322, ARC Evaluation Worksheet, IT Services. ARC's proposal states that its [DELETED] permits service members to "[r]equest shipment reweighs," but the proposal says nothing about a [DELETED] reweigh request. AR, Tab 195, ARC Technical Capability Proposal at [DELETED].

The basis for the strength appears to be the evaluation worksheet, which states--under round two discussions--that "[t]he offeror demonstrated a [DELETED] reweigh request for the customer to communicate quickly and easily." AR, Tab 322, ARC Evaluation Worksheet, IT Services. That evaluation worksheet entry is an evaluation finding and not a contemporaneous record of the oral presentations. The notes from the oral presentation stated:

[DELETED]

AR, Tab 348, ARC Demonstration Notes at 1, 4.

The record of the oral presentation contains no evidence that a reweigh feature--let alone a [DELETED] reweigh feature--was demonstrated. At the time of the presentation, ARC's reweigh notification feature was a [DELETED], and it is not clear how a non-existent feature could have been adequately demonstrated, as the agency evaluation claims. It is a principle of government accountability that an agency maintain a record of oral presentations adequate to permit meaningful review. *Checchi and Co. Consulting, Inc.*, *supra*. Here, the record made at the time of the oral presentation does not support a finding that ARC's proposal exceeded a solicitation requirement. The statement in the evaluation that ARC demonstrated a [DELETED] reweigh feature is inconsistent with ARC's written proposal and the notes of the oral presentation. In this circumstance, therefore, USTRANSCOM unreasonably assigned ARC's technical capability proposal a strength for exceeding the RFP requirement that the contractor provide reweighs at the request of the service member.

Non-Meritorious Challenges

With respect to CGSL's challenges to the technical evaluation that we consider without merit, we set forth below four representative examples.

First, CGSL argues that the agency disparately evaluated proposals by assigning ARC's proposal a strength for [DELETED], but failing to assign CGSL's proposal a strength for essentially the same feature. Comments & Supp. Protest at 6-7. In response, the agency contends that the different evaluation findings stem from differences in proposals. *See* Suppl. COS/MOL at 5-6.

The agency argues that the protester's use of [DELETED] applies only to [DELETED], when the "the vast majority of household goods are [DELETED]." Supp. COS/MOL at 4-5. The record supports the agency's contention. CGSL's proposal references [DELETED] in a section entitled "[DELETED]." AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. The section discusses transport from [DELETED]. *See id*. at [DELETED]. CGSL's technical capability proposal states that, "[DELETED]." *Id*. at [DELETED]. CGSL's proposal contains a follow-on section labeled "[DELETED]," and that section contains no mention of [DELETED]. *See id*. at [DELETED]. In fact, there are no other mentions of [DELETED] in CGSL's proposal. ARC's proposal did not similarly restrict the use of [DELETED]. *See* AR, Tab 195, ARC Technical Capability Proposal. The record supports the agency's contention that the difference in the evaluation may be traced to differences in the offerors' proposals, and this allegation is without merit.

Second, CGSL argues its proposal should have been assigned a strength for reducing [DELETED]. Comments & Supp. Protest at 8-9. USTRANSCOM assigned ARC's proposal a strength for [DELETED], which resulted in an overall [DELETED]. AR, Tab 250, ARC Strengths FPR at 2. CGSL proposed a [DELETED] in a number of [DELETED], but never [DELETED]. *See* AR, Tab 134, CGSL Technical Capability Proposal, [DELETED]. CGSL's proposal [DELETED]. *See id*. at [DELETED]. The agency argues that ARC, unlike CGSL, proposed an overall [DELETED]. Supp. COS/MOL at 9. Accordingly, USTRANSCOM asserts that, based on differences in the two proposals, it was reasonable for the agency to assign ARC's proposal alone a strength for its approach. We agree, and we find this allegation to be without merit.

Third, CGSL alleges that ARC's proposal "received credit" for [DELETED] and for offering [DELETED], and that CGSL's proposal, which offered the same benefits, did not "receive credit." Comments and Supp. Protest at 10. ARC commits to [DELETED]; both [DELETED] than the PWS requirements. AR, Tab 195, ARC Technical Capability Proposal at [DELETED].

The agency contends that CGSL's assertion that it proposed the same, or similar, benefits as ARC, is not supported by CGSL's proposal. Supp. COS/MOL at 10. CGSL's proposal states "CGSL's team [DELETED]." AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. Those [DELETED] are consistent with the PWS requirements. *See* PWS at 15. CGSL's proposal also states: "[DELETED]." *Id.* at [DELETED]. USTRANSCOM contends that CGSL did not commit to [DELETED]; rather, the agency argues that [DELETED] is CGSL's historic performance that is not relevant to the protester's proposed commitment for this requirement. Given that CGSL proposed to meet, but not exceed, the [DELETED], we agree with the agency, and we find that this allegation, also, is without merit.

Fourth, CGSL contends that USTRANSCOM "read benefits" into ARC's proposal yet "refused to engage in a similar analysis with respect to CGSL's proposal" when comparing CGSL's proposed "[DELETED]" to ARC's "[DELETED]." Supp. Protest at 10-11. The agency assigned ARC's proposal a strength under the capacity and subcontractor management subfactor for proposing [DELETED]. AR, Tab 250, ARC Strengths FPR at 3; *see also* AR, Tab 195, ARC Technical Capability Proposal at [DELETED].

CGSL challenges USTRANSCOM's finding that this approach "[DELETED]." Supp. Protest at 11, *quoting* AR, Tab 322, ARC Technical Evaluation Worksheet, Capacity & Subcontractor Management (emphasis in protest omitted). CGSL further challenges the SSAC's conclusion that ARC's [DELETED] would help ARC and USTRANSCOM "[DELETED]" and "[DELETED]." Supp. Protest at 12, *quoting* AR, Tab 321, SSAC Report at 31. CGSL argues that ARC's proposal "did not expressly discuss [DELETED]." Supp. Protest at 12, *quoting* AR, Tab 321, SSAC Report at 31-32. The "only explanation" for the agency's findings, CGSL argues, is that "TRANSCOM applied a more rigorous standard of review to one proposal than the other, reading unstated details into ARC's approach and refusing to see any in CGSL's." Supp. Protest at 12.

The agency asserts that it reasonably evaluated different proposals differently. ARC's [DELETED]. AR, Tab 195, ARC Technical Capability Proposal at [DELETED]. [DELETED], which is responsible for helping "to [DELETED]." *Id*. at [DELETED]. In contrast, CGSL offered "[DELETED]." AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. As the agency notes, CGSL does not state [DELETED]. Supp. COS/MOL at 15; *see also* AR, Tab 172, CGSL Technical Capability Proposal at [DELETED]. Moreover, the [DELETED] proposed by CGSL concern only [DELETED]. The difference in the evaluation--with the agency assigning ARC's proposal, but not CGSL's, a strength--reflects meaningful differences in the proposals. Where, as here, the evaluation differences stem from differences in proposals, an allegation of disparate treatment is without merit.

Best-Value Tradeoff Analysis

Finally, CGSL challenges the reasonableness of the agency's best-value tradeoff analysis, asserting these flaws: the best-value tradeoff analysis was unreasonable because the source selection authority conducted no tradeoff at all between the proposals of CGSL and ARC; USTRANSCOM does not reasonably justify the $[DELETED] price premium; the agency did not give approximately equal weight to technical capability and price, emphasizing the former; the source selection was driven by ratings and not substantive proposal differences; and, the analysis was unreasonably based on alleged evaluation errors. Comments & Supp. Protest at 89-99. While we see no merit in any of these specific challenges to the best value tradeoff, because the tradeoff decision relies on conclusions that have been shown to be unreasonable, the current tradeoff decision cannot stand.

When a procurement provides for the award of a contract on a best-value tradeoff basis, it is the function of the selection official to perform any necessary price/technical tradeoff, that is, to determine whether one proposal's technical superiority is worth its higher price. *NCI Info. Sys., Inc*., B-412680, B-412680.2, May 5, 2016, 2016 CPD ¶ 125 at 9. The extent to which one is sacrificed for the other is governed only by the test of rationality and consistency with the stated evaluation criteria. *Id*. When price and technical capability are of approximately equal weight, we will not disturb awards to offerors with higher technical merit and higher prices so long as the result is consistent with the evaluation factors and the agency has reasonably determined that the technical superiority outweighs the price difference. *Financial & Realty Servs., LLC*, B-299605.2, Aug. 9, 2007, 2007 CPD ¶ 161 at 3.

The agency's rationale for any cost/technical tradeoffs made and the benefits associated with the additional costs must be adequately documented. FAR 16.505(b)(1)(iv)(D), (b)(7)(i). However, there is no need for extensive documentation of every consideration factored into a tradeoff decision, but rather the documentation need only be sufficient to establish that the agency was aware of the relative merits and prices of the competing quotations. FAR 16.505(b)(7); *Addvetco, Inc*., B-412702, B-412702.2, May 3, 2016, 2016 CPD ¶ 112 at 9. A protester's disagreement with an

agency's judgments about the relative merit of competing proposals does not establish that the evaluation was unreasonable. *NCI Info. Sys., Inc.*, *supra*.

The protester argues that the best-value tradeoff analysis was unreasonable because the source selection authority conducted no tradeoff at all between the proposals of CGSL and ARC based on the agency's conclusion that the proposals of CGSL and HomeSafe were approximately equal in technical merit and HomeSafe had a lower evaluated price than CGSL. Comments & Supp. Protest at 95-96. Under FAR 15.308, CGSL argues, the "the source selection decision shall represent the [source selection authority's] independent judgment." *Id*. at 96. The record shows that only the SSAC attempted a comparative analysis of the proposals of CGSL and ARC, not the source selection authority, the protester asserts. Consequently, CGSL contends that the source selection authority did not render an independent judgment about whether CGSL's proposal represented the best value to the government. *Id.*

Section 15.308 of the FAR provides that the source selection authority may use reports and analyses prepared by others, but that the source selection decision must represent the source selection authority's independent judgment. FAR 15.308; *CR/ZWS LLC*, B-414766, B 414766.2, Sept. 13, 2017, 2017 CPD ¶ 288 at 14. The source selection authority stated that he had read and accepted the findings of both the SSAC and the SSEB, and that he concurred with the source selection recommendation and rationale. *See* AR, Tab 335, SSDD at 1. That is sufficient to demonstrate that the selection decision represents the source selection authority's independent judgement. *CR/ZWS LLC, supra.*

Having concurred with the SSAC Report that the proposals of HomeSafe and CGSL were approximately technically equal, with CGSL having a higher evaluated price, the source selection authority performed a detailed comparison of the proposals of ARC and HomeSafe. AR, Tab 335, SSDD at 2, 8-9. He identified what he considered to be advantages to ARC's proposal that "represent a substantial margin of service superiority and merit the price difference." *Id*. at 8-9. While the source selection authority noted the difference in evaluation ratings--which favored ARC's proposal--he also considered the proposal content underlying those ratings and the specific benefits of ARC's higher price. For example, the source selection authority described how ARC's proposal under the IT services subfactor of the technical capability factor "[DELETED]." *Id*. at 7. After comparing the two proposals, and noting attributes of both, the source selection authority concluded that there was "a discernible difference between ARC and HomeSafe in their proposed technical approaches offered" under the IT services subfactor. *Id.* at 8.

In the source selection authority's view the "[DELETED]% difference in price" of ARC's proposal over HomeSafe's was worth the strengths in ARC's proposal that would "dramatically improve the [DOD] HHGs program." *Id.* at 9. The record confirms that the source selection authority considered not just the adjectival ratings but the advantages of the specific proposals. He was aware of the advantages of ARC's proposal and the price premium that those advantages would cost the agency, and he weighed those

competing factors. In short, the source selection authority performed a best-value tradeoff analysis consistent with the solicitation and determined that the technical superiority of ARC's proposal warranted its higher price over HomeSafe's. AR, Tab 335, SSDD at 9.

While we see no basis to sustain the specific challenges raised by CGSL to how the agency conducted the best-value tradeoff, we note that the tradeoff analysis was nonetheless flawed because of the errors in the underlying evaluation identified above.

PREJUDICE

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. Here, given the pervasive errors in the conduct of the competition and the evaluation of proposals, CGSL has established the requisite competitive prejudice to prevail in its protest.

RECOMMENDATION

We sustain the challenges to the agency's responsibility determination, the conduct of discussions, the conduct and the documentation of oral presentations, the evaluation of technical capability proposals, and the best-value tradeoff analysis. We recommend that the agency conduct and properly document a new round of oral presentations, and include in that record documentation of the discussions conducted with each offeror. We recommend that the agency reevaluate technical capability proposals and perform a new best-value tradeoff decision. If the agency again determines ARC's proposal to represent the best value to the agency, we recommend that the agency perform a new responsibility determination consistent with this decision. In addition, we recommend that the agency reimburse CGSL the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). CGSL's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Ekagra Partners, LLC

File: B-408685.18

Date: February 15, 2019

Antonio R. Franco, Esq., and Kathryn V. Flood, Esq., PilieroMazza PLLC, for the protester.
Stephen O'Neal, Esq., General Services Administration, and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging a solicitation term that limits the number of experience projects that may be submitted in a mentor-protégé joint venture's proposal for a large business mentor firm is denied where the solicitation term is not prohibited by procurement laws or regulations and where the agency provides a reasonable basis for its inclusion.

2. Protest challenging a solicitation term as unduly restrictive of competition where the term prohibits a mentor-protégé joint venture from submitting a proposal as part of a contractor teaming arrangement that includes additional subcontractors is sustained where, although the solicitation term is not prohibited by procurement laws or regulations, the agency does not provide a reasonable basis for its inclusion.

DECISION

Ekagra Partners, LLC, of Leesburg, Virginia, a small business, challenges the terms of request for proposals (RFP) No. GS00Q-13-DR-0002, which was issued by the General Services Administration (GSA), Information Technology Service, for award of new contracts in the agency's One Acquisition Solution for Integrated Services (OASIS)--small business pool of government-wide multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. The protester argues that the solicitation includes terms that improperly restrict competition by limiting the ways in which a mentor-protégé joint venture may submit proposals.

We sustain in part and deny in part the protest.

BACKGROUND

GSA administers seven groups of government-wide multiple-award IDIQ OASIS contracts that are set aside for small business. Contracting Officer's Statement (COS) at 1. These seven groups of IDIQ contracts are referred to as pools. Id. These groups of contracts allow agencies to place orders for flexible and innovative solutions for complex professional services. Agency Report (AR), Tab 2, RFP, at 10.[1] This protest concerns the OASIS small business pool 1 contracts. Id. at 7. The agency initially awarded contracts in this pool in 2014; the current solicitation is an "open season On-Ramp," which allows additional firms to compete for the award of contracts. Id. The agency states that it intends to award 190 new IDIQ contracts in pool 1. Id.

GSA issued the RFP on September 10, 2018. The RFP advises that awards will be made to the offerors whose proposals are found to be the most highly rated under the non-cost/price factors and that offer a fair and reasonable cost/price. Id. at 105. For the non-cost/price factors, the proposals are to be evaluated based on factors in two categories: (1) minimum requirements, which are to be evaluated on an acceptable/unacceptable basis, and (2) self-scored evaluation criteria, under which offerors indicate whether they qualify for points. Id. at 108-09. The scored non-cost/price factors are relevant experience; past performance; and systems, certifications, and clearances. Id. at 117-118. The RFP advises that the non-cost/price factors, when combined, are significantly more important than cost/price. Id. at 105.

As relevant here and discussed below, offerors must provide information regarding relevant experience for projects in three categories: (1) pool qualification projects, which "demonstrate an Offeror's experience in performing complex professional services and the responsibility for the overall performance and completion of the entire Project as a Prime Contractor" for a North American Industry Classification System or product service code listed in the solicitation; (2) relevant experience (primary) projects, which "demonstrate an Offeror's experience in performing complex professional services and the responsibility for the successful completion of the entire Project as a Prime Contractor"; and (3) relevant experience (secondary) projects, which "demonstrate an Offeror's experience in managing multiple customers and/or managing in a multiple award contracting environment similar to the OASIS [small business] Program and the responsibility for the successful completion of the entire Project as a Prime Contractor." Id. at 75, 86, 94-95.

The RFP states that offerors' proposals must demonstrate a minimum number of relevant experience projects to be found acceptable under the minimum requirements. RFP at 75, 85-86, 94-95. Proposals that meet the minimum relevant experience requirements will be eligible to receive self-scored points based on various criteria, such as the type and value of work performed. Id. at 77-78, 89, 95. For offerors that submit

[1] Citations to the RFP and its amendments are to the PDF pages in the documents provided by the agency.

proposals as part of a mentor-protégé joint venture, the RFP states that they may identify projects that were performed by the individual joint venture members. Id. at 83; AR, Tab 5, RFP amend. 3, at 317. For such offerors, however, the RFP limits the number of projects that may be identified as being performed by a large business mentor firm. Id. Ekagra filed this protest prior to the closing date of November 13.

DISCUSSION

Ekagra raises two primary challenges to the terms of the solicitation: (1) the RFP places unreasonable limits on the extent to which mentor-protégé joint venture offerors can rely on the experience of the large business mentor firm, and (2) the RFP improperly prohibits joint venture offerors from forming a contractor teaming arrangement whereby the offeror relies on the experience of subcontractors that are not one of the joint venture members. Protest at 4-6; Protester's Comments, Dec. 20, 2018, at 2-7. For the reasons discussed below, we find no basis to sustain the protest regarding the first argument, but sustain the protest regarding the second argument.

In preparing a solicitation, a contracting agency must specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs, or are otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester challenges a solicitation term or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. See Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation term to ensure that it is rational and can withstand logical scrutiny. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. Protein Scis. Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

Offeror Experience

Ekagra argues that the solicitation's relevant experience factor improperly limits the number of projects that may be submitted by the large business mentor of a mentor-protégé joint venture offeror. Protest at 1, 4-5; Protester's Comments, Dec. 20, 2018, at 3-4. The protester contends that this restriction is inconsistent with statutory and regulatory provisions regarding mentor-protégé small business joint ventures, and that the agency does not provide a reasonable explanation for this restriction. Id. For the reasons discussed below, we find no basis to sustain the protest.

The Small Business Administration's (SBA) small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts."

13 C.F.R. § 125.9(a) & (b). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. Id. § 125.109(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for "any government prime contract or subcontract, provided the protégé qualifies as small for the procurement." Id. § 125.9(d)(1); see also 13 C.F.R. §§ 121.103(b)(6) & (h)(3)(ii).

The solicitation for the OASIS small business pool 1 contracts that were awarded in 2014 required mentor-protégé joint venture offerors to demonstrate experience for the joint venture itself, and prohibited offerors from relying on the experience of the individual joint venture members. COS at 2-3; see Aljucar, Anvil-Incus & Co., B-408936, Jan. 2, 2014, 2014 ¶ 19 at 5-6 (denying protest challenging OASIS solicitation terms that limited the evaluation of the experience of joint venture offerors to work performed by the joint venture, itself). Subsequent to the 2014 OASIS contract awards, Congress amended the Small Business Act to require agencies to consider the experience of small business joint venture members:

> When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(q)(1)(C). SBA promulgated regulations implementing this statutory provision, including the following:

> When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

13 C.F.R. § 125.8(e).

The solicitation here requires offerors to submit projects that demonstrate experience in two categories: (1) pool qualification projects, which requires two projects, and (2) relevant experience (primary) projects, which requires a minimum of three and a maximum of five projects. RFP at 75, 86. For the third experience category, relevant experience (secondary) projects, the solicitation allows, but does not require, offerors to submit projects to receive additional self-scored credit in the following areas: (1) a

maximum of five projects with mission spaces[2]; and (2) a maximum of 10 projects with multiple award IDIQ contracts or blanket purchase agreements. Id. at 95, 97.

As relevant to the protester's arguments, the RFP limits the number of projects that may be submitted by a large business mentor in a mentor-protégé joint venture, as follows:

> L.5.1.10. Contractor Team Arrangement [CTA], if applicable
>
> * * * * *
>
> (d) Offerors who are an existing Partnership or Joint Venture CTA as defined in [Federal Acquisition Regulation (FAR)] 9.601(1) or FAR 9.601(2) may submit a proposal under this Solicitation subject to the following conditions:
>
> 2. .....For any approved Mentor-Protégé Joint Ventures in accordance with 13 CFR 125.8 where the Mentor is not a Small Business under the applicable size standard, that Mentor may submit a maximum of one (1) Pool Qualification Project as defined in L.5.1.2, maximum of two (2) Relevant Experience (Primary) Projects as defined in L.5.3.1, a maximum of two (2) Relevant Experience (Secondary) Projects as defined in Section L.5.3.3.1, and a maximum of two (2) Relevant Experience (Secondary) Projects as defined in section L.5.3.3.2.

RFP amend. 3 at 317.

Ekagra argues that the solicitation's limitation on the number of projects that may be submitted by a large business mentor firm is unreasonable because it "specifically hinders otherwise qualified and capable small businesses, i.e., the mentor-protégé joint ventures, from presenting their most competitive offers for the Solicitation." Protester's Comments, Dec. 20, 2018, at 3 (emphasis omitted). In this regard, the protester notes, as discussed above, that SBA's regulations provide that an approved mentor-protégé joint venture is considered small for procurements where the protégé firm meets the size requirements. 13 C.F.R. § 125.9(d)(1); see also 13 C.F.R. § 121.103(h)(3)(ii). The protester argues, therefore, that there is no reasonable basis for the agency to distinguish between the mentor and protégé members of a joint venture for purposes of evaluating experience because the joint venture itself would be considered small.

GSA argues that the evaluation criteria are consistent with the requirements of the Small Business Act at 15 U.S.C. § 644(q)(1)(C) and SBA's regulations at 13 C.F.R. § 125.8(e) because the solicitation provides for the consideration of the experience of

[2] A mission space is a "U.S. Federal Government Agency whose primary mission falls under Protection and Defense, Quality of Life, Commerce, Natural Resources," or other defined mission. RFP at 95.

each joint venture partner. See Memorandum of Law (MOL) at 6. The agency contends, however, that the applicable statutes and regulations do not require that the experience of mentor and protégé members of a joint venture be given equal consideration.

Our Office requested that SBA provide its views on the issues raised in this protest. With regard to the evaluation of experience, SBA advises that "neither SBA regulations nor the Small Business Act specifically address the relative consideration that an agency must give to the past performance of a large business mentor in a mentor-protégé joint venture, as compared to a small business protégé." SBA Comments, Feb. 1, 2019, at 1. SBA further states that, although it may address this matter in future regulations, "presently SBA's regulations are limited to stating that the agency 'must consider work done individually by each partner to the joint venture,'" including a large business mentor. 13 C.F.R. § 125.8(e)." Id.

We agree with GSA and SBA that nothing in the statutes or regulations discussed above prohibits the terms of the solicitation. Although SBA regulations require agencies to consider the experience of both the mentor and protégé members of the joint venture, the regulations neither mandate a specific degree of consideration for the mentor and the protégé firm, nor prohibit an agency from limiting the experience that may be submitted by one of the members. In the absence of statutes or regulations that specifically prohibit this solicitation term, we look next to the agency's rationale for its inclusion.

GSA states that the solicitation limits the amount of experience that can be credited to a large business mentor because allowing a mentor-protégé joint venture to "rely primarily upon the qualifications of their Other Than Small team members' experience, without any limitation or restriction," gives the joint venture a "fundamentally unfair competitive advantage" as compared to small businesses that are not part of such joint ventures. COS at 4. The agency further states that the limitation on the experience that can be credited to a large business mentor firm is necessary to ensure that the small business protégé is capable of performing the work. Id. at 5. In this regard, GSA notes that SBA's regulations require a small business protégé to be the majority owner and managing partner of a mentor-protégé joint venture. Id.; MOL at 8 (citing 13 C.F.R. § 125.8(b)(2)). The agency states that, "[g]iven the tremendously important responsibilities assigned to the Protégé in performance of contracts awarded to a Mentor-Protégé [joint venture]," the agency believes there is "significant predictive value in ensuring the [experience of the] Protégé is adequately considered. . . ." COS at 5.

Ekagra contends that GSA could take an alternative approach to the evaluation of experience. For example, the protester argues that, because a large business mentor firm may perform up to 60 percent of the work awarded to a mentor-protégé joint venture, the agency could limit the mentor's experience to no more than 60 percent of the overall evaluation weight. Protester's Comments, Dec. 20, 2018, at 4 (citing 13 C.F.R. § 125.8(c)(3)).

Based on the record here, we agree that GSA has set forth a rational basis for the challenged solicitation term. We think the agency reasonably explains that limiting the amount of experience that may be credited to a large business mentor ensures that the agency will be able to meaningfully consider the experience of the protégé member of the joint venture. Although the protester contends that GSA could take a different approach to the weighting of the mentor's experience, the protester's disagreement with the agency's judgment, without more, does not establish that the solicitation term is unreasonable. We therefore find no basis to sustain the protest.

Contractor Teaming Arrangements

Next, Ekagra argues that the RFP improperly limits the manner in which an offeror competing as a CTA may submit a proposal. Specifically, the protester argues that the solicitation unreasonably prohibits joint ventures, including mentor-protégé joint ventures, from proposing as a CTA that uses additional subcontractors that are not members of the joint venture, and thereby relying on their experience. Protest at 1, 6; Protester's Comments, Dec. 20, 2018, at 5-7. For the reasons discussed below, we sustain this argument.

Subpart 9.6 of the FAR addresses CTAs and explains that such arrangements "may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired." FAR § 9.602(a). The FAR defines a CTA as follows: "[A]n arrangement in which--(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." Id. § 9.601.

The RFP provides the following guidance regarding submitting a proposal under a CTA:

> L.5.1.10. Contractor Team Arrangement, if applicable
>
> (a) "Contractor Team Arrangement" means an arrangement in which two or more companies form a Partnership or Joint Venture to act as a potential Prime Contractor (See FAR 9.601(1)); or, a potential Prime Contractor agrees with one or more other companies to have them act as its Subcontractors under a specified Government contract or acquisition program (See FAR 9.601(2)[)].
>
> * * * * *
>
> (c) Offerors proposing as a CTA must [offer] as a single type of CTA. Combinations of CTAs are not acceptable. For example, a Joint Venture CTA utilizing subcontractors that are not members of the Joint Venture or a Prime/Subcontractor CTA utilizing a Joint Venture as a Subcontractor.

RFP amend. 3 at 317 (emphasis added). The solicitation further explains that: "[a]ll minimum requirements and scored evaluation criteria under L.5.1.2 [pool qualification projects] and L.5.3 [project experience] must have been performed by the CTA itself or the individual team members." Id.

In essence, the solicitation allows small businesses to submit proposals as CTAs where the small business is a prime contractor and other firms act as subcontractors, and thereby rely on the experience of both the prime contractor and the subcontractors. Id. In contrast, the solicitation prohibits joint ventures, such as a mentor-protégé joint venture, from submitting proposals that rely on the experience of subcontractors. Id. The agency refers to a joint venture with additional subcontractors that are not members of the joint venture as a "hybrid" CTA. See MOL at 9-10.

Ekagra argues that the solicitation's prohibition on so-called hybrid CTAs is improper. Protester's Comments, Dec. 20, 2018, at 5. As discussed above, SBA's regulations treat an approved mentor-protégé joint venture as a small business offeror. 13 C.F.R. § 125.9(d)(1); see also 13 C.F.R. § 121.103(h)(3)(ii). The protester argues, therefore, that such an offeror should be accorded the same ability as any other small business to form teaming arrangements with prospective subcontractors. Protester's Comments, Dec. 20, 2018, at 5. The protester contends that neither the applicable SBA regulations nor the FAR require a small business offeror to choose between proposing as a mentor-protégé joint venture or as a small business prime/subcontractor team.

GSA argues that the challenged solicitation term is consistent with the FAR's definition of a CTA. In this regard, the agency contends that the disjunctive "or" in FAR § 9.601 anticipates that offerors must propose as either a joint venture or as a prime contractor with one or more subcontractors. MOL at 9-10. As the protester notes, however, FAR § 9.601 states that a contractor teaming agreement is formed when firms "form a partnership or joint venture to act as a potential prime contractor," or where "[a] potential prime contractor agrees with one or more other companies to have them act as its subcontractors. . . ." Protester's Comments, Dec. 20, 2018, at 6 (quoting FAR § 9.601 (emphasis added)). The protester contends that this term anticipates that a joint venture may be a "potential prime contractor," and that such an offeror could also agree with other firms to have them act as subcontractors.

SBA's comments regarding this argument acknowledge that its regulations do not address CTAs described in FAR subpart 9.6. SBA Comments, Feb. 1, 2019, at 1. SBA notes, however, that a different type of teaming arrangement described in FAR § 2.101 --small business teaming arrangements--may include an approved mentor-protégé joint venture. Id. at 1-2. The SBA further notes that its regulations state that where an agency receives a proposal from an offeror that has formed a small business teaming arrangement, the agency "shall evaluate the offer in the same manner as other offers with due consideration of the capabilities of the subcontractors." 13 C.F.R. § 121.103(b)(9). For these reasons, SBA states that "we do not believe it is permissible to restrict a small business teaming arrangement with a large business mentor to

consist[] solely of the large business mentor and its small business protégé." SBA Comments, Feb. 1, 2019, at 2.

GSA argues, however, that 13 C.F.R. § 121.103(b)(9) is inapplicable here because it applies only "[i]n the case of a solicitation for a bundled contract." GSA Response, Feb. 6, 2019, at 2-3 (quoting 13 C.F.R. § 121.103(b)(9)). Under the Small Business Act, a solicitation for a contract is bundled if it "consolidat[es] 2 or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern" due to concerns such as the size, value, or place of performance of the requirements. 15 U.S.C. § 632(o)(2); see also FAR § 2.101. As our Office has explained, a solicitation that is set aside for small businesses is, by definition, not "unsuitable for award to a small-business concern," and is therefore not a bundled contract requirement.[3] Homecare Prods., Inc., B-408898.2, Mar. 12, 2014, 2014 CPD ¶ 98 at 4 (solicitation is not for a bundled contract where it is set aside for small businesses); Encompass Grp. LLC, B-405688, Dec. 9, 2011, 2011 CPD ¶ 272 at 2 (same). The solicitation at issue here is set aside for small businesses. RFP at 7.

For the reasons discussed above, we agree with Ekagra that FAR § 9.601 does not expressly require offerors to elect between two forms of contractor teaming agreements, nor does this term expressly prohibit a joint venture offeror from agreeing with other firms to act as subcontractors. To the extent, therefore, that the agency contends that the challenged solicitation term is required by FAR § 9.601, we do not agree. We agree with GSA, however, that 13 C.F.R. § 121.103(b)(9) does not apply to this solicitation, and thus find no merit to SBA's argument that the solicitation violates its regulations concerning the evaluation of small business teaming arrangements.

In the absence of statutes or regulations which specifically require or prohibit this solicitation term, we look to GSA's other rationale for its inclusion. GSA argues that the inclusion of the challenged term is reasonable because it avoids "significant administrative burdens" in assessing the documentation that offerors must submit. MOL at 11. For a joint venture CTA, the agency states that it "must conduct a review of specific proposal submissions for each individual joint venture member, as it is often not possible to evaluate these items for the joint venture itself when the joint venture is unpopulated [i.e. not fully integrated]." Id. The agency contends, therefore, that the following concern requires the solicitation's prohibition on joint venture offerors forming CTAs with subcontractors that are not members of the joint venture:

> Requiring the technical evaluators to determine which team members are individual joint venture partners, and which ones are first tier subcontractors, and accordingly which submissions are required from the

[3] SBA does not specifically contend that the solicitation is for a bundled contract; the protester does not contend that the procurement is bundled or that 13 C.F.R. § 121.103(b)(9) applies, here.

former and the latter, substantially increases the overall level of effort and burden associated with the review of each proposal, and increases the likelihood of ambiguities and confusion in the source selection process.

Id. at 11-12.

We conclude that GSA does not reasonably explain why it would experience significant administrative burdens that warrant prohibiting joint venture offerors from teaming with subcontractors that are not members of the joint venture. GSA acknowledges that it must distinguish between prime and first tier subcontractors when evaluating a proposal submitted by a prime/subcontractor CTA. COS at 7; MOL at 11. The agency does not explain, however, why it would be significantly more difficult to distinguish between the members of a joint venture and its first tier subcontractors, as compared to a single prime contractor and its first tier subcontractors.

As the protester notes, the RFP requires an offeror proposing as a joint venture to provide information regarding the joint venture, including "a complete copy of the existing Partnership or Joint Venture agreement that established the CTA relationship." RFP at 83. This agreement must, among other things, "[d]isclose the legal identity of each team member of the Partnership or Joint Venture," and "[d]escribe the relationship between the team members." Id. Because the offeror is required to clearly identify the members of the joint venture, we see no basis for the agency's contention that it would be difficult to determine "which team members are individual joint venture partners, and which ones are first tier subcontractors." MOL at 11.

On this record, we find no basis to conclude that the CTA limitation challenged by Ekagra is reasonable. As discussed above, the FAR does not require the agency to include this term, and the agency has not reasonably explained why allowing mentor-protégé joint ventures to compete as CTAs that include subcontractors poses significant administrative burdens that warrant inclusion of the term. We therefore sustain the protest on this basis.[4]

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that the solicitation's limitation on the ability of a joint venture to submit a proposal as a CTA that relies on the experience of subcontractors that are not members of the joint venture is unduly restrictive of

[4] We note that this issue does not address how much weight an agency may accord to a subcontractor's experience. As our Office has explained, the significance of, and the weight to be assigned to, a subcontractor's experience is a matter of contracting agency discretion. Emax Fin. & Real Estate Advisory Servs., LLC, B-408260, July 25, 2013, 2013 CPD ¶ 180 at 6. Our decision here solely addresses whether the agency has justified the solicitation's prohibition on joint ventures from submitting proposals that rely on subcontractors that are not members of the joint venture.

competition. We also conclude that Ekagra is prejudiced by this RFP term because, it contends, the solicitation prevents it from relying on the experience of proposed subcontractors to enhance its ability to compete for and win an award. Protest at 5; see CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 12 (competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete). We recommend that the agency reassess its rationale for including the restrictive term and document its justification. If no such justification exists, we recommend that the agency amend the solicitation to remove the challenged term and request revised proposals.

We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained in part and denied in part.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Amaze Technologies, LLC

File: B-418949; B-418949.2; B-418949.3

Date: October 16, 2020

Shane M. McCall, Esq., Koprince Law, LLC, for the protester.
Thomas Craig, Emily Spence, Esq., Marlena Ewald, FH+H, PLLC, for the intervenor.
Leigh Ann Bunetta, Esq., Federal Acquisition Service, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Challenge to the agency's evaluation of experience and past performance of the awardee, a joint venture, is denied where the evaluation was consistent with the terms of the solicitation and applicable small business regulations.

DECISION

Amaze Technologies, LLC, a small business joint venture of Fairfax, Virginia, protests the issuance of a task order to Karthik Consulting, LLC, of Reston, Virginia, under request for task order proposals (RTOP) No. ID08200019, issued by the General Services Administration (GSA) for support services for the Air Force's Space and Missile Systems Center. Amaze asserts that GSA unreasonably evaluated its offer under the experience and past performance factors, and treated it disparately in the evaluation. Amaze also complains that the contracting officer improperly changed the rating assigned by the technical evaluation team (TET) to Amaze's proposal under the experience factor without justification.

We deny the protest.

BACKGROUND

GSA issued the solicitation for task order proposals to provide defensive cyber operations for space agile release teams to the Air Force. Agency Report (AR), Exh. 1, RTOP at 19.[1] Specifically, the Air Force was seeking a broad range of acquisition

[1] Citations to the record are to the numbered pages provided by the agency in its report.

support capabilities to execute effective and responsive integrated program management of space-related research, development, production, and lifecycle acquisition activities for the Air Force's Space and Missile Systems Center. *Id.* at 20.

The competition was limited to firms holding a One Acquisition Solution for Integrated Services (OASIS) Small Business Pool 1 indefinite-delivery, indefinite-quantity (IDIQ) contract, which are multiple award contracts awarded by GSA to small business concerns. *Id.* at 1. The procurement was conducted in accordance with the terms and conditions of the OASIS contract, and Federal Acquisition Regulation (FAR) 16.505. *Id.* at 16. The solicitation provided that the task order would be issued on a best-value tradeoff basis considering the following factors: relevant experience, past performance, and price. *Id.* For purposes of award, the relevant experience factor was more important than the past performance factor, and the two non-price factors when combined, were significantly more important than price. *Id.*

GSA received ten proposals, including one from Karthik and one from Amaze. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 4. Amaze is a joint venture comprised of AttainX, Inc., a small business protégé and the managing member of the joint venture, and 22nd Century Technologies, Inc., the large business mentor and team member. *See* AR, Exh. 4, Amaze Technical Proposal at 2; Supp. Comments at 6. Following the evaluation of proposals by the TET, and review of the evaluation by the contracting officer who was also the source selection authority, Amaze and Karthik were rated as follows:[2]

	AMAZE	KARTHIK
Relevant Experience	Marginal[3]	Satisfactory
Past Performance	Satisfactory	Excellent
Price	$ 13,152,986	$ 15,707,866

AR, Exh. 10, Award Decision at 3, 9, 25.

[2] For the relevant experience and past performance factors, the possible ratings were excellent, good, satisfactory, marginal, and unsatisfactory. AR, Exh. 10, Award Decision at 3, 4-5.

[3] The TET initially rated Amaze satisfactory for relevant experience. AR, Exh. 9, TET Report at 1. As discussed below, the contracting officer changed the rating to marginal. AR, Exh. 10, Award Decision at 8.

The source selection authority, determined that Karthik's proposal offered the best value to the government, and issued the task order to Karthik. *Id.* at 30. Following a debriefing, Amaze submitted its protest to our Office.[4]

DISCUSSION

Amaze protests that the contracting officer unreasonably lowered the satisfactory rating that the TET assigned to its proposal under the experience factor from satisfactory to marginal. Comments & 2nd Supp. Protest at 12-13. Amaze also asserts that GSA unreasonably evaluated its relevant experience and past performance, and treated it disparately. Protest at 8-14; Comments & 2nd Supp. Protest at 2-11.

As noted, this task order competition was conducted among OASIS contract holders pursuant to the provisions of FAR subpart 16.5. In reviewing protests of awards in task order competitions, we do not reevaluate quotations but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors or vendors equally and evaluate their proposals or quotations evenhandedly against the solicitation's requirements and evaluation criteria. *Sumaria Sys., Inc.; COLSA Corp.,* B-412961, B-412961.2, July 21, 2016, 2016 CPD ¶ 188 at 10. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that the agency acted unreasonably. *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

We have reviewed all of the issues presented by Amaze and find that none provides a basis to sustain the protest. We discuss several examples below.

Experience and Past Performance

With respect to experience, offerors were required to submit at least one, but no more than three, recent and relevant examples of the offeror's experience as a prime contractor or subcontractor performing a contract awarded by the federal government, or performing a task order that was issued against a contract that was awarded by the federal government. AR, Exh. 6, RTOP amend. 3 at 17. An experience example was recent if it was performed within 5 years before the date the RFP was issued, and was performed for at least one year. *Id.* An experience example was relevant if it demonstrated experience in all of the following areas: (1) providing and maintaining a staff of 14 people or more, all of whom have at least a bachelor's degree and 5 or more

[4] This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B).

years of experience, and holding a minimum security clearance level of secret or equivalent; (2) [development, security, operations (DevSecOps)], [Scaled Agile Framework (SAFe)], and Agile software development activities; and (3) a total contract/task value of approximately $3 million or more per year.[5] *Id.* The solicitation provided that offerors that submitted more than one example that met the definition of relevant might be rated more favorably. *Id.* at 18. Similarly, offerors that submitted more than one example that met the definition of relevant and demonstrated additional experience might be rated more favorably. *Id.*

With respect to past performance, the agency considered each example submitted in response to the relevant experience factor that met the definition of relevant to assess the offeror's likelihood of successful performance. *Id.* For each relevant example, the agency reviewed a completed contractor performance assessment reporting system (CPARS) report submitted by the contractor, or information provided to the government in a past performance questionnaire. *Id.* The solicitation advised offerors that the agency might also consider past performance information that it received on its own from other sources. *Id.*

Amaze submitted three examples to demonstrate its relevant experience. AR, Exh. 4, Amaze Technical Proposal at 4, 9, 13. The three examples, all of which involved work that had been awarded to 22nd Century (the large business joint venture partner) were contracts in support of: (1) Facilities Services Branch (FSB) Information Technology Services; (2) U.S. Army Recruiting Command Information Technology Support Services; and (3) Defense Logistics Agency Distribution Standard Systems. *Id.*

The TET concluded that the FSB example was relevant as defined by the solicitation. AR, Exh. 7, TET Report at 2. However, while the other two examples met the threshold for value, they did not demonstrate experience in all required areas. *Id.* at 3, 4. The TET therefore concluded that AMAZE submitted one recent and relevant example and assigned AMAZE a rating of satisfactory for experience. *Id.* at 4.

With respect to past performance, the TET reviewed the CPARS for the relevant FSB contract which rated 22nd Century exceptional. *Id.* at 5. The TET also considered that the CPARS for the two non-relevant examples raised concerns with personnel turnover. *Id.* Based on the fact that AMAZE submitted only one recent and relevant example, and there was concern over potential staffing issues, the TET rated 22nd Century satisfactory for past performance. *Id.*

The contracting officer reviewed the TET's evaluation results, and then conducted his own evaluation of Amaze's experience and past performance. AR, Exh. 10, Award Decision at 6, 8. The contracting officer concluded that the FSB example Amaze submitted to demonstrate its experience was relevant, but that neither of the other two examples met the definition of relevant. *Id.* at 8. After checking the CPARS and finding

[5] The solicitation also referred to a relevant example as a "similar contract/task order." *See* AR, Exh. 6, RTOP amend. 3 at 17-18.

that Amaze, as a joint venture, had no relevant experience, the contracting officer decided to assess the relevant experience of AttainX and 22nd Century, the members of the joint venture. *Id.* The contracting officer concluded that the FSB example demonstrated that 22nd Century had relevant experience, but that AttainX, the small business and managing member, did not have any relevant experience. *Id.* The contracting officer therefore assigned AttainX an experience rating of unsatisfactory. *Id.* Based on the lack of experience for AttainX, and the submission of one recent and relevant experience example for 22nd Century, the contracting officer assigned the joint venture (Amaze) a rating of marginal for relevant experience. *Id.*

With respect to past performance, the contracting officer also considered the past performance of the individual joint venture members, since the joint venture itself did not have any relevant past performance. *Id.* at 9. The contracting officer assigned AttainX a rating of neutral, since it did not have any past performance examples. *Id.* The contracting officer further considered that 22nd Century submitted one relevant past performance example that was rated excellent. *Id.* The contracting officer combined the neutral and excellent ratings, and assigned Amaze an overall past performance rating of satisfactory. [6] *Id.*

Amaze protests that the agency unreasonably evaluated its proposal under the relevant experience and past performance evaluation factors. First, Amaze complains that the contracting officer improperly changed the satisfactory rating that the TET assigned to its proposal under the relevant experience factor to marginal without providing any justification. Comments & 2nd Supp. Protest at 12-13. According to Amaze, the contracting officer simply reached a different result in the evaluation without explaining why the TET assigned the wrong rating.[7] *Id.*

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[6] In the tradeoff analysis, the contracting officer discussed further the past performance of Amaze for the two examples found not relevant. AR, Exh. 10, Award Decision at 29. Specifically, the contracting officer stated that in the CPARS, the government identified the contractor's increased turnover rate, and noted that the "quality/skill set of new hires is not at the level it was in the past." *Id.* In another CPARS, the government stated that the "contractors had a high turnover in contract personnel, at times it caused the government to pick up in the lack of support." *Id.* Overall, the contracting officer found that the "issue of turnover noted in the two projects identifies a concerning trend and does not instill confidence in Amaze's experience to provide and maintain the necessary staff for this requirement." *Id.*

[7] Amaze also asserts that, as demonstrated by the CPARS the protester submitted, AttainX was a key subcontractor to 22nd Century on the FSB contract. Supp. Protest at 2-3; Comments & 2nd Supp. Protest at 10. Amaze complains that the agency failed to consider this information in evaluating Amaze's relevant experience. *Id.* Our review of the record confirms that the CPARS for the FSB example lists AttainX as a key subcontractor performing [DELETED] of the effort. AR, Exh. 4, Amaze Technical Proposal at 18. Nonetheless, there is nothing in the CPARS report, or anywhere else in

Source selection officials are not bound by the evaluation judgments of lower level evaluators; they may come to their own reasonable evaluation conclusions. *TruLogic, Inc.*, B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29 at 8. When a source selection official disagrees with the ratings of lower-level evaluators, the independent judgement must be reasonable, consistent with the provisions of the solicitation, and adequately documented. *CSR, Inc.*, B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶ 64 at 9. Official. Here, while the contracting officer did not specifically state why he disagreed with the TET, it is clear from his discussion in the source selection decision that he did not believe that the TET properly considered the experience of the joint venture. Specifically, as discussed above, because Amaze, the joint venture, did not have any independent relevant experience, the contracting officer determined it was necessary to evaluate the experience of both joint venture partners to evaluate Amaze. AR, Exh. 10, Award Decision at 8, 9.

As discussed above, in evaluating Amaze's experience, the contracting officer assigned AttainX a rating of unsatisfactory because it did not have any experience, and assigned Amaze a rating of marginal based on AttainX's lack of experience and 22nd Century's provision of one relevant project. Given these factors, we find that the source selection decision reasonably documented why the contracting officer disagreed with the rating assigned by the TET.[8] *See CW Government Travel, Inc.*, B-416091, B-416091.2, Jun. 13, 2018, 2018 CPD ¶ 225 at 7.

Amaze next protests that GSA improperly evaluated the experience and past performance of the joint venture. Protest at 8-10; Comments & 2nd Supp. Protest at 6-9. According to the protester, the agency was required to consider the experience and past performance of each member of the joint venture as the experience and past performance of the joint venture itself. That is, in Amaze's view, the experience of each member separately is the experience of the joint venture, especially such as here, where a mentor-protégé joint venture is involved. The protester therefore reasons that

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Amaze's technical proposal, which describes what tasks AttainX was responsible for performing in this effort. Consequently, even if Amaze intended this to be an experience example for AttainX, the agency would be unable to determine if AttainX's performance met the definition of relevant experience.

[8]Amaze complains that in the award decision the contracting officer wrongly indicated that the TET rated Amaze marginal, rather than satisfactory, for relevant experience. Comments & 2nd Supp. Protest at 12-13. This error did not result in competitive prejudice to Amaze since the contracting officer performed an independent evaluation of Amaze's experience, and based the award decision on that evaluation. Our Office will not sustain a protest, even where there is an error, where the protester does not demonstrate competitive prejudice. *See Interfor US, Inc.,* B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7.

the agency was required to rely solely on the experience and past performance of 22nd Century to evaluate the experience and past performance of Amaze, the joint venture, without considering that the joint venture Amaze, or AttainX, the small business member and managing partner of the joint venture, lacked any relevant experience or past performance. Amaze argues that because it submitted one recent and relevant project, which was all that the solicitation required, its proposal should have received the highest ratings for experience and past performance. We disagree.

The Small Business Act requires agencies under certain circumstances to evaluate the experience and past performance of the individual partners of a joint venture, and to attribute those evaluations to the joint venture itself as follows:

> When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(q)(1)(C). The Small Business Administration (SBA) promulgated regulations implementing this statutory provision, including the following:

> When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business[es] as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to 9 whichthe joint venture as well as any work done by the joint venture itself previously.

13 C.F.R. § 125.8(e); *see also* 13 C.F.R. § 124.513(f). The SBA's notice explained that the current version of the regulations were proposed "in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity." 81 Fed. Reg. 48568 (July 25, 2016). According to the notice, SBA concluded that if each partner to a joint venture has individually performed on one or more similar contracts previously, the joint venture should be credited with the experience or past performance of its individual partners.[9] *See id.*

GAO has previously sought SBA's views about how this provision should be applied. In response, the SBA advised our Office that in evaluating the experience of a joint venture "neither SBA regulations nor the Small Business Act specifically address the

[9] On October 16, the SBA issued an amendment to this regulation which becomes effective on November 16. Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments, 86 Fed. Reg. 66146, 66194 (Oct. 16, 2020). Therefore, the new language is not applicable to this analysis.

relative consideration that an agency must give to the past performance of a large business mentor in a mentor-protégé joint venture, as compared to a small business protégé." *See Ekagra Partners*, *LLC,* B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83 at 6 (*citing* SBA Comments, Feb. 1, 2019, at 1). Thus, while the SBA regulations require agencies to consider the experience and past performance of both the mentor and protégé members of the joint venture, the regulations do not mandate a specific degree of consideration for the mentor or the protégé firm.

We thus conclude that regardless of the ratings that were assigned in evaluating the experience and past performance of Amaze, the agency properly considered the experience and past performance of both AttainX and 22nd Century, as required by SBA's regulation. Further, the solicitation did not indicate that any specific weight would be assigned to the experience and past performance of the joint venture members. Accordingly, we have no basis to challenge the weight the agency assigned to each of the joint venture members. Here, Amaze submitted one recent and relevant project example for 22nd Century, and no relevant projects for AttainX, the managing member. In addition, Amaze provided three CPARS for 22nd Century, two of which expressed concern regarding staffing turnover. Based on these facts, we find the agency reasonably evaluated Amaze's experience and past performance. [10] *See 22nd Century Techs, Inc.,* B-417478.3, B-417478.4, Feb. 24, 2020, 2020 CPD ¶ 74 at 12-14.

Disparate Treatment

In its protest, Amaze asserted that in evaluating relevant experience, the agency improperly failed to apply the same standard to Amaze and Karthik. Amaze argued that

[10] Amaze points out that in our decision in *Enola-Caddell JV*, B-292387.2, B-292387.4, Sept. 12, 2003, 2003 CPD ¶ 168, the protester argued that the agency improperly downgraded its technical evaluation rating based on the lack of experience and past performance of its protégé, even though its mentor had a rating of excellent. Comments & 2nd Supp. Protest at 7-8. Amaze notes that in that decision, our Office requested SBA's views and SBA stated that while its regulations provide no guidance on the technical evaluation of joint ventures between mentor-protégé participants by procuring agencies, it appeared contrary to both the intent of the 8(a) business development mentor-protégé program, and FAR 15.305(a)(2)(iv), for a procuring agency to downgrade a proposal based on the lack of experience/past performance of a protégé. *Id.* at 7 (*quoting Enola-Caddell JV*, *supra* at 7-8 n.7).

In SBA's view, if a mentor had excellent experience/past performance and is legally obligated to perform the entire requirement, the joint venture itself should receive an excellent technical rating in those areas. *Enola-Caddell* JV, *supra* at 7-8 n.7. Since then, SBA has advised our Office that neither SBA's regulations, nor the Small Business Act, specifically address the relative consideration that an agency must give to the past performance of a large business mentor in a mentor-protégé joint venture, as compared to a small business protégé. *See Ekagra Partners*, *LLC, supra* at 5 (*citing* SBA Comments, Feb. 1, 2019 at 1).

Karthik was rated satisfactory under the experience factor even though it had only one experience example, which Amaze contends did not meet the definition of relevant. Protest at 12. In contrast, according to Amaze, it submitted one relevant experience example, yet it received a rating of marginal. In its report, the agency acknowledged that Karthik submitted only one experience example, but explained why it was relevant. COS/MOL at 11 (*quoting* AR, Exh. 8, Karthik Technical Evaluation at 11). In its comments, Amaze did not respond to the agency's explanation. Accordingly, we consider this basis of protest abandoned and do not consider it further. *See Jacobs Tech, Inc.*, B-413389, B-418389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 5.

In its comments, Amaze argues that the agency treated Amaze and Karthik disparately in the past performance evaluation because while they each submitted one recent and relevant example, Karthik was rated excellent, and Amaze only satisfactory. Comments & 2nd Supp. Protest at 10. We disagree that the agency engaged in disparate treatment. The agency's past performance evaluation for Karthik explained that its CPARS for the one relevant project was rated exceptional and very good. AR, Exh. 10, Award Decision at 25. In addition, in the quality section of the report, the CPARS stated that Karthik and its subcontractors exceeded the requirements of the contract to the benefit of the government and there was no "gap or drop in support" with respect to its hiring. *Id.* In the scheduling section of the CPARS, it stated that the team operated in such an efficient manner that there was never a need for government involvement. *Id.* The agency assigned an overall rating of excellent for Karthik's past performance after "considering the entirety of the information evaluated by the Government." *Id.* As discussed above, however, Amaze was properly evaluated as satisfactory for past performance given the issues reported relating to staffing issues.

Failure to Adhere to the Evaluation Criteria in the Solicitation

Finally, Amaze argues that the agency failed to adhere to the evaluation criteria in the solicitation. As discussed above, the solicitation required offerors to provide at least one example of recent and relevant experience. AR, Exh. 6, RTOP amend. 3 at 17. According to Amaze, the agency failed to follow the evaluation criteria because only one experience example was required, but the agency would assign a rating higher than satisfactory only where the offeror provided more than one relevant experience example. Comments & 2nd Supp. Protest at 14. Amaze argues that because it submitted the required one relevant example, it should have received the highest rating of excellent for experience. Amaze further asserts that had it known that the agency would assign a rating of good or excellent only where the offeror provided more than one relevant experience example, it would have submitted more relevant experience examples. *Id.*

We disagree that the agency ignored the solicitation's evaluation criteria, or that submitting one relevant experience example required the agency to award the highest rating. One relevant experience example was the minimum required. That did not mean, however, that an offeror that submitted one relevant experience example would receive the highest rating. To the contrary, the solicitation specifically provided that offerors that submitted more than one experience example that meets the definition of

recent and relevant could be rated more favorably.[11] AR, Exh. 6, RTOP, amend. 3 at 18.

The protest is denied.

Thomas H. Armstrong
General Counsel

[11] Moreover, we see no basis to conclude that Amaze suffered competitive prejudice. Amaze asserts that if it had known that more than one project was required to get a rating higher than satisfactory it would have identified more relevant experience. However, the solicitation specifically identified what would be considered relevant experience. Amaze submitted three experience examples, the maximum number of examples permitted. In our view, if Amaze possessed more relevant experience, it should have provided it in its proposal.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: VSE Corporation

File: B-417908; B-417908.2

Date: November 27, 2019

Cameron Hamrick, Esq., C. Peter Dungan, Esq., and Jason Blindauer, Esq., Miles & Stockbridge P.C., for the protester.
Kevin P. Connelly, Esq., Kelly E. Buroker, Esq., and Jeffrey M. Lowry, Esq., Vedder Price, P.C., for AECOM Management Services, Inc., the intervenor.
Jonathan A. Hardage, Esq., Amanda C. Gingrich, Esq., and Kevin G. Normile, Esq., Department of the Army, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's evaluation of the awardee's proposal for failing to reasonably consider whether the proposal presented unacceptable performance risks due to the awardee's divestiture from its corporate parent is denied. The challenges to the awardee's financial capacity to perform in fact pertain to the awardee's affirmative responsibility, and we have no basis to question the reasonableness of the agency's responsibility determination regarding the awardee. The non-price challenges also fail because the solicitation did not contemplate the evaluation of any factor other than price.

DECISION

VSE Corporation, of Alexandria, Virginia, protests the issuance of a task order to AECOM Management Services, Inc., of Germantown, Maryland, under task order request (TOR) No. W56HZV-19-X-JW02, which was issued by the Department of the Army, Army Materiel Command, for a supplemental labor force to support combat/tactical vehicle production, facilities maintenance, warehousing, and hazardous materials handling for disposal in support of the Department of Defense Industrial Base for Red River Army Depot, Sierra Army Depot, Anniston Army Depot, and Rock Island Arsenal. The TOR was issued against the Equipment Related Services (ERS) contract suite under the TACOM Strategic Service Solutions (TS3) multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. VSE argues that the Army unreasonably evaluated AECOM Management Services' proposal.

We deny the protest.

BACKGROUND

The Army's TS3 ERS suite of IDIQ contracts allows for the procurement of services primarily related to: tasks necessary to keep machines or systems functioning; or for maintenance, repair, and overhaul; equipment modification; equipment installation; and technical representative services. Contracting Officer Statement/Memorandum of Law (COS/MOL) at 3. VSE and AECOM Management Services (formerly URS Federal Services) are TS3 ERS suite contract holders. Id. The TOR, which was issued on May 22, 2019, and subsequently amended four times, sought proposals from TS3 ERS contract holders for a supplemental labor force to support combat/tactical vehicle production, facilities maintenance, warehousing, and hazardous materials handling for disposal in support of the Department of Defense Industrial Base for Red River Army Depot, Sierra Army Depot, Anniston Army Depot, and Rock Island Arsenal. TOR at 1.[1] The TOR contemplated the award of a time-and-materials task order, with a base year and two, 1-year option periods. Id. at 2, 18.

Award was to be made to the responsible offeror that submitted the proposal with the lowest total evaluated price (TEP). TOR at 30. Thus, the only evaluation factor was price. Id. at 29, 30; see also Agency Report (AR), TOR Questions & Answers (ver. 2), at 36 ("The Government will not be considering a Best Value evaluation, this will be based on price only."); TOR at 29 (instructing offerors to only submit one proposal volume, cost/price, which was to consist entirely of a price evaluation template, which was included as TOR attachment No. 2).

As to price, the Army was to evaluate for: affordability; price reasonableness; and completeness. Id. As to affordability, the TOR provided that an offeror could not receive an award if its proposal was unaffordable. Id. As to price reasonableness, the TOR provided that a price was reasonable if, in its nature and amount, it did not exceed that which would be incurred by a prudent person in the conduct of competitive business. Id. As to completeness, the TOR provided that offerors had to include all information required by the TOR for the base and option years. Id. at 30-31. The TOR also included a provision entitled, "order of evaluation," at § M.3. That provision set out the order in which proposals were to be evaluated, and provided that: "[e]ach proposal will be evaluated to determine the [TEP], to include an assessment of affordability, price reasonableness, completeness, and responsibility. The Government will identify the proposal with the lowest [TEP]." Id. at 31.

The Army received four proposals in response to the TOR. Following discussions, the agency received final proposal revisions from the offerors. Based on the final proposals, AECOM Management Services was found to offer the lowest TEP of

[1] References herein are to the TOR as amended.

$520,255,848. COS/MOL at 7-8.[2] On August 2, 2019, the contracting officer signed a memorandum for the record documenting his responsibility determination for AECOM Management Services. The memorandum reflects that the contracting officer reviewed available information for AECOM Management Services in the System for Award Management (SAM), the Federal Awardee Past Performance and Integrity Information System (FAPIIS), and the Contract Performance Assessment Reporting System. AR, Tab 8, Responsibility Determination (Aug. 2, 2019), at 1. On August 14, the contracting officer again checked the information in SAM and FAPIIS, and then proceeded to issue the task order to AECOM Management Services. COS/MOL at 8; AR, Tab 9, SAM & FAPIIS Records.

VSE timely requested a debriefing. During the debriefing, VSE asked the Army if it had considered the potential impacts of AECOM Management Service's proposed spinoff from its corporate parent, AECOM. COS/MOL at 9. In this regard, AECOM announced in a June 17 statement to shareholders that it intended to spinoff AECOM Management Services as a new public company. The statement represented that the new standalone AECOM Management Services would be "a top 20 government services provider, as ranked by Bloomberg", and that AECOM Management Services' fiscal year 2018 revenue was $3.7 billion, its operating revenue was $200 million, and its adjusted operating income was $239 million. AR, Tab 14, AECOM Statement to Investors, at 1-2. The Army has represented that the contracting officer, contract specialist, price analyst, and legal advisor that evaluated proposals and made the applicable responsibility determination, as well as the Contract Review Board and other agency personnel who were involved in peer reviewing the solicitation and proposed contract award, were not aware of the proposed corporate reorganization until VSE raised the issue during the debriefing. See COS/MOL at 9; AR, Tab 16, Second Responsibility Determination (Aug. 26, 2019), at 1; Tab 20, Joint Declaration of Contracting Officer, Contract Specialist, and Cost/Price Analyst; Tabs 27-38 Emails from Agency Personnel to Agency Counsel.[3]

After VSE's debriefing, the Army investigated VSE's allegations, including reviewing the AECOM statement to investors, conducting a call with AECOM Management Services officials, reviewing AECOM's Securities and Exchange Commission (SEC) 2018 annual filing, and reviewing AECOM Management Services' written response regarding the potential impacts of the transaction. See, e.g., COS/MOL at 9-10; AR, Tab 41, Email exchange between Agency and AECOM Management Services Officials; Tab 42, Email exchange between Agency and AECOM Management Services Officials. With respect

[2] VSE proposed the second lowest TEP of $536,124,691. COS/MOL at 8.

[3] As addressed below, VSE challenges the thoroughness and accuracy of the agency's disclosures with respect to the agency personnel involved in this procurement and their knowledge of the proposed spinoff of AECOM Management Services. For the reasons addressed below, we find that VSE's arguments provide no basis on which to sustain the protest.

to AECOM Management Services' written response, the firm advised that there would be no material adverse change in the resources that would be relied upon for purposes of task order performance or the firm's proposed fixed rates. AECOM Management Services further confirmed that it would not seek any rate increases that were driven by the spinoff transaction, the task order would continue to be performed by the same people and assets, and there would not be any risk to meeting operational or contractual requirements. The firm also emphasized that the standalone AECOM Management Services entity would have adequate financial resources, pointing to the unit's fiscal year 2018 revenue, operating income, and adjusted operating income. AR, Tab 15, Letter from AECOM Management Services (Aug. 23, 2019), at 1.

On August 26, the contracting officer executed a second memorandum for the record concluding that AECOM Management Services would still be responsible following the proposed spinoff from AECOM. Relying on the representations in AECOM Management Services' written response and telephone conversation, the contracting officer concluded that: "With management and labor personnel staying in place, the nature of the work performed which creates easy cash flow from monthly billing, and the financial capability of the company not being put in jeopardy, the Government believes AECOM [Management Services] will be able to fulfill the performance requirements under this contract and meet the responsibility requirements under Federal Acquisition Regulation (FAR) 9.104." AR, Tab 16, Memo. for Record re: AECOM Management Services Potential Spin-off (Aug. 26, 2019), at 1. On the same date, VSE filed its initial protest with our Office.[4]

On October 14, which was a day before the submission of the parties' initial comments on the agency's report, AECOM announced that the proposed spinoff of AECOM Management Services would no longer occur. Rather, AECOM now plans to sell its equity interests in AECOM Management Services to two private equity firms. See, e.g., AECOM Management Services Comments (Oct. 15, 2019) at 11 (citation to AECOM Press Release omitted).

DISCUSSION

This is an unusual case in that many of the parties' asserted facts, assumptions, and arguments have rapidly been overtaken by changed circumstances. VSE initially alleged that the agency had failed to reasonably consider the potential consequences of AECOM Management Services' announced spinoff from its corporate parent. The agency's report in response to the protest, however, included a new responsibility determination to consider the potential impacts of the proposed corporate reorganization. By the time the protester and intervenor submitted their first respective

[4] The task order at issue is valued in excess of $25 million, and was placed under the TS3 IDIQ contracts established by the Army. Accordingly, our Office has jurisdiction to consider VSE's protest. 10 U.S.C. § 2304c(e)(1)(B).

set of comments on the agency report, the announced spinoff was cancelled; instead, a different corporate transaction was announced.

As an initial matter, because the transaction that gave rise to VSE's protest has been cancelled--the spinoff of AECOM Management Services as a standalone company--VSE's arguments regarding the cancelled transaction appear to be moot. In addition, the protester's arguments regarding the second prospective transaction--AECOM's sale of its ownership shares of AECOM Management Services to two private equity firms--are irrelevant to the evaluation of proposals, as well as the Army's contemporaneous responsibility determination for AECOM Management Services. Rather, the transaction, announced more than 2 months after the initial award here to AECOM Management Services, appears to raise matters of contract administration, which are not appropriate for consideration under our bid protest function. 4 C.F.R. § 21.5(a).

Even so, interpreting these arguments in the light most favorable to the protester, they do not advance any basis on which to sustain VSE's objections to the agency's actions.[5] Specifically, VSE primarily asserts that the agency failed to reasonably consider the potential price and performance risks associated with AECOM Management Services no longer being affiliated with its corporate parent, AECOM. The protester also argues that the agency failed to reasonably consider whether AECOM Management Services' changed circumstances would impact its financial and technical capacity, and ability to perform, in accordance with its proposal and contractual commitments.

As to the protester's allegations that the Army failed to reasonably consider AECOM Management Services' potential financial incapability to perform the resulting task order following its divestiture from AECOM, we note that VSE casts its argument not as a challenge to AECOM Management Services' responsibility, but rather as a challenge to the agency's evaluation of the awardee's proposal under the TOR's evaluation criteria. See, e.g., VSE Supp. Comments at 5 ("VSE expressly and clearly went out of its way to

[5] As noted above, VSE raises a number of collateral arguments. While our decision does not address all of the protester's arguments, we have carefully reviewed all of them and find that none provides a basis on which to sustain the protest. For example, VSE argues that the agency conducted unequal discussions when it effectively reopened discussions with AECOM Management Services following VSE's debriefing to discuss the prospective awardee's proposed spinoff from AECOM. This argument is without merit. The Army's communications with AECOM Management Services with respect to its corporate reorganization were in connection with the firm's responsibility, not with respect to the evaluation of the acceptability of its proposal. We have repeatedly recognized that an agency may request and receive information about an offeror's responsibility without conducting discussions that trigger the obligation to conduct non-responsibility discussions with other offerors. Chags Health Info. Tech., LLC, B-413104.30, B-413104.37, Apr. 11, 2019, 2019 CPD ¶ 145 at 6; Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 19.

emphasize that it challenges the Agency's evaluation under Section M.3 of the TOR, and is **not** challenging the Agency's affirmative responsibility determination.") (emphasis in original). Notwithstanding VSE's characterization of its argument, VSE is not challenging the evaluation of AECOM Management Services' proposal. In this price only competition, the protester does not allege any flaw with AECOM Management Services' proposed TEP, which was approximately 3 percent less than VSE's proposed TEP. Rather, VSE essentially challenges AECOM Management Services' financial capabilities following the divestiture from its corporate parent. See, e.g., VSE Comments & Supp. Protest at 16 (alleging that the agency failed to consider that the awardee has had "serious performance and profitability problems", and been accused of having "consistently overpromised and underdelivered") (internal citation omitted). These arguments raise quintessential matters of responsibility. See FAR § 9.104-1(a) (contracting officers are to consider as part of responsibility determination whether a prospective offeror has "adequate financial resources to perform the contract, or the ability to obtain them").

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will only hear a protest challenging an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. We have further explained that the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. IBM Corp., B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 11; United Capital Investments Grp., B-410284, Nov. 18, 2014, 2014 CPD ¶ 342 at 2. Absent any such allegations here, we find no basis to disturb the agency's affirmative responsibility determination.

We similarly find no merit to VSE's arguments that the solicitation included non-price evaluation criteria and the agency should have considered the impact of the divestiture as part of its non-price evaluation. In support of its position, the protester points to a "reason for rejection" provision in section M.4b of the TOR. This provision provided that a proposal may be rejected if it reflects an inherent lack of technical competence or failure to comprehend the complexity and risks required to perform the TOR requirements if it is unachievable in terms of technical, labor mix, or schedule commitments. TOR at 31. Here, however, there were no technical submissions to evaluate for risk or a failure to comprehend the requirements.

In this regard, the TOR's instructions explained that proposals were to consist solely of one volume, cost/price. The cost/price volume consisted entirely of a price evaluation sheet, which was included as TOR attachment No. 2. TOR at 29. Similarly, both the instructions and the evaluation criteria explicitly stated that the only evaluation factor was price. Id. at 29, 30. Thus, contrary to VSE's arguments, there were no (and the nature of proposals submitted would not otherwise reasonably provide the agency with an ability to analyze any) technical, labor mix, or schedule commitments from the offerors.

Indeed, the agency's responses to offerors' questions on the TOR unequivocally provided that the only evaluation factor would be price:

> 85. Why is the acquisition strategy for this solicitation determined to be the "Lowest Price"?
>
> RESPONSE: All contractors in the ERS Suite of the TS3 have already been determined as responsible sources when they were awarded contracts at the base level. Also, all previous awarded Task Orders for these Labor Services were solicited as [lowest priced, technically acceptable] and no offerors were kicked out for having technically unacceptable proposals, so it ultimately came down to price.
>
> * * * *
>
> 93. Would the government consider an actual Best Value solicitation rather than just a Cost proposal from any TS3 ERS prime contractors and the lowest price wins?
>
> RESPONSE: No. The Government will not be considering a Best Value evaluation, this will be based on price only.

AR, Tab 3, TOR Questions & Answers (ver. 2), at 35, 36.

Therefore, we find no basis to sustain VSE's argument that the agency unreasonably failed to evaluate any technical or performance risks with respect to AECOM Management Services' proposed separation from its corporate parent where the TOR cannot reasonably be construed as requiring such considerations.

Although we conclude the above discussion is dispositive of the protest issues raised, we also briefly address the protester's reliance on our decisions addressing imminent corporate transactions, and their potential impact on an agency's consideration of an offeror's proposal. These cases have arisen when an awardee divests some or all of its business, resulting in the contract being performed by a materially different contractor. See, e.g., Lockheed Martin Integrated Sys., Inc., B-410189.5, B-410189.6, Sept. 27, 2016, 2016 CPD ¶ 273 (denying protest that agency unreasonably considered a potential divestiture of one of the protester's business segments that was proposed to perform on the resulting contract where the agency was aware of the transaction and the potential impacts on the protester's indirect rates on the cost-reimbursable contract could be significant), recon. denied, Lockheed Martin Integrated Sys., Inc.--Recon., B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258; Wyle Labs., Inc., B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16 (sustaining protest where procuring agency prior to award of a cost-reimbursable contract was aware of, but declined to consider in its evaluation, the awardee's proposed division into two separate firms, the awardee's intent to assign the contract to the new corporate entity, and the potential material resulting changes to the technical approach and costs proposed by the awardee), recon. denied, National

Aeronautics & Space Admin.--Recon., B-408112.3, May 14, 2014, 2014 CPD ¶ 155. For the reasons that follow, we do not find that line of decisions applicable here.

First, as we have clarified with respect to this line of decisions, key in our analysis is both whether an agency is aware of a particular transaction, as well as its imminence and certainty. Lockheed Martin Integrated Sys., Inc.--Recon., supra, at 7. As addressed above, the transaction giving rise to VSE's initial protest cannot reasonably be considered imminent, or certain, since it was ultimately cancelled.[6] Moreover, the agency could not have known of the revised corporate transaction plans because they were announced months after award. As a general matter, an agency's lack of knowledge of a proposed corporate transaction is generally not unreasonable, and an agency generally has no affirmative obligation to discover and consider such information. See, e.g., Target Media Mid Atlantic, Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 7; Veterans Eval. Sys., Inc., et al., B-412940 et al., Jul. 13, 2016, 2016 CPD ¶ 185 at 9-10; TrailBlazer Health Enters., LLC, B-406175, B-406175.2, Mar. 1, 2012, 2012 CPD ¶ 78 at 18-19.

Second, it is not apparent that AECOM Management Services' divestiture from AECOM, as currently planned, would meaningfully impact AECOM Management Services' performance of the task order. Our decisions regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing. Lockheed Martin Integrated Sys., Inc.--Recon., supra, at 5. In this regard, we have found unreasonable an agency's failure to consider the impact of a known, imminent or completed transaction on the offeror's potential performance of a resulting contract. Where an offeror's proposal

[6] As noted above, VSE challenges the Army's representations regarding relevant procurement officials' lack of knowledge about the subsequently cancelled transaction at the time of the initial award. The protester argues that the agency's representations have been "carefully characterized," fail to identify all individuals involved in the initial solicitation review (which predated AECOM's announcement), and "failed to support [the agency's] own careful choice of words." VSE Supp. Comments at 9-15. We find no merit to VSE's arguments for at least three reasons. First, as discussed above, the announced corporate transaction is essentially irrelevant since it has been cancelled. Second, even if we assumed agency personnel were aware of the transaction, as discussed herein, it is not apparent that the transaction had any impact on the award because the proposed transaction would have no impact on AECOM Management Services' proposed fixed rates, and the agency did not request or receive proposals as to any non-price factor. Finally, the agency has produced statements from the individuals directly involved in the evaluation of proposals and the affirmative responsibility determination for AECOM Management Services that they were unaware of the spinoff before VSE's debriefing. To the extent that VSE argues that others in the agency who were not directly involved in the evaluation or responsibility determination may have known of the transaction, we fail to see how such facts would impact the result here.

represents that it will perform the contract in a manner materially different from the offeror's actual intent, the award cannot stand, since both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement. See Wyle Labs., supra, at 8-9 (sustaining protest where procuring agency declined to consider impact of proposed reorganization of offeror where the offeror would not perform as the prime contractor, and assignment of the contract to a new legal entity that was smaller and with substantially fewer resources would likely have material effects on both the costs incurred and technical approach employed during contract performance). Those concerns are not present here.

First, this is not a case where the offeror is undergoing a corporate reorganization such that a different entity will perform the resulting contract or order. AECOM Management Services is the offeror, and, based on the disclosed details of the current proposed transaction, AECOM Management Services will perform the resulting order. In this regard, AECOM Management Services explains that the private equity firms are acquiring its stock, as opposed to acquiring its assets and merging them into a new company. See AECOM SEC Form 8-K (Oct. 17, 2019), exh. 2.1, Purchase & Sale Agreement, § 2.4(a)(i); see also VSE Comments & Supp. Protest, exh. No. 4, American Securities Press Release, at 2 (representing that AECOM Management Services' president and management team will continue to lead the company). Thus, since the transaction involves only a change in the ownership of AECOM Management Services' stock, there is no change between the offeror and the entity that will ultimately perform the requirements, and no change in the underlying assets that will be used to perform the work.

Second, the TOR here did not require a technical proposal from offerors and contemplates a time-and-materials task order. Any changes to AECOM Management Services' cost-reimbursable rates will have no impact on the fixed rates proposed here. As a result, there is no basis to conclude that AECOM Management Services' manner of performance following the anticipated transaction will change in any material way.

We deny the protest.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Knight Point Systems, LLC

File: B-418746

Date: August 24, 2020

Daniel R. Forman, Esq., Robert J. Sneckenberg, Esq., and Gabrielle D. Trujillo, Esq., Crowell & Moring LLP, for the protester.
Shandra J. Kotzun, Esq., Department of Homeland Security, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision to exclude quotation from consideration is sustained where record shows that quotation was eliminated based on considerations not contemplated by the solicitation's requirements.

2. Protest challenging agency's decision to exclude quotation from consideration is sustained where record shows that the agency's conclusion regarding the identity of the entity submitting the quotation is not supported by the record.

DECISION

Knight Point Systems, LLC, of Chantilly, Virginia, protests the Department of Homeland Security, United States Coast Guard's decision to exclude Knight Point's quotation from further consideration under request for quotation (RFQ) No. 70Z07920QPT203400, issued by the United States Coast Guard, for infrastructure management services (IMS). The protester argues that the agency unreasonably concluded that the quotation had been submitted by Knight Point's parent company, Perspecta, Inc., instead of by Knight Point, and therefore, that Knight Point was ineligible for award.

We sustain the protest.

BACKGROUND

The Coast Guard issued the RFQ on April 6, 2020, for a multi-phase procurement under Federal Acquisition Regulation (FAR) subpart 8.4, to vendors holding General Services Administration (GSA) Federal Supply Schedule contracts under Information Technology

Schedule 70. The solicitation contemplates the establishment of two, fixed-price blanket purchasing agreements (BPAs): the first with a vendor that holds a GSA schedule contract, with four required special item numbers (SINs),[1] to be the team leader responsible for the requirement as a whole (referred to herein as the IMS prime vendor); and the second with a small business vendor that is responsible for providing end user hardware devices (referred to as the hardware vendor).[2] The solicitation also anticipates the issuance of an initial task order (task order 1) under each BPA. The combined estimated value of the two BPAs is $969 million. Agency Report (AR), Tab 8, RFQ, amend. 0001, at iv.[3]

The RFQ provides for three evaluation phases: phase I (prior experience), phase II (technical approach), and phase III (performance and pricing). *Id.* at 18. As relevant here, phase I, prior experience, consists of: verifying that the IMS prime vendor possesses the four required GSA schedule SINs; confirming the IMS prime vendor meets the RFQ's small business subcontracting goals requiring that the IMS prime vendor allocate 40 percent of subcontracted dollars to small businesses, not including the dollars allocated to the hardware vendor; and evaluating the IMS prime vendor's prior experience submission. *Id.* at 20-22, 29-30.

The RFQ provides, as relevant here, that to be considered for a BPA and task order 1, the IMS prime vendor "shall submit a response for Phase I by the Quote Submission Deadline," and that "[f]ailure to submit a response in Phase I precludes an IMS prime vendor from participating in Phase II and Phase III." *Id.* at 15. The solicitation also provides that the IMS prime vendor shall submit a quotation that "clearly, concisely, and accurately describe[s] the IMS prime vendor's response to the RFQ." *Id.* at 18.

For small business subcontracting goals, the solicitation provides: "If an IMS prime vendor does not have an established GSA Subcontracting Plan, the IMS prime vendor shall submit a Small Business Subcontracting Plan [in accordance with] FAR 52.219-9(d)." *Id.* at 21. With regard to prior experience, the solicitation explains that the "IMS prime vendor shall provide up to four (4) examples of demonstrated experience as a Prime Contractor." *Id*. It also instructs that the "information provided shall be sufficiently detailed that the Government can determine whether the examples demonstrate the IMS Prime Vendor's experience," and that the agency "will not contact

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[1] These GSA Schedule 70 SINs include: SIN 132-40, Cloud; 132-45D, Risk and Vulnerability Assessment; 132-51, IT Professional Services; and 70-500, Order-Level Materials (OLMs). RFQ at iii.

[2] The hardware vendor is required to have GSA Schedule 70 SIN 132-8, Purchase of New Equipment. *Id.* at 31.

[3] The RFQ has been amended once. Citations to the RFQ are to the amended copy, which fully incorporated the initial RFQ and was provided in the AR at tab 8.

references for the purposes of obtaining detail lacking from the IMS prime vendor's response." *Id.* at 20-22.

On April 20, 2020, the Coast Guard received a timely quotation on Perspecta letterhead. AR, Tab 16, Quotation. The quotation's cover page stated that the quotation had been prepared by "Knight Point Systems, LLC (a Perspecta company)."[4] AR, Tab 16, Quotation, Cover Page. The introductory paragraph of the quotation's cover letter stated as follows:

> Perspecta Inc., (Perspecta; NYSE: PRSP), submitting this proposal through its bidding entity, Knight Point Systems, LLC (Knight Point), is pleased to respond to the subject opportunity for the Department of Homeland Security (DHS), United States Coast Guard (USCG) for Infrastructure Managed Services (IMS). The Perspecta name used throughout this proposal is considered interchangeable among the legal bidding entity, Knight Point.

Id. at 2. The cover letter identified Knight Point as the IMS prime vendor, and included a single Dun & Bradstreet (DUNS) number and commercial and government entity (cage) code--both for Knight Point. *Id.* at 3. The quotation also included a copy of Knight Point's GSA Schedule contract, with the four SINs required by the RFQ. *Id.* at 5. The quotation was signed by an individual authorized to negotiate on Knight Point's behalf. *Id.* at 3.

In addition to the references to Knight Point, the quotation included multiple references to Perspecta. For example, the quotation cover letter stated that "Perspecta, through its bidding entity Knight Point, hereby acknowledges BPA RFQ IMS Amendment 01, dated 14-APR-2020." *Id.* at 2.

On April 24, 2020, the contracting officer sent a letter to "Knight Point Systems, LLC (a Perspecta company)."[5] AR, Tab 22, Communications Letter, at 1. The letter advised that the agency did not understand the "relationship between Perspecta and Knight Point," and sought clarification regarding the quotation's use of the term "Legal Bidding Entity." *Id.* The letter also asked what the quotation meant by saying that the "Perspecta and Knight Point company names are interchangeable," and asked whether Knight Point and Perspecta were independent entities with the ability to enter into their own contracts. *Id.*

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[4] The cover page also contained a Freedom of Information Action Act exemption notice, which similarly identified "Knight Point Systems, LLC, a Perspecta company," as the owner of the quotation's information. AR, Tab 16, Quotation, Cover Page.

[5] The letter specified that the agency was "not requesting or accepting quote revisions," but rather, "requesting written responses" to the agency's questions. AR, Tab 22, Communications Letter, at 1.

In addition, as relevant here, the letter noted that the solicitation required that the IMS prime vendor submit prior experience examples where the IMS prime vendor was the prime contractor on the contract. *Id.* The agency advised, however, that although Knight Point had been identified as the IMS prime vendor, all "[p]rior [e]xperience examples identify Perspecta as the [p]rime [c]ontractor." *Id.* The agency therefore asked that the vendor explain why this "experience should be considered as the [p]rior [e]xperience of the IMS prime vendor, Knight Point." *Id.*

In response, the vendor explained that, "Perspecta Inc. (Perspecta) acquired Knight Point Systems, LLC (Knight Point)," on August 1, 2019, and that "Perspecta is the parent company that wholly owns Knight Point." AR, Tab 24, Communications Response, at 2. With regard to the term "Legal Bidding Entity" as used in the quotation, the response explained that this term "refers to the legal entity that is submitting the proposal for the [Coast Guard] IMS program," and that "[f]or this procurement, Knight Point is the legal bidding entity holding the required GSA IT Schedule 70 No. GS-35F-0646S entering into this contract, if awarded." *Id.*

In response to the inquiry about how the company names Perspecta and Knight Point can be interchangeable, the vendor reiterated that "[f]or the avoidance of any doubt, Knight Point is the bidding entity and Perspecta is the parent company." *Id.* The vendor then explained that, "[i]n order to demonstrate the full suite of capabilities, we included Prior Experience citations across the Perspecta enterprise as 'Perspecta,' and we regret the confusion this may have caused." *Id.* The vendor explained that "[b]ecause Knight Point is fully integrated into the Perspecta corporate enterprise operating model, (*i.e.* the Perspecta corporate family), Knight Point is able to offer [the Coast Guard] the full resources of not only Knight Point, but of its parent and affiliates as well." *Id.* The vendor also explained that "[o]ur Phase 1 submission included efforts performed by both Knight Point and Perspecta subsidiary [DELETED]." *Id.* Additionally, it noted that "Knight Point's offerings are significantly enhanced through its corporate affiliation with Perspecta and other Perspecta subsidiaries," and "[w]e anticipate that Knight Point will undergo a name change later this year to conform the entity name to the Perspecta brand." The vendor added, however, that "this will have no effect on Knight Point's ability to deliver the capabilities highlighted in our Phase 1 submission for the USCG IMS program." *Id.*

In response to the agency's question regarding why the prior experience in the quotation should be attributed to Knight Point as the IMS prime vendor, the vendor explained that the phase I quotation included [DELETED] from Knight Point and [DELETED] from [DELETED], both of which are operating as subsidiaries under the common control of the parent company, Perspecta. *Id.* at 3. The vendor stated that Knight Point, the IMS prime vendor, is the "prime contractor for the [DELETED] identified in the quotation, and [DELETED] "is the prime contractor" for the other [DELETED] identified. *Id.* The vendor also noted that "[e]ach of the [p]rior [e]xperience citations in our Phase I response individually met all of the relevant capabilities required by [the prior experience factor] of the RFQ." *Id.*

After reviewing the quotation and response from the vendor, the contracting officer determined that Perspecta, rather than Knight Point, submitted the quotation. Protest, exh. E, Coast Guard Decision, at 1. The contracting officer noted that "the letterhead, certifications, representations, and the majority of the quote all use the Perspecta name." *Id.* The contracting officer also found that "the Small Business Plan was submitted by Perspecta" and that "the four Prior Experience examples were submitted as Perspecta experience." *Id.* The contracting officer explained that the "RFQ instructions required that the IMS prime vendor submit a quote that clearly, concisely, and accurately describe[s] the IMS prime vendor's response to the RFQ." *Id.* at 2. He further noted that the solicitation also stated that "for each phase the Government will review the quote to ensure that all required volumes/information have been included for the current Phase," and that if "an IMS [p]rime [v]endor does not submit all required volumes/information for the current phase, the IMS [p]rime [v]endor's submission may be rejected and the IMS [p]rime [v]endor will be ineligible for award." *Id.* The contacting officer concluded that, although Knight Point was the IMS prime vendor, it was not the entity that had submitted the quotation, and therefore, the quotation did not meet the requirements of the RFQ. *Id.*

On May 6, 2020, the Coast Guard issued its decision to reject the quotation and exclude the protester from further consideration. After attempts to engage the Coast Guard in additional communications regarding this issue failed, Knight Point filed the instant protest.

DISCUSSION

Knight Point challenges the agency's decision to exclude its quotation from phase I of the procurement. The protester argues that the agency unreasonably concluded that the quotation was submitted by Knight Point's parent company, Perspecta, instead of by Knight Point. The protester asserts that the quotation as a whole shows that Knight Point--not Perspecta--prepared the quotation, submitted the quotation, and as the IMS prime vendor, will be the entity with which the Coast Guard is required to establish the BPA if its quotation is successful.

The agency argues that the solicitation required that the IMS prime vendor submit "all required information in response to the RFQ requirements," and that the agency's decision to reject the quotation here was reasonable because it was submitted by Perspecta, rather than by the IMS prime vendor. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. For the reasons discussed below, we conclude that the agency's determination to exclude the quotation from the competition was unreasonable and inconsistent with the terms of the solicitation, and sustain the protest on this basis.

We have concluded in past disputes that uncertainty as to the identity of a quoting entity renders the quotation technically unacceptable, since ambiguity as to the quoter's identity could result in there being no party that is bound to perform the obligations of the contract. *Dick Enterprises, Inc.*, B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 1.

There is no such concern, however, where it is clear from the quotation which entity will be bound to perform. *See, e.g.*, *Kollsman, Inc.*, B-413485 *et al.*, Nov. 8, 2016, 2016 CPD ¶ 326 at 5 (finding no ambiguity where entity bound to perform contract was identified by unique CAGE code); *see Trandes Corp.*, B-271662, Aug. 2, 1996, 96-2 CPD ¶ 57 at 3 n.1 ("inclusion of the names of corporate affiliates in a proposal does not make the identity of the offeror ambiguous where . . . it is possible to sufficiently identify the offering entity so that it would not be able to avoid the obligations of the offer").

Knight Point argues that the quotation was not ambiguous as to whether it or its parent company, Perspecta, submitted the quotation. The protester asserts that Knight Point submitted the quotation because the submission identified Knight Point as the "offeror" and included, for example, a single CAGE code and a single DUNS number--both Knight Point's. In addition, Knight Point notes that the quotation consistently identified Knight Point as the "bidding entity" and included a copy of Knight Point's GSA schedule contract. The protester also asserts that there was no ambiguity in the quotation regarding which entity would be bound to perform the awarded BPA.

The Coast Guard acknowledges that the quotation identified Knight Point as the IMS prime vendor. The Coast Guard also acknowledges that the quotation clearly indicates that, if the quotation is successful, Knight Point will be the entity that is bound to perform because the Coast Guard will be required to establish a BPA with Knight Point. Protest, exh. E, Decision at 1-2 ("[I]n the event the [quotation] was the successful [quotation] in this competitive solicitation, the BPA would have to be awarded to Knight Point."). The Coast Guard argues, however, that, as noted above, the RFQ imposed the additional requirement that the IMS prime vendor submit all volumes/information for the current phase of the procurement. The agency asserts that the contracting officer reasonably determined that the quotation had been submitted by Perspecta, which was not identified in the quotation as the IMS prime vendor. COS/MOL at 14. The agency therefore asserts that its decision to exclude the quotation as ineligible for award complied with the terms of the RFQ and was reasonable.

In reviewing protests challenging an agency's evaluation of quotations, we do not independently evaluate quotations. Rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. *See Innovative Mgmt. & Tech. Approaches, Inc.*, B-413084, B-413084.2, Aug. 10, 2016, 2016 CPD ¶ 217 at 4. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. *See McCann-Erickson USA, Inc.*, B-414787, Sept. 18, 2017, 2017 CPD ¶ 300 at 3.

As explained below, we conclude that the agency's decision to exclude the quotation from the competition here was unreasonable. First, the record shows that the agency decided to exclude the quotation from the competition based on considerations not contemplated by the solicitation's requirements. In deciding to exclude the quotation, the agency relies upon solicitation language providing that "for each phase the

Government will review the quote to ensure that all required volumes/information have been included for the current Phase," and that "[i]f an IMS prime vendor does not submit all required volumes/information for the current phase, the IMS prime vendor's submission may be rejected and the IMS prime vendor will be ineligible for award." RFQ at 29.

The agency essentially argues that this provision precluded any entity other than the IMS prime vendor from contributing information to the quotation. *See, e.g.*, COS/MOL at 2 ("The RFQ was very specific on how vendors should propose in that the IMS prime vendor was to submit all required information in response to the RFQ requirements."); *see id.* at 23 (agency asserts that "two separate legal entities contributed information in the quote contrary to the RFQ requirements that the IMS prime vendor shall submit all required information.").

We find this was not a reasonable interpretation of the solicitation provision, which was clearly focused on the completeness of the information submitted, as opposed to the source of the information. Moreover, considering that this RFQ provision applies to all phases of the acquisition, the agency's interpretation appears inconsistent with the solicitation's contemplated incorporation of team members and subcontractors. RFQ at 32. Based on our review of the record and the terms of the solicitation, we conclude the agency's reliance on this provision to exclude the quotation from the competition was unreasonable.

Second, the record fails to support the contracting officer's conclusion that portions of the quotation, such as the small business subcontracting plan and the prior experience examples were submitted by Perspecta, Inc., rather than Knight Point. For example, with regard to the small business subcontracting plan, as indicated above, the agency determined that the plan was submitted by Perspecta, Inc. The agency made this determination in relevant part, because the plan stated that it was submitted by "a Large Business (LB) offeror" but, in contrast, according to a screenshot of Knight Point's GSA Schedule 70 contract, the contracting officer concluded that "Knight Point is a small business[.]" AR, Tab 25, Phase I Initial Review & Eval., at 7 ("[A]lthough the quote says Perspecta is submitting the Small Business Subcontracting Plan through its legal bidding entity, Knight Point, within the Small Business Subcontracting Plan attachment, Perspecta states, "As a large Business (LB) offeror, Perspecta respectfully submits this Small Business Subcontracting Plan to the [Coast Guard]", but Knight Point is a small business."); COS/MOL at 8; AR, Tab 16, Quotation, at 2-1. As the protester points out, however, in light of Knight Point's acquisition by Perspecta, Knight Point is no longer a small business.[6]

[6] The record also shows that the contracting officer was aware of Perspecta's acquisition of Knight Point at the time of the agency's evaluation. See AR, Tab 24, Communications Response, at 2. The protester also maintains that Knight Point is not (and was not) identified as a small business in SAM.gov at the time of quotation submission.

The record also shows that the cover page of the small business subcontracting plan stated that the plan had been prepared by "Knight Point Systems, LLC, a Perspecta company." The plan's introduction stated it was an "individual plan" that was "developed specifically for this contract," and identified: "Knight Point Systems, LLC." AR, Tab 20, Quotation, attach. 2, Small Business Subcontracting Plan (SBSP), Cover Page, 1. The evaluation of the plan also shows that the agency found that it "met the Small Business Subcontracting Goals of the RFQ." AR, Tab 25, Phase I Initial Review & Eval., at 4. On this record, we find the agency's determination that the small business subcontracting plan was submitted by Perspecta is not supported by the record, and therefore, unreasonable.

Similarly, the agency determined that all the prior experience examples in the quotation are from Perspecta, and none from Knight Point. AR, Tab 25, Phase I Initial Review & Eval., at 7. This conclusion, however, is also not supported by the record. As discussed above, in response to the agency's inquiry, Knight Point clarified that the prior experience examples included in the quotation were performed by Knight Point and [DELETED], both of which are subsidiaries of Perspecta, Inc. *Id.* at 5; AR, Tab 24, Communications Response, at 4 (Knight Point "is the prime contractor for the [DELETED]," and its affiliate, [DELETED], "is the prime contractor on the [DELETED]."). The response further explained that "Knight Point has access to the resources of the entire Perspecta family, and is relying on those resources in this procurement." *Id.* at 3. In light of the clarification that Knight Point and [DELETED] were the prime contractors for the prior experience examples, we find the agency's rationale--that the quotation was submitted by Perspecta, Inc., instead of Knight Point, because all four of the prior experience examples involved Perspecta, Inc. (instead of Knight Point)--is not supported by the record.[7]

[7] After the vendor clarified that Knight Point was the prime contractor for [DELETED] of the prior experience examples in the quotation, the agency concluded that "to accept the assertion . . . the Phase I quote would have to be revised." AR, Tab 25, Phase I Initial Review & Eval., at 5. This conclusion, however, appears to be based, at least in part, on the agency's interpretation of the same RFQ requirement, which as discussed previously, we find was unreasonable. See *id.* ("This is a direct contradiction to the RFQ requirements that the IMS prime vendor submit Prior Experience examples where they were the [p]rime [c]ontractor."). The record reflects that the quotation identified the following specific information for all four of the prior experience examples included in the quotation, as required by the RFQ: agency name, contract number, period of performance, total end users, and client contact information, and then detailed the experience on the contract. AR, Tab 16, Quotation, at 3-1–3-14; RFQ at 22.

Accordingly, all of the pertinent information regarding the prior experience [DELETED] for which Knight Point was the prime contractor was included in the quotation. AR, Tab 16, Quotation, at 3-1-3-4. Additionally, as discussed above, the quotation explained that the name Perspecta as used in the quotation was interchangeable with the entity, Knight Point. *Id.* at 1. All that was provided in the communications response letter was

Finally, we are not persuaded that the use of the name "Perspecta" in multiple places in the quotation reasonably supports the conclusion that the quotation was submitted by Perspecta, Inc., rather than Knight Point. The agency argues in this regard that the "cover letter clearly provided designated shorthand names for the two companies; 'Perspecta, Inc. (Perspecta)' and 'Knight Point Systems, LLC (Knight Point),'" and that, "[b]ased on this shorthand it was logical to conclude that the use of the name Perspecta was shorthand for Perspecta Inc. and the name Knight Point was shorthand for Knight Point Systems, LLC, not each other." COS/MOL at 15. The agency asserts that "[t]his shorthand also indicates that Perspecta and Knight Point were two separate legal entities, not the same entity," and "[a]s a result, it was reasonable for the [agency] to determine that any use of the name Perspecta actually referred to Perspecta, Inc., not the IMS [p]rime [v]endor." *Id.*

Based on the plain language in the quotation, we find the agency's conclusion in this regard unreasonable. Although the quotation's cover letter included shorthand names for Perspecta, Inc., and Knight Point Systems, LLC, it also clearly advised that: "The Perspecta name used throughout this proposal is considered interchangeable among the legal bidding entity, Knight Point." AR, Tab 16, Quotation, at 1. This sentence makes clear that the Perspecta "name" is interchangeable with the legal entity--Knight Point. Knight Point's response further explained how the two company names were interchangeable, noting that "[f]or the avoidance of any doubt, Knight Point is the bidding entity and Perspecta is the parent company" but that Knight Point "[i]n order to demonstrate the full suite of capabilities," included Prior Experience citations across the Perspecta enterprise as 'Perspecta[.] AR, Tab 24, Communications Response, at 2.

Knight Point also explained that, "[b]ecause Knight Point is fully integrated into the Perspecta corporate enterprise operating model, (*i.e.* the Perspecta corporate family), Knight Point is able to offer [the Coast Guard] the full resources of not only Knight Point, but of its parent and affiliates as well," and that "Knight Point's offerings are significantly enhanced through its corporate affiliation with Perspecta and other Perspecta subsidiaries." *Id.* Accordingly, although Perspecta, Inc. and Knight Point are separate legal entities, we find that the quotation, as a whole, sufficiently identified the relationship between the two entities. Additionally, we find that the quotation left no doubt as to which entity--*i.e.*, Knight Point, was submitting the quotation and would be the legal entity responsible for entering into the BPA with the Coast Guard if successful.

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clarification that Knight Point was the prime contractor for the [DELETED] in the quotation. We see no reason why the quotation would need to be revised in order for the agency to consider the correct identity of the prime contractors provided in the quotation's prior experience examples for purposes of evaluating the experience factor. We further note that the solicitation also provided that the agency may "contact references provided to confirm the accuracy of the information provided in the IMS [p]rime [v]endor's response." RFQ at 22. On this record, we do not agree with the agency that the quotation would necessarily need to be revised.

On this record, we conclude that the agency's evaluation that the quotation was submitted by Perspecta, Inc., rather than Knight Point, is not supported by the record. We further conclude that the agency's evaluation that the quotation failed to adhere to an RFQ requirement based on the conclusion that the quotation was submitted by Perspecta, Inc., rather than Knight Point, is inconsistent with the terms of the RFQ. We sustain the protest on these two bases.

RECOMMENDATION

We recommend that the Coast Guard reevaluate Knight Point's quotation in accordance with the solicitation and our decision, and make a new determination regarding advancement of the quotation to the next phase of the competition. We also recommend that Knight Point be reimbursed its costs of filing and pursing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-158766

December 23, 2020

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2020

Congressional Committees:

This letter responds to the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (CICA), that the Comptroller General report to Congress each instance in which a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest decided the prior fiscal year and each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the Comptroller General. We are pleased to report that there were no such occurrences during fiscal year 2020. In this letter we also provide data concerning our overall protest filings for the fiscal year. Finally, this letter also addresses the requirement under CICA that our report "include a summary of the most prevalent grounds for sustaining protests" during the preceding year. 31 U.S.C. § 3554(e)(2).

Summary of Overall Protest Filings

During the 2020 fiscal year, we received 2,149 cases: 2,052 protests, 56 cost claims, and 41 requests for reconsideration. We closed 2,137 cases during the fiscal year, 2,024 protests, 66 cost claims, and 47 requests for reconsideration. Of the 2,137 cases closed, 417 were attributable to GAO's bid protest jurisdiction over task orders. Enclosed for your information is a chart comparing bid protest activity for fiscal years 2016-2020.

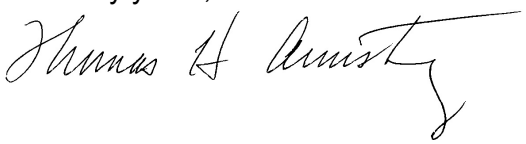
Most Prevalent Grounds for Sustaining Protests

Of the protests resolved on the merits during fiscal year 2020, our Office sustained 15 percent of those protests. Our review shows that the most prevalent reasons for sustaining protests during the 2020 fiscal year were: (1) unreasonable technical evaluation;[1] (2) flawed

[1] *E.g.*, *Leidos Innovations Corp.*, B-417568.3, B-417568.4, May 11, 2020, 2020 CPD ¶ 167 (finding that the agency's evaluation was unreasonable where the agency excluded from consideration certain portions of the offerors' proposals and failed to comply with the solicitation's provisions regarding consideration of that information).

solicitation;[2] (3) unreasonable cost or price evaluation;[3] and (4) unreasonable past performance evaluation.[4] It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.

Sincerely yours,



Thomas H. Armstrong
General Counsel

Enclosure

[2] *E.g.*, *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 (finding that the terms of a solicitation failed to provide an intelligible and common basis for award, where the proposed methodology--predicated on the agency's determination of which combination of two independently developed proposals offered the best value to the government--failed to reasonably represent the key areas of importance and emphasis to be considered in the source selection decision and to reasonably support meaningful comparison and discrimination between and among competing proposals as required by the Federal Acquisition Regulation).

[3] *E.g.*, *Sayres & Assocs. Corp.*, B-418374, Mar. 30, 2020, 2020 CPD ¶ 115 (finding that the agency's cost realism analysis was unreasonable where the record fails to establish the reasonableness of the agency's rejection of the protester's proposed labor escalation rate and where that rejection was inconsistent with the terms of the solicitation).

[4] *E.g.*, *Addx Corp.*, B-417804 *et al.*, Nov. 5, 2019, 2020 CPD ¶ 118 (finding that the agency's evaluation of the protester's past performance was unreasonable where the agency identified a weakness based on an unstated evaluation criterion and where the ratings of marginal and moderate risk lacked a reasonable basis).

List of Congressional Committees

The Honorable Richard Shelby
Chairman
The Honorable Patrick Leahy
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Ron Johnson
Chairman
The Honorable Gary C. Peters
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Nita M. Lowey
Chairwoman
The Honorable Kay Granger
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Carolyn B. Maloney
Chairwoman
The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
House of Representatives

Bid Protest Statistics for Fiscal Years 2016-2020

	FY2020	FY2019	FY2018	FY2017	FY2016
Cases Filed[1]	2149 (down 2%)[2]	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)
Cases Closed[3]	2137	2200	2642	2672	2734
Merit (Sustain + Deny) Decisions	545	587	622	581	616
Number of Sustains	84	77	92	99	139
Sustain Rate	15%	13%	15%	17%	23%
Effectiveness Rate[4]	51%	44%	44%	47%	46%
ADR[5] (cases used)	124	40	86	81	69
ADR Success Rate[6]	82%	90%	77%	90%	84%
Hearings[7]	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)

[1] All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (*i.e.*, .2, .3). Each of these numbers is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.

[2] From the prior fiscal year.

[3] Of the 2,137 cases closed in FY 2020, 417 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

[4] Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

[5] Alternative Dispute Resolution.

[6] Percentage of cases resolved without a formal GAO decision after ADR.

[7] Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Mythics, Inc.; Oracle America, Inc.

File: B-418785; B-418785.2

Date: September 9, 2020

David S. Black, Esq., Gregory R. Hallmark, Esq., and Amy Fuentes, Esq., Holland & Knight LLP, for Mythics, Inc.; and Craig A. Holman, Esq., and Nathaniel E. Castellano, Esq., Arnold & Porter Kaye Scholer, LLP, for Oracle America, Inc., protesters.
Emily Vartanian, Esq., Library of Congress, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging the terms of a solicitation as unduly restrictive are sustained where the terms of the solicitation are inconsistent with various regulatory requirements applicable to the agency.

DECISION

Mythics, Inc., of Virginia Beach, Virginia, and Oracle America, Inc., of Reston, Virginia, protest the terms of request for proposals (RFP) No. 030ADV20Q0125, issued by the Library of Congress (LOC) to acquire cloud computing services. The protesters argue that the RFP is unduly restrictive of competition for a variety of reasons.

We sustain the protests.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a single, fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract to provide the LOC cloud computing products and services for a 5-year period of performance. RFP at 4, 9, 40.[1]

[1] After issuing the initial RFP, Agency Report (AR), exh. 1a, RFP, the agency issued a series of four amendments prior to Mythics and Oracle filing their protests. AR, exhs. 1j, 1l, 1n, 1o, RFP Amendments. All references to the RFP in this decision are to the consolidated version of the RFP issued as amendment No. 0004.

The RFP identifies the name-brand products of three cloud services providers, Amazon Web Services, Google Cloud Platform and Microsoft Azure, and requires offerors to provide pricing for an enumerated list of 13 products or services available from these three firms. RFP at 5-6, 39. *See also* AR, exh. 1p, Pricing Schedule.

In addition (and as amended) the RFP provides for the possibility of offering the cloud services of firms not specifically identified in the RFP, and referred to only generically as "other" services (including marketplace services, professional services, training services, and support services). RFP at 6, 39; *see also* AR, exh. 1p, Revised Price Schedule.

The RFP instructions expressly provide as follows: "The Library anticipates making a single award to the vendor who can provide all three cloud services. Vendors are encouraged to enter into teaming agreements if unable to provide all three cloud services." RFP at 38. The RFP instructions also state that offerors are required to provide a technical narrative describing how they will meet the requirements of the solicitation's statement of work, and explicitly encourage offerors to propose a solution that incorporates the "marketplaces" (discussed in detail below) of the three identified vendors. RFP at 38. The RFP does not include any specific instructions relating to proposing cloud services of "other" vendors.

The RFP includes three separate provisions that comprise the statement of work. First, the RFP document itself includes a section "C" which is captioned "Section C Statement of Work (SOW)." RFP at 5-8. This portion of the RFP includes an "overview/background" section that provides a list of the specific services being solicited from the named vendors (for example, section C.1.1 describes the Amazon services being solicited), as well as a list of "other" cloud service providers' services being solicited, *id.* at 5-6; a statement of the scope of the contemplated services, *id* at 6; a list of contractor requirements (for example, a requirement to provide a dedicated master payer account) *id.*; a description of the information necessary to place an order against the awarded contract, *id.*; a definitional list of "functional categories" of work being solicited (for example, the list includes a definition of infrastructure as a service (IaaS)), *id* at 6-7; a list of contract performance and reporting requirements (for example, this includes reports detailing quality control of services and deliverables), *id.* at 8; a description of various requirements for all key personnel, *id.*; and, finally, certain generic information relating to the provision of government furnished property and reimbursement for travel, *id.*

Second, the RFP includes an attachment which is an Amazon-specific statement of work detailing "migration readiness and planning" consulting and advisory services to be performed--presumably directly by Amazon or an authorized Amazon reseller--once award has been made. AR, exh. 1b, Attachment A, Amazon-Specific SOW.

Third, the RFP includes an attachment which is a Google-specific statement of work describing services to be performed in connection with the establishment of a "Google cloud professional services project charter," also described as a "cloud foundation

engagement"--once again, these are services that, presumably, will be provided by Google or an authorized Google reseller after contract award. AR, exh. 1c, Attachment B, Google-Specific SOW.[2]

In addition, the RFP includes a document that is an enumerated list of 68 required "minimum capabilities" that also identifies 15 additional "desirable features." AR, exh. 1m, Attachment J4, Cloud Service Providers Base Minimum Requirements.

Finally, in addition to these RFP documents, the agency published three lists of offeror questions and answers relating to the agency's requirements. AR, exhs. 1g, 1h, 1i, Offeror Questions and Answers. We discuss a number of these questions and answers below.

In sum, the materials described above comprise the solicitation as a whole.[3]

DISCUSSION

The protesters raise a number of challenges to the terms of the RFP. We discuss these in detail below, but address two preliminary matters before considering the merits of the protests.

The Agency's Requests for Dismissal

The agency sought to have one or both of the protests dismissed for various reasons. On June 15, 2020, the agency submitted a request to dismiss the Oracle (but not the Mythics) protest, arguing that Oracle was not an interested party. The agency reasoned that, because it was soliciting cloud services through resellers (such as Mythics) as opposed to the actual cloud service providers (such as Oracle), that Oracle lacked the direct economic interest necessary to pursue its protest. By notice dated June 18, we declined to dismiss the Oracle protest, concluding that Oracle was an interested party with a direct economic interest in the outcome of the acquisition.

One day later, on June 19, the agency filed a request for dismissal of the protest based on its stated intent to take corrective action. The agency's dismissal request provided as follows:

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[2] The RFP also included another attachment, which appears to be an order form to actually place the order for these initial tasks to be performed by Amazon and Google during the first year of contract performance, and which references as attachments the vendor-specific SOWs described above. AR, exh. 1d, Task Order Form.

[3] The RFP also included a Service Contract Act wage determination that is not pertinent to our consideration of the protest. AR, exh. 1f.

> The Library of Congress will take corrective action in connection with the above captioned protests. Although the precise corrective action to be taken has not yet been determined, the Library will not award a contract from the current solicitation without further modification.

Agency Dismissal Request, June 19, 2020. In response to this request for dismissal, our Office sought clarification of the agency's intended corrective action. In response to our request, the agency submitted a letter that provided additional information about its proposed corrective action. We again declined to dismiss the protests, notwithstanding the agency's clarification.

The basis for our conclusion was that the proposed corrective action either was too vague to provide a basis for dismissal, or that the proposed corrective action failed to address one or more of the protest allegations. For example, in responding to a protest allegation that the agency impermissibly was soliciting proposals on a brand-name-only basis, the agency's clarification advised as follows:

> The Library will either remove brand name requirements from the solicitation; post a brand name justification; or solicit on a "brand name or equal" basis indicating salient characteristics of the brand name item that an equal item must meet for award. The solicitation will include information regarding the Library's current IT [information technology] environment, such as what applications are in use in what brand name cloud environments.

Agency Dismissal Request, June 25, 2020, at 1. We concluded that the agency's request for dismissal failed to resolve this protest issue. In essence, the agency's proposed corrective action stated its intent to choose a course of action from among the only three possible courses of action available that would render the protests academic. This notice did not, however, advise our Office--or the protesters--which of the three possible courses of action the agency would actually take.[4]

Similarly, in responding to a protest allegation that the RFP impermissibly solicits marketplace services, the agency's clarification letter stated that the agency would

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[4] The agency's proposed corrective action in response to an allegation that the RFP impermissibly contemplates the award of just a single IDIQ contract was similarly ambiguous, providing only as follows:

> The solicitation will clarify that award will be made on either a single or multiple award basis as determined by the Library at the time of award. Any necessary justifications for awarding on a single award basis will be documented in the contract file, if a single award is made.

Agency Dismissal Request, June 25, 2020, at 1. Again, the agency's representation stated that it intends to take one of only two courses of action available, without actually stating which course of action the agency intended to take.

continue to include the marketplace services as part of the overall requirement. Agency Dismissal Request, June 25, 2020, at 2. Because the agency's clarification letter represented that the agency would continue to include the challenged requirement, we found that this did not resolve this protest allegation.

After we declined to dismiss the protests based on the agency's clarification letter, the agency filed a report responding to the protests. In its report, in addition to providing substantive responses to the protest allegations, the agency again stated its intention to take corrective action in connection with certain protest issues, but did not provide sufficient detail or explanation about what, precisely, it intended to do, or when it intended to implement any proposed corrective action.

For example, in responding to an allegation that the RFP impermissibly solicits the agency's requirements on a brand-name basis, the agency takes the overall position that the RFP, as amended, now permits competition on a brand-name-or-equal basis (an issue discussed in detail below), but also states that the agency intends to issue an amendment that removes all references to brand names in connection with the agency's solicitation of the infrastructure as a service (IaaS) requirement. Agency Memorandum of Law at 2-3. However, in the same passage, the agency states that it will continue to solicit software as a service (SaaS) on a brand-name basis from Microsoft. *Id.*

In the final analysis, as in every protest, our Office must consider the propriety of the agency's actions based on a review of the record presented. In the context of a solicitation challenge, our Office necessarily must confine our review to the terms of the solicitation as actually--currently--issued. Vague, ambiguous, partial, or inadequate statements on the part of the agency to take corrective action at some indefinite point in the future--corrective action that may or may not render the protest academic--do not provide a basis for dismissal of the protests. *See Payne Construction*, B-291629, Feb. 4, 2003, 2003 CPD ¶ 46 at 3-4. Additionally, in the absence of an actual solicitation provision, there is no basis for our Office to consider the undefinitized corrective action measures sketched out in the agency's pleadings in reviewing the propriety of the solicitation as written. Under the circumstances, we will review the protest allegations in light of the record actually before us, without consideration of the assertions made by the agency to amend or modify the RFP at some time in the future.

Applicability of the Federal Acquisition Regulation

In addition to the considerations discussed above, we note that many of the protester's challenges are couched in terms of alleged violations of, or inconsistencies with, certain requirements of the Federal Acquisition Regulation (FAR). Because the Library of Congress is a legislative branch agency, we consider first the question of whether the FAR is applicable to the acquisition. The agency has not argued that it is not bound by the requirements of the FAR, and in fact, cites its own regulation stating that the agency follows the FAR as a matter of policy. Library of Congress Regulation 7-210--Procurement of Goods and Services, §3.A. Under the circumstances, we conclude that the requirements of the FAR govern this acquisition.

Protests

Turning to the merits, the protesters principally argue that the solicitation as currently issued essentially amounts to a brand-name type solicitation that was issued without the required justification; that the agency is improperly soliciting online marketplace products or services that will be obtained without the benefit of competition; and that the agency improperly is using a single versus multiple award strategy. The protesters also raise several additional, related arguments. We discuss each of the protest allegations below.

Brand-Name Solicitation

The protesters argue that the RFP impermissibly requires offerors to provide the 13 brand-name products peculiar to Amazon, Google and Microsoft without the agency having executed the required justification and approval for limiting competition to those products, and without alternatively specifying the salient characteristics of those products that are necessary to meet the agency's requirements so that alternative products may be offered. According to the protesters, this amounts to an impermissible brand-name-only solicitation, even though the agency added line items for "other" products in an amendment to the RFP.

We sustain this aspect of the protests. In describing an agency's needs, the FAR mandates that agencies include restrictive provisions only to the extent necessary to satisfy actual requirements. FAR 11.002(a)(1)(ii). To the maximum extent practicable, agencies are required to ensure that their needs are stated in terms of functions to be performed; the performance required; or the essential physical characteristics necessary to meet the agency's actual requirements. FAR 11.002(a)(2)(i).

Agencies generally are precluded from describing their requirements using a particular brand-name product or service (thereby precluding firms from offering the products or services of other concerns), and may only specify goods or services "peculiar to one manufacturer" where the agency's market research shows that other companies' products or services do not meet, or cannot be modified to meet, the agency's requirements. FAR 11.105(a). When agencies restrict competition to a particular brand-name product or service, the authority to contract without providing for competition must be supported by a justification and approval (J&A) describing the basis for the agency's conclusion that only the brand-name product--and no other supplies or services--will meet the agency's requirements. FAR 11.105(a), 6.302-1.

The FAR does provide agencies with authority to use brand-name-or-equal type purchase descriptions or specifications. In this connection, the FAR provides that the use of performance specifications is preferred over the use of brand name or equal specifications, because performance specifications encourage offerors to propose innovative solutions. FAR 11.104(a). Nonetheless, agencies may use brand-name-or-equal specifications provided that, in addition to specifying the brand-name product or

service, the agency also includes a general description of those salient physical, functional, or performance characteristics of the brand-name product that an "equal" product must meet to be acceptable for award. FAR 11.104(b).

The record includes a J&A in support of limiting competition to the name-brand products identified in the RFP that was executed in January 2020. AR, exh. 6d, Cloud Services J&A. However, the agency failed to publish the J&A when it issued the solicitation, as required by the FAR (the agency states that it inadvertently failed to publish it). *See* FAR 6.302-1(c)(1)(ii)(C), 5.102(a)(6). In any event, the agency now claims that its failure to publish the J&A was rendered "moot" when it issued amendments 2, 3 and 4 to the RFP which, it argues, converted the RFP into a brand-name-or-equal solicitation. We disagree.

A review of the RFP as currently issued leads our Office to conclude that, rather than issuing a brand-name-or-equal solicitation, the agency effectively has issued what we would characterize as a "brand-name-and-equal" solicitation. In particular, the RFP as currently issued continues to require any prospective offeror to propose the 13 enumerated brand-name products. RFP at 39; exh. 1p, Pricing Schedule.

As noted above, in responding to the protest, the agency stated that it intends to modify the RFP to remove all references to brand names in connection with its requirement for IaaS, but that it will continue to solicit its requirement for SaaS on a brand-name basis from Microsoft. The agency also states that, even after removing those references to the brand-name products, it intends to inform offerors of the agency's existing cloud environment, and to communicate to offerors that the agency's applications currently in an existing cloud environment must be maintained to support full operation until those applications can be migrated to an alternate cloud service provider.

Leaving aside the fact that the agency has not actually modified the RFP in the manner described in its response to the protests, even the proposed changes do not address in a meaningful way the issues related to identifying brand name products. First, although the agency represents that it will remove references to the brand name products in connection with the solicitation of its IaaS requirement, the agency nonetheless states that it will continue to solicit its SaaS requirements on a brand-name basis from Microsoft. Thus, in this area, the solicitation continues to seek a product on a brand-name-only basis without the agency having executed the necessary J&A.

Second, although the agency states that it will remove all references to the 13 enumerated brand-name products in connection with its IaaS requirements, it nonetheless states that it will describe--and continue to require offerors to provide--what amounts to the agency's current IaaS cloud computing environment for some unspecified, indefinite period of time. In effect, the agency is saying that it will no longer actually name the products it is soliciting, but will instead describe its current cloud computing environment and require that environment to be provided in response to the

RFP.[5] This also amounts to a prohibited solicitation of products on a brand-name basis without executing the necessary J&A.[6]

In addition to the considerations outlined above, the agency's addition of the "other" products category to the RFP did not convert the solicitation from one seeking brand-name products, to one seeking either "brand-name" or "other" products. A brand-name-or-equal solicitation, by definition, permits firms to propose either the brand-name product being solicited, or some unspecified alternative that is equivalent to the brand name product being solicited.

Here, the RFP continues to require offerors to propose all of the enumerated brand-name products being solicited, and also permits offers of unspecified "other" products in addition to, but not in lieu of, the brand-name products. The RFP instructions specifically provide that: "The Library anticipates making a *single award* to the vendor who can provide all three [Amazon, Google and Microsoft] cloud services. Vendors are encouraged to enter into teaming agreements if unable to provide all three cloud services." RFP at 38 (emphasis supplied). *See also* RFP at 4 ("The contract is a single award Indefinite Delivery-Indefinite Quantity and available for use by all Library service units and Legislative agencies."). As noted, this amounts to what we would characterize as a "brand-name-and-equal" solicitation, but does not address the improper limitation caused by brand-name-only procurements.

Second, merely adding contract line items for other products to the RFP fails to provide information about what particular characteristics those other products need to meet in order to be considered equivalent to the brand name products being solicited. The FAR requires agencies, when issuing brand-name-or-equal solicitations, to include a general description of those salient physical, functional, or performance characteristics of the brand-name product that an "equal" product must meet to be acceptable for award. FAR 11.104(b).

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[5] In a related argument, the protesters point out that the requirement for continued operation of the agency's current cloud computing environment is being acquired on a brand-name basis, and essentially without competition among competing cloud service providers. We agree. This is borne out by the two vendor-specific Amazon and Google statements of work included with the RFP. AR, exhs. 1b, 1c.

[6] In responding to the protest, the agency represented that, if necessary, it will document a justification for support of the existing cloud computing environment pending migration to another cloud computing environment. The agency also suggests that its June 25 notice of corrective action submitted during the protest left open the possibility of issuing a J&A to acquire particular brand name products. At this juncture, however, the record here includes no J&A that would permit the agency to solicit its requirements on a brand-name-only basis.

Here, the RFP does not include a list of the salient characteristics peculiar to the brand-name products that must be met by any proposed "equal" product in order to be considered acceptable. As noted, the RFP does include a list of the agency's base minimum requirements for all cloud service providers. AR, exh. 1m, Cloud Service Providers Base Minimum Requirements. However, this document does not enumerate the salient characteristics peculiar to the brand name products being solicited. Instead, this is a list of the agency's requirements that would have to be met by any cloud service provider, even those proposing brand-name products.[7]

The agency argues that this list of mandatory requirements is essentially equivalent to a list of salient characteristics. We disagree. The list itself provides:

> The Library performed market research for . . . the current CONUS [continental United States] full service cloud platforms (AWS [Amazon Web Services], Azure [Microsoft], Google, IBM [International Business Machines], Oracle) in December 2019 to determine the minimum capabilities that would be required . . . to establish an Infrastructure as a Service Platform to host Library Applications. These requirements were developed by the OCIO [Office of the Chief Information Officer] Cloud Integrated Product Team, OCIO IT [information technology] Security and the OCIO Business Units.
>
> The following requirements were determined to be the minimum requirements:

AR, exh. 1m, Cloud Service Providers Base Minimum Requirements, at 1. This overarching statement is followed by a list of 68 enumerated requirements, as well as a list of an additional 15 desirable features.

This is not a list of salient characteristics peculiar to the brand-name products being solicited but, instead, is a list of all the requirements that any prospective cloud service provider's product would be required to meet in order to be responsive to the agency's overall requirements. The list makes no reference to the particular brand-name products being solicited--or to specific characteristics peculiar to those brand-name products--that an equivalent product would need to meet in order to be considered acceptable. Based on the record before us, we conclude that, even if the agency intends to solicit its requirements on a brand-name-or-equal basis, the RFP also lacks a

[7] The protesters point out that there is at least some evidence in the record to show that at least one of the named cloud service providers--Google--may not meet all of the requirements enumerated in this document. For example, among the requirements listed is one for a "relational DBaaS." AR, exh. 1m, Cloud Service Providers Base Minimum Requirements, Requirement No. 5. The record here shows that Google does not entirely meet this requirement. *See* AR, exh. 6a, Cloud Requirements Matrix, IaaS Requirements Worksheet.

list of the salient characteristics that any alternative products would have to meet in order to be acceptable.

In summary, the RFP as written amounts to a "brand-name-and-equal" solicitation that requires prospective offerors to propose an enumerated list of brand-name products, and also contemplates that firms can offer "other" products in addition to the brand-name products; the agency has not executed a J&A that would permit it to solicit its requirements on a brand-name basis; and in any event, even if the agency intends to solicit its requirements on a brand-name-or-equal basis, the RFP is inadequate because it lacks a statement of the salient characteristics peculiar to the brand-name products that would have to be met by an alternate product. In light of these considerations, we sustain this aspect of the protests.[8]

Solicitation of Online Marketplaces

The protesters argue that the RFP impermissibly requires offerors to provide what is known as an "online marketplace" for third-party software applications. These marketplaces are essentially like the applications stores available to obtain software for a smartphone. According to the protesters, these online marketplaces provide a mechanism for the agency to purchase pre-selected, third-party software products from the cloud service provider without competition of any sort for the software applications to be acquired.

The protesters also argue that the cloud service provider essentially is performing an inherently governmental function because the cloud service provider acts as a "gatekeeper" for what third-party software is available to be purchased, as well as what the terms and conditions of the sale may be. According to the protesters, these online marketplaces eliminate many of the basic responsibilities for agencies to acquire goods and services using full and open competition, including, for example, evaluating the products being offered, determining whether the prices offered are fair and reasonable, determining whether the firms providing the products are responsible, and determining whether the third-party vendors have improper conflicts of interest.

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[8] The protesters also correctly point out that the RFP is silent on the question of how the agency will comparatively evaluate proposals from vendors that include the brand-name products only, versus proposals from vendors offering the name-brand products, as well as cloud services from another, unnamed provider. There is nothing in the solicitation's evaluation criteria that addresses this question or explains how the agency will perform an apples-to-apples comparison of offers that are fundamentally different in terms of what is being proposed. *See* RFP at 40. In this connection, offerors must be provided adequate information to compete intelligently and on a comparatively equal basis, and this includes the solicitation's basis for award. *See Blue Origin of Florida, LLC*, B-417839, Nov. 18, 2019 2019 CPD ¶ 388. We therefore sustain this aspect of the protests.

The agency responds that these online marketplace services are an established, integral adjunct to the cloud services providers' overall product. The agency argues as well that the protesters are not prejudiced by this requirement because, according to the agency, they offer such an online marketplace.

We sustain this aspect of the protests. Our Office has not previously had occasion to address this question, but a similar issue arose recently in a protest considered by the U.S. Court of Federal Claims, *Electra-Med Corporation, et al., v. United States* 140 Fed. Cl. 94 (2018), *aff'd and remanded,* 791 Fed. Appx. 179 (Fed. Cir. 2019). In that case, the Department of Veterans Affairs (VA) awarded a series of prime vendor contracts to firms that were responsible for stocking (acquiring), storing and distributing medical supplies available on a master list to VA user locations.

The focus of the case revolved around the fact that these contracts, as modified, required the prime vendor contractors--private concerns rather than government agencies--to populate the master list with supplies that were selected by them, rather than with supplies that had been selected by the VA through, for example, the conduct of a competition to provide particular supplies. There, the court found that, by outsourcing the selection of suppliers entirely to the prime vendor contractors, the VA effectively avoided numerous legal and regulatory requirements pertaining to the federal government procuring goods or services.[9] *Electra-Med Corporation, et al., v. U.S. supra.* at 105.

The same concern identified by the Court in the *Electra-Med* case is present in this case. Here, the RFP contemplates that the cloud service providers will make these online marketplaces available to the agency. For example, the RFP provides, with respect to the Amazon online marketplace, as follows:

> AWS Marketplace: The AWS enables the Library to connect to a marketplace and digital catalog of thousands of software listings from independent software vendors. This will enable the Library to easily find, test, buy and deploy software that runs on AWS.

RFP at 5. The RFP includes similar descriptions of the Microsoft and Google marketplaces. RFP at 5-6.

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[9] This is in contrast to, for example, the Federal Supply Schedule (FSS), where the General Services Administration runs competitions among firms to have their products included on the FSS. It is only through these competitions that a vendor may be included on the FSS. In effect, GSA--rather than a third-party, private concern--is the "gatekeeper" that decides which products and services are listed on the FSS.

Here, in contrast, the online marketplaces being solicited will include only products selected by the third-party cloud service providers without any input from--or as a result of competition conducted by--the agency.

These online marketplaces are populated entirely with software offerings selected by the cloud service providers. The selection process for these third-party software products is unknown and not subject to any of the bedrock requirements for competition applicable to federal agencies; the provenance of these third-party products also is entirely unknown and, by extension, the safety and security of these applications is unknown.

The agency will not hold a competition for the selection of these third-party software products, or participate in any way in the selection of the third-party software vendors or their products for inclusion in the online marketplaces. There is no way for the agency to know whether the third-party software products will be the best solution to the agency's technical requirements; whether the third-party software products will be obtained by the agency at fair and reasonable prices; whether the third-party software vendors are responsible concerns; or whether the third-party software vendors will comply with the many other legal requirements applicable to the acquisition of goods or services by the federal government.

The record in this case also does not include any documentation supporting the agency's decision to acquire these third-party software products using other than competitive procedures. In contrast, in the *Electra-Med* case for example, the VA had executed a J&A finding that the four vendors that had been awarded the master list contracts were the only concerns capable of meeting the agency's requirements. While that J&A ultimately was found inadequate by the Court, the agency nonetheless had executed a document that embodied the agency's rationale for using other than competitive procedures to meet its requirements. No such J&A exists here.[10] In light of these considerations, we sustain this aspect of the protests.

Single Contract Award

[10] In a case previously decided by our Office, the question of whether an online marketplace could be included in a solicitation for cloud computing services arose, but we did not address the issue directly. In *Oracle of America, Inc.*, B-416657, *et al.*, Nov. 14, 2018, 2018 CPD ¶ 391, the protester argued that a solicitation requirement for online marketplaces was unduly restrictive of competition because not all cloud service providers offered such a marketplace. We denied that aspect of the protest because there was direct evidence in the record that the protester, in responding to an agency request for information, actually had advised the agency that it had an online marketplace available; we therefore determined that the protester was not prejudiced by the requirement. *Id.* at 11-12. No such evidence exists here. In addition, the agency in the *Oracle* case had prepared a justification for its solicitation that included the agency's rationale for, among other things, the marketplace requirement. *Id.* Again, no such justification exists here.

Finally, the protesters argue that the RFP improperly contemplates the award of just a single IDIQ contract. According to the protesters, multiple IDIQ contract awards are the presumed preference under the FAR, and in every instance where an agency decides to award just a single IDIQ contract, the contracting officer is required to document the agency's decision as part of the agency's acquisition planning activities. FAR 16.504(c)(1)(ii)(C). The protesters also argue that, since the anticipated maximum value of the contract is $150 million, the agency is required either to make multiple awards, or to have the head of the contracting agency execute a determination that award of only a single contract is appropriate. FAR 16.504(c)(1)(ii)(D).

The agency argues that the RFP allows for the possibility of multiple awards, and also that the agency intends to lower the maximum anticipated value of the contract below the $112 million threshold by eliminating the possibility of other legislative branch agencies using the contract.

We sustain this aspect of the protests. Although the agency is correct that the FAR provision allowing for the possibility of making multiple awards--FAR 52.216-27--is referenced in the solicitation, RFP at 3, 38, the solicitation nonetheless expresses the agency's clear intent to make a single award, if at all possible. First, the RFP expressly provides in several places that the agency intends to make just a single award. RFP at 4, 38; *see also* AR, exh. 1h, Bidders Questions and Answers, Question 10. The agency further clarified its position in responding to a question concerning whether there was a possibility of making multiple awards by again stating its preference for a single award solution as follows:

> Q: Is the requirement that resellers have or secure (through teaming agreements) the ability to resell all of the eligible cloud service providers a mandatory requirement, such that resellers not meeting the requirement would be disqualified from award? What if no reseller can meet the requirement?
>
> A: Yes that is the requirement. *If there are no possible contractors that can meet that requirement we may consider a multiple vendor approach.*

AR, exh. 1h, Bidders' Questions and Answers, Question 19 (emphasis supplied).

Notwithstanding the agency's expressed preference for a single award strategy, the record does not include a determination by the contracting officer prepared during the agency's acquisition planning activities finding that the award of a single contract is appropriate, as required by the FAR. Thus, regardless of the anticipated dollar value of the contract, the agency has failed to comply with the requirements of the FAR regarding the use of its single award strategy.

In addition, the RFP expressly states that the maximum anticipated value of the contract to be awarded is $150 million. RFP at 5. The agency states that it intends to amend the RFP to reduce the value of the contract below the $112 million threshold, thereby

eliminating the need for a determination from the head of the contracting activity that a single award is appropriate. However, as noted, the agency has not amended the RFP.

In the final analysis, at a minimum, the record before our Office shows that the agency intends to make just a single award unless that is simply not possible based on the proposals received, but the agency has failed to execute the contracting officer's determination that a single award is appropriate as part of its acquisition planning activities. The RFP also currently states that the anticipated value of the resulting contract is estimated to be $150 million. This amount exceeds the threshold amount necessary to require the head of the contracting agency to determine in writing that a single award is appropriate, although we see nothing in the regulation that would require that such a determination be made until the point in time when the agency is ready to award a contract.[11] We therefore sustain this aspect of the protests.[12]

RECOMMENDATION

In light of the foregoing discussion, we sustain the protests. We recommend that the agency amend the solicitation in a manner that is consistent with the above discussion (as well as applicable FAR requirements) and provide offerors an opportunity to respond to the revised solicitation. In the alternative, should the agency prefer to use the RFP as issued, then we recommend that the agency execute the necessary documentation to support such a decision. We also recommend that the protesters be reimbursed the costs of filing and pursuing their respective protests, including reasonable attorneys' fees. The protesters should submit their certified claims for such

[11] Section 16.504(c)(1)(ii)(D) of the FAR provides only that no task or delivery order may be awarded until such time as the written determination has been made. We read this requirement as a prohibition against the award of a contract, but it does not necessarily require that the head of the contracting agency execute the written determination at any point earlier in the acquisition cycle.

[12] As a final matter the protesters complain that certain of the bidders' questions and answers include inaccurate or misleading information about Oracle's capabilities. We need not discuss this aspect of the protests in detail. As part of our recommendation below that the agency amend the RFP in a manner consistent with this decision, we recommend as well that the agency review the bidders' questions and answers to ensure that they do not include inaccurate or misleading information about Oracle's capabilities.

costs, detailing the time spend and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Raytheon Company

File: B-419393.5; B-419393.6

Date: December 22, 2020

Jeffery M. Chiow, Esq., Alexandra Tindall Webb, Esq., Lucas T. Hanback, Esq., and Stephen L. Bacon, Esq., Rogers Joseph O'Donnell, P.C., and Beth Marie Weinstein, Esq., of Raytheon Co., for the protester.
Andrew Shipley, Esq., Philip E. Beshara, Esq., and Chanda L. Brown, Esq., Wilmer Cutler Pickering Hale and Dorr LLP, for L3 Harris Technologies, Inc.; and Robert Nichols, Esq., Andrew Victor, Esq., and Samuel Van Kopp, Esq., Nichols Liu LLP, for Space Exploration Technologies Corp., the intervenors.
Colonel Patricia S. Wiegman-Lenz, Lawrence Anderson, Esq., Christopher Judge-Hillborn, Esq., and Lieutenant Colonel Amer Mahmud, Department of the Air Force, for the agency.
Todd C. Culliton, Esq., Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging scope of agency's proposed corrective action is dismissed where the protest is premature.

DECISION

Raytheon Company, of El Segundo, California, protests the scope of the corrective action taken by the Space Development Agency (SDA) under request for proposals (RFP) No. HQ0850-20-R-0003, for design, fabrication, assembly, and testing of space vehicles. Raytheon alleges that the scope of the corrective action fails to remedy the issues raised in its previously dismissed protest.

We dismiss the protest at this juncture.

BACKGROUND

On June 15, 2020, the agency issued the RFP to procure wide-field-of-view space vehicles deployed in low-earth orbit designed to detect hypersonic missile threats. Protest, exh. 2, RFP at 1; RFP, Statement of Work (SOW) at 2. The RFP contemplated

the award of two contracts, both made on a best-value tradeoff basis, considering schedule, technical, past performance, small business utilization, and price factors. Protest, exh. 3, RFP, § M at 1-8.

After evaluating proposals, the agency made awards to Space Exploration Technologies Corporation, of Hawthorne, California, and L3 Harris Technologies, of Palm Bay, Florida, on October 5, 2020. Protest, exh. 1, Debriefing Letter from the Agency to Raytheon, Oct. 5, 2020. Following its debriefing, Raytheon challenged the award in a bid protest filed with our Office. Prior Protest Pleading, B-419393.3, Nov. 3, 2020.

In that protest filing, Raytheon raised several allegations. Principally, Raytheon alleged that the agency misevaluated proposals because it used its expected budget as an unstated evaluation criterion, and improperly evaluated the firm's past performance and record of commitment to small business participation. Protest at 9-15.

Shortly thereafter, Raytheon filed two supplemental protests. In its first supplemental protest, Raytheon argued that the agency unreasonably evaluated the firm's technical proposal. First Supp. Protest, Nov. 9, 2020, at 17-25. Raytheon also argued that the agency unreasonably evaluated aspects of the awardees' technical and past performance proposals. *Id.* at 25-29.

In its second supplemental protest, Raytheon raised new allegations and provided additional support for some of its previous allegations based on public comments made by an agency official. Second Supp. Protest, Nov. 19, 2020, at 9-13. Chiefly, Raytheon alleged that the agency official's comments demonstrated that the agency used its budget constraints as an unstated evaluation criterion, and that the agency's requirements changed from a single overhead persistent infrared (OPIR) band to multiple OPIR bands in response to proposed solutions. *Id.*

Prior to the due date for the agency report, SDA notified our Office that it would take corrective action. Notice of Corrective Action, Nov. 18, 2020. The agency stated that it would reevaluate proposals, make a new award decision, and take any other corrective action deemed appropriate. *Id.* Raytheon objected, arguing that the agency's proposed corrective action did not remedy all of its allegations because the agency did not commit to amending the solicitation and allowing for submission of revised proposals. Resp. To Notice of Corrective Action, Nov. 20, 2020, at 2-7.

On November 23, 2020, the agency clarified the scope of its proposed corrective action, explaining that it would reassess its needs and determine if the current solicitation accurately reflected those needs. Notice of Corrective Action, Nov, 23, 2020. The agency explained that, if it determined that the current RFP did not reflect its needs, it would issue an amended RFP and solicit new proposals. The agency further explained that, if it determined that the current RFP accurately reflected its needs, it would simply reevaluate proposals and make a new award decision in accordance with the RFP. *Id.* at 2.

Raytheon again objected, insisting that the agency was required to revise the RFP and solicit new proposals because the current RFP did not accurately reflect the agency's needs, or the agency's desire to use its budget limitations as an evaluation factor. Resp. to Notice of Corrective Action, Nov. 25, 2020, at 2-3.

On November 30, 2020, our Office dismissed Raytheon's protest as academic. *Raytheon Co.*, B-419393.2 *et al.*, Nov. 30, 2020 (unpublished decision). We concluded that Raytheon's allegations challenged the reasonableness of the agency evaluation, and that the agency's commitment to reevaluate proposals (or amend the solicitation and solicit revised proposals) and make a new selection decision, rendered academic, or moot, any further consideration of Raytheon's challenges to the agency's earlier selection decision. *Id.* at 2. We also noted that Raytheon's arguments that the agency should be required to amend the solicitation were distinct from its challenges to the evaluation, and should be the subject of a new protest filing. *Id.*

On November 30, after receiving our decision, the agency transmitted an email to the offerors. Protest, exh. A, Email from Agency to Offerors, Nov. 30, 2020. The agency explained that it intended to reevaluate proposals, and requested that the offerors extend their proposals through December 31, 2020. *Id.* The agency also explained that "[a]t this time, SDA does not intend to ask for proposal revisions." *Id.* After receiving this email, Raytheon filed the instant protest on November 30 continuing to argue, among other things, that the agency was required to amend the RFP and permit offerors to submit revised proposals.

Subsequent to the agency's issuance of the email described above, and while the current protest was pending, the agency sent Raytheon an "evaluation notice" on December 14. This evaluation notice requested that Raytheon provide additional information relating to the past performance examples previously submitted (and permitting the submission of additional past performance examples, provided that they were confined to past performance information that pre-dated the submission of proposals on September 15). This evaluation notice expressly stated that the agency would not consider revisions to any other portion of Raytheon's proposal.[1]

After receiving this evaluation notice, Raytheon filed a supplemental protest on December 17. In this supplemental protest, Raytheon again maintained that the agency's corrective action is improper because, according to the protester, the agency is "forcing Raytheon to revise its proposal" without first amending the solicitation to reflect what Raytheon describes as the agency's actual requirements.

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[1] We are unable to describe in any detail the substantive contents of the agency's evaluation notice. While those portions of the evaluation notice explaining that the agency would not consider proposal revisions to any other portion of the Raytheon proposal were provided by Raytheon, the substantive portion of the evaluation notice has been redacted by the protester for reasons that are not explained.

On December 18, the agency filed a request that our Office dismiss Raytheon's supplemental protest. In that filing, the agency advised that, after carefully reviewing its requirements, it has determined that it is not necessary to revise the RFP because the agency has concluded that the RFP as currently written reflects its actual needs. The agency maintains that Raytheon's December 17 supplemental protest fails to state a cognizable basis for protest because, contrary to Raytheon's position, the agency has, in fact, revisited its requirements, and determined that revision of the solicitation is unnecessary.

The agency further argues that Raytheon's supplemental protest--which has as its underlying assumption that the agency will improperly reevaluate proposals using unstated evaluation factors--merely anticipates improper agency action. The agency notes as well that its proposal reevaluation effort remains underway; that there is no basis at this juncture to assume that its reevaluation will use unstated evaluation factors, and that, in any case, it may yet solicit proposal revisions if it deems this necessary during the course of its reevaluation.

DISCUSSION

Raytheon argues that the agency's corrective action is improper because the agency has not committed to amending the RFP and soliciting revised proposals before performing any new proposal evaluation and making a new selection decision. As in its earlier protest, Raytheon argues that the current RFP improperly fails to provide for consideration of the agency's budget constraints in connection with the evaluation of proposals, and also improperly fails to reflect what Raytheon describes as the agency's preference for multiple OPIR bands.

In support of its position, Raytheon points to the public statements made by the agency official noted in its earlier protests described above; according to the protester, these statements demonstrate that the RFP as written does not reflect the agency's current requirements. Raytheon also points to the agency's November 30 email, along with its December 14 evaluation notice (which do not contemplate allowing revisions to the offerors' technical, schedule or price proposals) in support of its position that the agency improperly is proceeding with its reevaluation without affording offerors an opportunity to revise their proposals.

The agency requests dismissal of Raytheon's current protest. Specifically, the agency argues that Raytheon's allegations are premature until the agency completes its reevaluation of proposals. The agency also argues that Raytheon's insistence that it amend the RFP and afford offerors an opportunity to submit revised proposals fails to state a basis for protest, inasmuch as it is based only on the informal statements made by an agency official, and not on official agency action.

The agency also contends that Raytheon has misread its November 30 email, as well as its December 14 evaluation notice. According to SDA, the email states only that the agency is not soliciting revised proposals at this time. In addition, the agency points out

that, while the December 14 evaluation notice sent to Raytheon also states that the agency is not soliciting technical, schedule or price revisions at this time, the agency has specifically represented to our Office that it may yet solicit proposal revisions should it deem revisions necessary as a result of its reevaluation.

We have no basis to consider Raytheon's protest at this juncture. The public statements relied on by Raytheon are not probative evidence that the RFP as currently written necessarily fails to accurately reflect the agency's requirements. These statements do not legally bind the agency to evaluate proposals using any particular criteria; it follows that these statements--without more--do not compel the agency to amend the RFP and solicit revised proposals at this time. Until the agency takes some official, concrete action during its reevaluation effort--such as evaluating proposals using unstated evaluation factors--we consider Raytheon's challenge to the agency's proposed corrective action premature. Indeed, to the extent the agency's reevaluation is performed without consideration of the allegedly unstated evaluation factors that Raytheon claims reflect the agency's actual requirements, its decision not to amend the RFP and solicit revised proposals is entirely unobjectionable. Accordingly, we conclude that Raytheon's argument that the agency is required to amend the RFP and solicit revised proposals fails to state a cognizable basis for protest; we therefore dismiss this aspect of the protest. 4 C.F.R. § 21.5(f).

Raytheon also argues that the corrective action described by SDA is unreasonably vague and therefore should be addressed at this juncture. In support of this latter argument, Raytheon directs our attention to our decision in *Mythics, Inc.*; *Oracle America, Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295, a case where our Office declined to dismiss a protest based on proposed corrective action, which we described as too vague to resolve the issues raised in the protest.

Our Office will only consider challenges to an agency's proposed corrective action after the agency takes some concrete action that either does--or does not--create a basis for challenging the terms of a reopened acquisition. For example, in *Accenture Fed. Servs., LLC*, B-414268.3 *et al.*, May 30, 2017, 2017 CPD ¶ 175 at 3, although we considered several protest issues on the merits, we dismissed as premature the protester's allegation that the agency should conduct discussions and solicit revised proposals as part of the corrective action process. There, as here, the agency had not ruled out the possibility that it would conduct discussions, and thus had not taken the concrete action necessary for challenging the reopened acquisition.

We do not consider the agency's November 30 email, or its December 14 evaluation notice, as embodying the requisite concrete action necessary to trigger our review of the agency's corrective action at this juncture. While the agency's correspondence with Raytheon does state that the agency does not presently intend to obtain revised technical, schedule or price proposals, the correspondence does not foreclose that possibility as part of the agency's corrective action. In fact, the agency has expressly represented to our Office that its corrective action may yet include soliciting proposal revisions, if necessary. Request for Dismissal, Dec. 18, 2020, at 7. Dismissing

Raytheon's current protest at this juncture does no more than afford the agency an opportunity to carefully consider how best to proceed with its acquisition in light of the allegations advanced by Raytheon in its earlier protests, and to announce its course of action once it has completed its deliberations. *Accenture Fed. Servs., LLC*, *supra.* Simply stated, we consider Raytheon's protest premature at this juncture.

As a final matter, we note that Raytheon's reliance on our decision in *Mythics, Inc.*; *Oracle America, Inc.* reflects a fundamental misunderstanding of that decision. As noted, Raytheon contends that we should decline to dismiss the current protest because, according to the protester, the current case is no different than the circumstances in *Mythics*, where we declined to dismiss a protest after concluding that the agency's proposed corrective action was too vague, partial or inadequate. However, Raytheon ignores important differences between the two cases.

The first difference between our prior decision and the current case--and of fundamental importance in understanding the *Mythics* decision--is the fact that *Mythics* involved a pre-closing challenge to the terms of a solicitation, not a post-award challenge to an agency's evaluation of proposals and source selection decision. As we noted in *Mythics*, the agency's attempts to take corrective action there were inadequate because they failed for one reason or another to render all of the protest issues academic.[2] *Mythics, supra,* at 5.

In contrast to *Mythics* (or any other pre-closing protest), Raytheon's earlier protests involved a post-award challenge to the agency's evaluation of proposals and selection decision. Raytheon's earlier protests were rendered academic because the agency committed to a reevaluation and a new selection decision. Notwithstanding Raytheon's insistence, an agency's corrective action need not resolve every protest issue or provide the precise remedy sought by the protester; rather it must only render the protest academic. *See Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3.

The second difference is that *Mythics* involved the question of whether actions taken in response to a pending protest rendered that protest academic. As we noted in that decision, those actions did not render the protest academic, for the simple reason that there were unresolved issues concerning the terms of the solicitation that precluded offerors from competing intelligently and on a relatively common basis. (We point out that in a pre-closing protest, an agency may render the protest academic simply by

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[2] For example, in some instances, the agency proposed to eliminate certain challenged requirements, but failed to propose the elimination of other challenged requirements found elsewhere in the solicitation. In other instances, the agency's proposed corrective action identified several possible alternative courses of action that the agency could take in response to a concern identified by the protester, but failed to identify which of these alternative courses of action the agency would actually take. This proposed partial corrective action did not render protest academic because it left unresolved at least some of the issues advanced in the protest.

cancelling the underlying solicitation, without actually addressing the issues raised by the protest, or providing the remedy sought by the protester. *RCG of North Carolina, LLC,* LLC, B-418824, B-418824.3, Sept. 17, 2020, 2020 CPD ¶ 298 at 1 n.1.) The reason the agency's proposed corrective action in *Mythics* was inadequate was that it sought to resolve some--but not all--of the issues raised in the protest without cancelling the underlying solicitation.

Raytheon is now arguing that the agency's proposed corrective action is in some way improper because it does not address all of the matters Raytheon argued in its earlier--and current--protests. As discussed in detail above, the agency currently is weighing the extent of its corrective action, which could take one of two possible courses--the agency can either reevaluate the proposals already submitted in accordance with its existing solicitation, or the agency can engage in discussions and allow firms to revise their proposals, and thereafter perform its reevaluation and source selection. The fact that the agency has not yet reached a conclusion regarding whether to engage in discussions in no way invalidates, undercuts, or renders improperly vague, partial or inadequate the corrective action it has committed to take. *Accenture Fed. Servs., LLC*, *supra.* Since either approach might comply with procurement law or regulation, Raytheon has given us no basis to conclude that the agency's actions, at this juncture, are improper.[3]

Crucially, Raytheon is not prejudiced by the agency's failure to reach a conclusive decision about the extent of its intended corrective action at this time. If the agency elects to reevaluate proposals without engaging in discussions (and Raytheon is again not selected for award), Raytheon is free to challenge any improprieties in the agency's new evaluation and selection decision after the decision is made. Alternatively, if the agency elects to engage in discussions and solicit revised proposals, Raytheon will have a renewed opportunity to compete for the agency's requirements. Nonetheless, regardless of which of these two courses the agency selects, any current challenge to the agency's corrective action is premature at this juncture, as that challenge could prove immaterial in light of subsequent events.

In the final analysis, Raytheon's current protest amounts to no more than an attempt to force the agency to amend the RFP and solicit revised proposals. But for the reasons discussed above, there is no basis for our Office to conclude at this juncture that this is

[3] For the record, in many cases where GAO sustains a protest challenging an evaluation, the recommendation reflects the same alternatives as the agency has reserved for itself here. We recommend that an agency either reevaluate proposals in accordance with its existing solicitation or, alternatively, amend the solicitation and engage in discussions as appropriate, request and evaluate revised proposals, and make a new selection decision. *See, e.g.*, *Preferred Systems Solutions, Inc.*, B-292322, *et al.*, Aug. 25, 2003, 2003 CPD ¶ 166.

the appropriate course of action for the agency to take. Raytheon's interests are preserved, as is the agency's discretion to take the corrective action that it determines appropriate to the circumstances.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Odyssey Systems Consulting Group, Ltd.

File: B-418440.8; B-418440.9

Date: November 24, 2020

David S. Cohen, Esq., John J. O'Brien, Esq., and Daniel J. Strouse, Esq., Cordatis LLP, for the protester.
Colonel Patricia S. Wiegman-Lenz and Kyle E. Gilbertson, Esq., Department of the Air Force, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's pending corrective action in response to an earlier protest is dismissed where the protest fails to state a valid basis of protest, and where a supplemental protest is premature and attempts to resurrect allegations that were rendered academic by the corrective action.

DECISION

Odyssey Systems Consulting Group, Ltd., of Wakefield, Massachusetts, protests the agency's pending corrective action following its prior protest of the issuance of a task order under fair opportunity proposal request (FOPR) No. FA8622-20-F-8236, by the Department of the Air Force for advisory and assistance services to support the agency's medium altitude unmanned aircraft systems program office.

We dismiss the protest.

BACKGROUND

The agency issued the FOPR on September 16, 2019, to holders of the General Services Administration's One Acquisition Solution for Integrated Services Small Business multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. The procurement was conducted pursuant to Federal Acquisition Regulation section 16.505 procedures. The estimated value of the task order over the possible 5-year period of performance is $248,000,000. *Sumaria Sys., Inc.--Costs*, B-418440.3, July 16, 2020, 2020 CPD ¶ 240 at 2 (and internal citations).

The FOPR provided for award to the highest technically rated offeror with a realistic and reasonable price (HTRO-RRP), based on two evaluation factors: contractor rating system (technical) and cost/price. For the first factor, the FOPR established criteria for assigning up to 68,000 possible evaluation points, based on 32 subfactors. The FOPR provided that each offeror was to self-score its proposal against these 32 subfactors and submit, among other things, a self-scoring matrix worksheet and work samples to be used as substantiating data. *Sumaria Sys., Inc.--Costs*, *supra*, at 2 (and internal citations). Offerors were required to provide at least two government points of contact for each work sample, and the FOPR advised that the agency "reserves the right to contact the points of contact [ ] provided in the work sample . . . for any or all criteria during validation of self-scores." *Id.* at 6 (and internal citations); *see also* FOPR Instructions, Oct. 1, 2019, at 1 (also advising that, "[i]f necessary, the Government will make a reasonable effort to contact the Government [points of contact] provided").

On or before October 18, the agency received proposals from three offerors: Odyssey, Sumaria Systems, Inc., and a third offeror. The agency conducted an evaluation and selected Odyssey for award. Sumaria filed a protest with our Office on January 31, 2020, and a supplemental protest on March 12. On March 24, the agency took corrective action, and we dismissed the protest as academic. *Sumaria Sys., Inc.*, B-418440, B-418440.2, Mar. 25, 2020 (unpublished decision).

The agency conducted a reevaluation and made a new award decision, selecting Sumaria for award. Odyssey filed another protest with our Office on July 28, and a supplemental protest on August 3. On August 19, the agency again took corrective action, and we dismissed that protest as academic. *Odyssey Sys. Consulting Grp., Ltd.*, B-418440.4, B-418440.6, Aug. 20, 2020 (unpublished decision). The agency's notice of corrective action advised that it had decided to take the following actions:

> [T]he agency will reevaluate offerors' technical proposals under technical subfactor 3.1.12[1] and will reassess all other areas of the offerors' technical evaluations to ensure that they were performed in accordance with the solicitation. The Air Force will then make a new award decision in accordance with the solicitation. If Sumaria remains the [HTRO-RRP], the Air Force will lift the stay on Sumaria's contract; if it is not, the Air Force will terminate the award and award to the newest HTRO-RRP. The Air Force may take any additional corrective action it deems appropriate.

[1] As noted above, the FOPR established criteria for assigning points based on 32 subfactors. For subfactor 3.1.12, the FOPR provided that, with regard to the work samples submitted, the agency would consider the number of positions that performed direct support for special access programs. FOPR Evaluation Criteria, Oct. 1, 2019, at 10.

Id. at 1, *quoting* Notice of Corrective Action, B-418440.4, B-418440.6, Aug. 19, 2020, at 1.

These protests followed.[2]

DISCUSSION

On August 31, Odyssey filed a protest with our Office challenging the agency's pending corrective action. After the agency filed a request for dismissal, arguing that the protest was legally and factually insufficient, Odyssey filed a supplemental protest on September 16, raising numerous evaluation and award decision challenges. The agency then filed another request for dismissal, arguing, among other things, that Odyssey's supplemental protest is premature given that "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest, Sept. 21, 2020, at 4. The protester filed responses to the requests for dismissal.

We have reviewed all of Odyssey's arguments, including those that are in addition to, or variations of, those specifically discussed below. Based on our review, we dismiss Odyssey's protests.

Odyssey's Protest (B-418440.8)

Odyssey first argues that the agency's pending corrective action is "unreasonable because it does not permit offerors to revise their proposals" to update points of contact for the work samples, and some of Odyssey's points of contact are now "unavailable." Protest at 8-9. Odyssey's argument is based on its belief that "it is extremely likely that the Air Force will have to validate work samples in the current round of this procurement." *Id.* at 13.

The agency argues that Odyssey "fundamentally misread the agency's intended corrective action" in that "nowhere did the agency's intended corrective action mention contacting [points of contact], as contemplated by Odyssey's protest." Req. for Dismissal, Sept. 14, 2020, at 2-3. The agency argues, further, that Odyssey's protest should be dismissed as legally and factually insufficient because it is "based solely on the speculative assertion that the agency will be re-contacting its [points of contact] during corrective action." *Id.* at 5. In this regard, the agency explains that "this is not what the agency stated it would do, and not what the agency did" during this pending round of corrective action. *Id.*

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving

[2] Odyssey's protests are within our jurisdiction to hear protests of task orders placed under civilian agency multiple-award IDIQ contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B).

bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.,* B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.,* B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Odyssey's protest does not contain sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. We agree with the agency that Odyssey's protest is based on the protester's misreading of the agency's notice of corrective action, which did not contemplate contacting the points of contact provided in the proposals. The plain language of the agency's notice of corrective action contemplates a reevaluation under a single subfactor[3] and "reassess[ment of] all other areas of the offerors' technical evaluations to ensure that they were performed in accordance with the solicitation." *Odyssey Sys. Consulting Grp., Ltd.*, *supra*, at 1, *quoting* Notice of Corrective Action, *supra*, at 1. In other words, the record does not support Odyssey's contention, on which its protest is founded, that "it is extremely likely that the Air Force will have to validate work samples" during this pending round of corrective action.[4] Protest at 13.

Nonetheless, Odyssey continues to press that our Office should consider the merits of its various arguments and recommend the agency "permit offerors to revise their proposals as requested in this protest." Protest at 15; Response to Req. for Dismissal, Sept. 16, 2020, at 4-5. We note that agencies have broad discretion to take corrective

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[3] With regard to subfactor 3.1.12, we note that, as the agency points out, "Odyssey's protest does not even claim its allegedly unavailable [points of contact] would affect a reevaluation under that subfactor." Req. for Dismissal at 3.

[4] Even if the agency's pending corrective action had contemplated reevaluating other subfactors, we think Odyssey's underlying contention that the agency would be required to contact points of contact is still insufficient. Odyssey has not pointed to any requirement that the agency must allow proposal revisions under these circumstances. We noted in a previous decision about this procurement that the FOPR permits, but does not require, the agency to contact the points of contact provided in the work samples. *See Sumaria Sys., Inc.--Costs*, *supra*, at 6, *citing* FOPR Evaluation Criteria at 4 (advising that the agency "reserves the right to contact the points of contact [ ] provided in the work sample . . . for any or all criteria during validation of self-scores"). In this regard, we are persuaded by the agency's argument that its "discretion to contact [points of contact] is directly in accord with the solicitation, and Odyssey can point to nothing that mandated the agency contact [points of contact] during the evaluation or its limited corrective action." Req. for Dismissal at 3.

action where the agency determines that such action is necessary to ensure a fair and impartial competition. *See*, *e.g.*, *American Warehouse Sys., LLC*, B-412543, Mar. 1, 2016, 2016 CPD ¶ 66 at 3; *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. Whether an agency's compliance with such authorities for implementing corrective action coincides with a protester's desired relief is not generally a basis for challenging the agency's actions. *See*, *e.g.*, *Government Contracting Servs., LLC*, B-416696.2, May 6, 2019, 2019 CPD ¶ 170 at 5. While Odyssey believes "there were very good reasons why the Air Force should decide to take this additional step," Response to Req. for Dismissal at 5, the protester has not established a basis for challenging the agency's corrective action beyond advocating for its desired relief.[5]

In sum, Odyssey's protest does not contain sufficient information to establish the likelihood that the agency's pending corrective action violates applicable procurement laws or regulations. Under these circumstances, Odyssey's protest is dismissed.

Odyssey's Supplemental Protest (B-418440.9)

After receiving the agency's request for dismissal of its initial protest, Odyssey filed a supplemental protest that, in the protester's words, "revive[s] virtually all of the protest grounds that were previously asserted" in its prior protests, including various evaluation challenges.[6] Req. to Use Protected Material in a Follow-on GAO Protest, Sept. 14, 2020, at 1; *see also* Supp. Protest at 2 (stating that its supplemental protest "reasserts the protest grounds" from its prior protests). Odyssey claims that its supplemental protest is based "against the reassessment performed during the [agency's] corrective action, based on the description of the reassessment contained in the agency's request for dismissal dated September 14, 2020." Supp. Protest at 1.

The agency argues that Odyssey's supplemental protest is inconsistent with our Bid Protest Regulations; among other things, it is premature, given that the agency's corrective action is ongoing. The agency also points out that Odyssey's supplemental protest is "an almost complete rehash of its [prior] protest . . . a filing which preceded the agency's current corrective action." Req. for Dismissal of Supp. Protest at 1.

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[5] We also note that the agency already appears to be addressing some of Odyssey's concerns. For example, the agency represents that it is "agreeing to review the evaluation documentation for any discrepancies," Req. for Dismissal at 2, which seems appropriate to address Odyssey's prior protests that questioned "contradictory information" in the record and communications that were "difficult to reconcile." Protest at 13.

[6] For example, Odyssey argues that the agency unreasonably evaluated Odyssey's proposal by, among other things: decrementing Odyssey's score under various subfactors; applying unstated evaluation criteria; and providing insufficient explanation and various "contradictions and discrepancies in the validation record." *See* Supp. Protest at 4-44.

We have previously considered the timing of protests challenging the propriety of an agency's proposed corrective action. *Quotient, Inc.*, B-416473.4, B-416473.5, Mar.12, 2019, 2019 CPD ¶ 106 at 4 (and internal citations). We have considered a challenge to the way in which the agency will conduct its corrective action and recompetition to be analogous to a challenge to the terms of a solicitation, thus providing a basis for protest that must be raised prior to the closing time for receipt of proposals. *See Domain Name Alliance Registry*, *supra*, at 7-8; *see also* 4 C.F.R. § 21.2(a)(1). We have also considered that a challenge to the agency's evaluation judgments is premature when the agency is undergoing corrective action and has not yet made an award decision. *See 360 IT Integrated Sols.; VariQ Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 10.

Here, Odyssey is challenging the agency's evaluation judgments even though, as the agency asserts, "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest at 4. While Odyssey attempts to recast its complaints as a challenge to the "ground rules for [the agency's] corrective action," it represents that its supplemental protest is directed "against the reassessment performed during the [agency's] corrective action"--that is, an outcome that has not yet been finalized. Response to Req. for Dismissal of Supp. Protest, Sept. 23, 2020, at 4; Supp. Protest at 1. Under these circumstances, Odyssey's supplemental protest is dismissed as premature.

Nonetheless, Odyssey advances multiple reasons for why its protest should be considered, all of which we reject.

For example, Odyssey contends that the agency's "evaluation methodology can only result in award to Sumaria" because, according to the protester's view of the agency's pending corrective action, "the award decision to Sumaria [is] a foregone conclusion." Response to Req. for Dismissal of Supp. Protest at 6. Odyssey argues, therefore, that its supplemental protest should be considered timely "because the agency clearly announced its intent on September 14 [in the request for dismissal] to follow a course of action adverse to Odyssey's interests, which Odyssey was required to protest within 10 days." *Id.* at 8-9.

As noted above, agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *See*, *e.g.*, *American Warehouse Sys., LLC*, *supra*, at 3; *Domain Name Alliance Registry*, *supra*, at 8. When an agency takes corrective action, the interest to be served is the integrity of the procurement system. The mere possibility that the agency's corrective action could result in the selection of an offeror other than Odyssey for award is unobjectionable.

Moreover, Odyssey's contention that the agency's corrective action "can only result in award to Sumaria," Response to Req. for Dismissal of Supp. Protest at 9, reflects the protester's misunderstanding of the procurement and the agency's pending corrective

action. For example, based on the agency's commitment to reevaluate subfactor 3.1.12, which is worth a maximum of 1,000 points, Odyssey contends that, "no matter how the evaluation of this subfactor turns out, it cannot alter the procurement result since the evaluated difference between the Odyssey and Sumaria proposals was 2692.62 points." Supp. Protest at 2 n.1. The protester's theory does not address, however, the existence of the third offeror in the competition. Moreover, even were we to find persuasive Odyssey's attempt to predict the outcome of the agency's corrective action--which we do not--we have explained that when a firm has been notified that the agency is considering taking an action adverse to the firm's interests, but has not made a final determination, the firm need not file a "defensive protest," since it may presume that the agency will act properly. *American Multi Media, Inc.--Recon.*, B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158 at 3; *see also SOS Int'l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2 (viewing protester's assertions of improper evaluation as premature, given that an award decision had not yet been made).

Notwithstanding the absence of a final determination here, Odyssey argues that we should consider its protest based on our decision in *Blue Origin, LLC*, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289. Odyssey argues that, "[j]ust as in *Blue Origin, LLC*, here, the agency, on September 14 [*i.e.*, prior to award], clearly announced how it intended to evaluate proposals and, as discussed above, this evaluation methodology can only result in award to Sumaria." Response to Req. for Dismissal of Supp. Protest at 9. That decision, however, had "an unusual procedural posture" and involved several circumstances not found here. *Blue Origin, LLC*, *supra*, at 8. There, our Office found a protest "not speculative or premature, because [the agency] effectively has announced how it intends to evaluate proposals . . . [and] timely because it was filed within 10 days of Blue Origin being advised--through an adverse ruling on its agency-level protest--of [the agency's] position regarding its interpretation of the [solicitation]." *Id.* at 9. We also found that "[t]he most efficient, least intrusive alternative is for our Office to consider the issue now rather than to wait until the acquisition proceeds to a source selection decision." *Id.* We do not reach those same conclusions here.

As another example, Odyssey argues that its supplemental protest is appropriate for review because, in its view, the agency has now revealed details about its pending corrective action that would not have rendered Odyssey's prior protests academic. In this regard, Odyssey contends that, while it is not asserting that an agency's corrective action is required to address all of a protester's allegations, "it must address enough of them to render the entire protest academic." Response to Req. for Dismissal of Supp. Protest at 3-4, 4 n.2, *citing Mythics, Inc.; Oracle America, Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295 at 4-5 (declining to dismiss protest where the agency's proposed corrective action did not appear appropriate based upon the particular circumstances of the acquisition and protest). Here, Odyssey raises the following flawed premise:

> Had the agency's Corrective Action Notice[] informed GAO that its reassessment for all subfactors, other than 3.1.12, would consist of nothing more than relying on the original evaluation documentation, the

> protest would not have been rendered academic. Odyssey and GAO would have understood, at that time, that regardless of how the agency came out on the reevaluation of subfactor 3.1.12, the decision to award to S[u]maria will remain unchanged. In such a situation, the protest to the remaining evaluation subfactors would have necessarily gone forward to determine if the evaluation of those subfactors was reasonable.

Response to Req. for Dismissal of Supp. Protest at 3.

We disagree. Our Office may dismiss protests as academic in any number of circumstances. *The Jones/Hill Joint Venture--Recon.*, B-286194.2, Dec. 8, 2000, 2000 CPD ¶ 203 at 3 (describing various circumstances under which we may dismiss protests as academic). Of relevance here, we may dismiss a protest as academic where the corrective action, while not addressing the issues raised by the protester, appears appropriate based upon the particular circumstances of the acquisition and protest. *Id.*, *citing S. Tech., Inc.--Recon. and Costs*, B-278030.3, Apr. 29, 1998, 98-1 CPD ¶ 125; *see also Quotient, Inc.*, *supra*, at 3 (stating that an agency's corrective action need not address every protest issue, but must render the protest academic), *citing SOS Int'l, Ltd.*, *supra*, at 2.

Not only is Odyssey's argument based, again, on its mischaracterization of the agency's pending corrective action, Odyssey also errs in its contention that the agency's subsequent assertions would have altered our decision to dismiss its prior protests. The agency has committed to making a new award decision and, as we explained in our decision dismissing Odyssey's prior protests: "Where, as here, an agency undertakes corrective action that will supersede and potentially alter prior procurement actions, our Office will generally decline to rule on a protest challenging the agency's prior actions on the basis that the protest is rendered academic." *Odyssey Sys. Consulting Grp., Ltd.*, *supra*, at 2; *see also*, *e.g.*, *HP Enter. Servs., LLC--Recon.*, B-413382.3, Jan. 26, 2017, 2017 CPD ¶ 32 at 3 (explaining protest was properly dismissed as academic on the basis that the agency's pending corrective action "would supersede and potentially alter its prior source selection decision").

Odyssey's arguments also do not support maintaining its attempt to "revive" its prior protests. Req. to Use Protected Material in a Follow-on GAO Protest, Sept. 14, 2020, at 1; *see also*, *e.g.*, *HP Enter. Servs., LLC--Recon.*, *supra*, at 7 (explaining that a protest "that was once academic is not revived by subsequent agency action or inaction"). While we appreciate Odyssey's desire that our Office issue a decision resolving all of its concerns, "we simply will not proceed to consider matters that, under the circumstances, may well make no difference in the procurement's outcome." *The Jones/Hill Joint Venture--Recon.*, *supra*, at 3.

In conclusion, we note again the agency's assertion that the "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest at 4. If, in the future, the agency takes concrete action that may properly form the basis for a valid bid

protest, the protester may file a new protest with our Office at that time, consistent with our Bid Protest Regulations.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Leidos, Inc.

File: B-418242.5

Date: March 3, 2020

Sharon L. Larkin, Esq., and James M. Larkin, Esq., The Larkin Law Group LLP, for the protester.
Richard J. Conway, Esq., Michael J. Slattery, Esq., and Carolyn Cody-Jones, Esq., Blank Rome LLP, for Perspecta Enterprise Solutions LLC, the intervenor.
Audrey Roh, Esq., Jonathan E. English, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's corrective action in response to earlier protests is dismissed where the corrective action rendered the earlier protest academic and where the challenge is otherwise premature.

DECISION

Leidos, Inc., of Reston, Virginia, protests the pre-award actions taken by the Department of Housing and Urban Development (HUD) in connection with request for proposals (RFP) No. 86543D18R00001 for HUD enterprise architecture transformation end user (HEAT EU) services. The protester contends that the agency's corrective action must include reopening discussions because the agency previously engaged in misleading discussions with Leidos.

We dismiss the protest as premature at this juncture.

BACKGROUND

The RFP was issued on February 5, 2018, using Federal Acquisition Regulation subpart 16.5 procedures, to holders of the National Institutes of Health Information Technology Acquisition and Assessment Center, Chief Information Office, Solutions and Partners 3 governmentwide acquisition contracts. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3. The HEAT EU procurement is part of HUD's

initiative to transform its business and information technology (IT) landscape through modernization, with the objective of meeting its business requirements across mission areas through enterprise IT services. Agency Report (AR), Tab 10, RFP, at 8.[1] The successful offeror will provide services and equipment to support a secure end-user environment, a tiered help desk, dashboards with real-time data feeds, service enabled devices or appliances, project management, and relocation and modernization of equipment. Id. at 13-14. The RFP contemplates award of a hybrid fixed-price, cost-plus-fixed-fee, cost-reimbursement, and time-and-materials task order with a period of performance consisting of a base year and six option years. Id. at 3-7, 83.

The agency received three proposals, including one from Leidos,[2] by the April 9 due date. COS/MOL at 4. More than a year later, on July 16, 2019, HUD issued RFP amendment 0009, which made several changes to the solicitation, including how equipment should be priced. RFP at 2. The next day, the agency sent Leidos a discussion letter and enclosed RFP amendment 0009. AR, Tab 14, Leidos Discussions Letter. The discussion letter set forth evaluation weaknesses and discussion items; none of the discussion items concerned how Leidos priced equipment. Id. On July 23, the agency held oral discussions with Leidos. COS/MOL at 4. On July 26, the agency issued a request for final proposal revisions (FPR), which were due on August 9. AR, Tab 16, Leidos Request for Final Proposal Revision Letter.

On October 1, HUD notified Leidos that it had not been selected for award. AR, Tab 20, Leidos Unsuccessful Offeror Letter. Leidos was provided with a written debriefing in which it was advised that "[w]hile Leidos proposed a technically superior proposal as evidenced in the higher rating in the technical approach factor, the technical superiority did not support the cost premium or differential of approximately 129% (total 7 year evaluated price)." AR, Tab 22, Leidos Debriefing Letter, at 5.

On November 1, Leidos filed a protest with our Office.[3] On November 6, the agency requested that our Office dismiss the protest. Specifically, the agency argued that Leidos was not an interested party because, while the evaluators originally found Leidos' proposal to be technically acceptable, the agency conducted a "reevaluation or redetermination" and found that the Leidos proposal did not comply with the solicitation's pricing instructions with respect to equipment, or alternatively, failed to meet a material solicitation requirement, and thus was ineligible for award. Req. for Dismissal (B-418242), Nov. 6, 2019, at 2-5. Based on the agency's new evaluation conclusion that Leidos' proposal was ineligible for award, Leidos filed its second

[1] The RFP was amended nine times during the procurement. Citations in this decision are to the conformed version of the RFP provided by the agency.

[2] The initial proposal was submitted by Leidos Innovations Corporation, however, as a result of a corporate merger, the final proposal revision was submitted by Leidos, Inc. See COS/MOL at 4 n.2.

[3] Leidos additionally filed three supplemental protests on November 7, 12, and 22.

supplemental protest, and alleged that the agency had engaged in misleading discussions concerning its pricing. Supp. Protest (B-418242.3), Nov. 12, 2019, at 3-6.

Rather than file its report in response to the protest, the agency advised our Office that it intended to take corrective action, and requested that the protests be dismissed. Over the protester's objection, our Office dismissed the protests as academic "[b]ecause the corrective action will result in a new source selection decision." Leidos, Inc., B-418242 et al., Dec. 3, 2019 (unpublished decision). This protest followed.[4]

DISCUSSION

Leidos argues that the scope of the corrective action is inadequate and insufficient to remedy the issues raised in its prior protests. Protest at 4. Leidos contends that "the agency intends to stand by its position that Leidos' proposal is ineligible for award due to its pricing of equipment, despite the fact that Leidos was misled to believe, during discussions after issuance of the latest RFP amendment, that its pricing of equipment was correct." Id. The protester argues that the agency must reopen discussions to provide clear instructions regarding offerors' cost/price proposals in order to correct the misleading discussions it held with Leidos, as well as to address its other protest allegations regarding the insufficiency of the awardee's proposal. Id. at 5.

The agency argues that it did not engage in misleading discussions with Leidos, and its corrective action is appropriate to remedy the flaws the agency has identified in the procurement. COS/MOL at 16-20. The agency also argues that the protest is premature. Req. for Dismissal at 2-7. We agree that the protest is premature.

The agency's notice of corrective action stated that it would "reassess the Final Proposal Revisions for all offerors and make changes, as appropriate, to the evaluation and source selection documents in accordance with the solicitation and applicable laws and regulations." Req. for Dismissal (B-418242.1 et al.), Nov. 26, 2019, at 1. The agency was silent regarding whether it would conduct discussions with offerors. See id. After the agency issued the corrective action notice, Leidos contacted the agency and was informed that the agency would not reopen discussions. See Resp. to Req. for Dismissal (B-418242.1 et al.), Dec. 2, 2019, at 1. As a result, Leidos filed this protest with our Office.

The agency filed a request for dismissal disputing that it informed Leidos that it would not hold discussions. Req. for Dismissal at 2. The agency states that it informed Leidos that the misleading discussions protest ground lacked merit and the agency would proceed as outlined in its notice of corrective action. Id. The agency's dismissal request also stated that "HUD's Notice of Corrective Action did not explicitly state that HUD will not reopen discussions. . . [and] Leidos' protest merely anticipates adverse

[4] This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award indefinite-delivery, indefinite-quantity contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B).

action by the Agency." Id. at 4, 5. However, the agency also argued that it did not conduct misleading discussions with Leidos and that Leidos' proposal was unacceptable. Id. at 9 n.5, 10-13.

Subsequently, the agency stated that it did not intend to reopen discussions with Leidos. COS/MOL at 12 ("[T]he Agency has now stated that it does not intend to re-open discussions"). However, in the same filing to our Office, HUD also stated as follows:

> To the extent that GAO denies or dismisses this protest, HUD's corrective action in this protest will proceed as follows: First, we intend to conduct a new compliance review of the FPR proposals, including reassessing the proposals for any failure to meet a material requirement, and eliminate such non-compliant/unacceptable proposals from the competition. Then, we intend to reevaluate the remaining acceptable proposals. At that point, we may decide to hold discussions with those remaining offerors.

AR, Tab 53, Decl. of Contracting Officer, at 4 (¶ 18).

As a general rule, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Northrop Grumman Sys. Corp., B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8. The details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5.

Our prior decisions have also considered the timing of protests challenging the propriety of an agency's proposed corrective action. In doing so, in those instances where the agency's proposed corrective action alters or fails to alter the ground rules for the competition (i.e., aspects that apply to all offerors or vendors), we have considered a protester's challenge of such to be analogous to a challenge to the terms of a solicitation, thus providing the basis for protest prior to award. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10; see 4 C.F.R. § 21.2(a)(1). However, in those instances where the agency's proposed corrective action does not alter the ground rules for the competition, we have considered a protester's pre-award challenge to be premature. 360 IT Integrated Solutions; VariQ Corp., B-414650.19 et al., Oct. 15, 2018, 2018 CPD ¶ 359 at 10; SOS Int'l, Ltd., B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2.

Here, there is no dispute that Leidos, at some point, should again have the opportunity to challenge the adequacy of the agency's discussions with respect to its pricing of equipment--assuming that the issue is not made moot by the agency's corrective action. That challenge cannot be considered now, however, because as set forth above, the

agency has said both that (1) it will not reopen discussions, and (2) it may reopen discussions after its reevaluation. Therefore, we cannot conclude that the agency will not reopen discussions after a new reevaluation is completed. Accordingly, we do not view the ground rules of this procurement to have been changed in a manner that warrants our pre-award review. Cf. Domain Name Alliance Registry, supra, at 8 (the agency's actions from the time it initiated the corrective action until the second award decision clearly indicated that the agency did not contemplate holding discussions). Until the agency completes its reassessment of all proposals for compliance with the solicitation and concludes how it will further proceed with corrective action, the protest is premature.[5] If HUD takes concrete action in the future that may properly form the basis for a valid bid protest, the protester may file a protest with our Office at that time, consistent with our Bid Protest Regulations.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

[5] We recognize that the agency has asserted that Leidos' FPR failed to comply with a material solicitation requirement and is ineligible for award. See Req. for Dismissal (B-418242), Nov. 6, 2019, at 2-5; COS/MOL at 20. As a general rule, we accord greater weight to contemporaneous source selection materials rather than judgments, such as the agency's reevaluation here, made in response to protest contentions. Nexant, Inc., B-407708, B-407708.2, Jan. 30, 2013, 2013 CPD ¶ 59 at 11, quoting Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Specifically, the lesser weight that we accord these post-protest documents reflects the concern that, because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Id. at 12.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Unissant, Inc.

File: B-418193.2

Date: January 31, 2020

Christopher R. Shiplett, Esq., Randolph Law, PLLC, and Lanny J. Davis, Esq., David Goldberg & Galper PLLC, for the protester.
Pamela R. Waldron, Esq., Department of Health and Human Services, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's corrective action, which included terminating a task order and reviewing its requirement and acquisition process, is denied where the agency's corrective action was reasonable in light of its failure to adequately document its earlier evaluation and award decision.

DECISION

Unissant, Inc., of Herndon, Virginia, protests the corrective action taken by the Department of Health and Human Services, National Institutes of Health (NIH), in response to an earlier protest from another offeror challenging the issuance of a task order to Unissant under request for proposals (RFP) No. C57839 for information security services. The protester contends that the agency's corrective action--which included terminating Unissant's task order and reviewing its requirement and acquisition process--is unreasonable.

We deny the protest.

BACKGROUND

On March 11, 2019, the agency issued the RFP, pursuant to Federal Acquisition Regulation part 16, to holders of NIH information technology acquisition and assessment center Chief Information Officer-Solutions and Partners 3 governmentwide multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. Contracting Officer's Statement (COS) at 1. The RFP sought a contractor to provide information security support services for the agency's chief information officer. Id.

After the agency received initial proposals, engaged in exchanges with offerors, and requested several rounds of revised proposals, the agency selected Unissant for award. COS at 1. On September 30, the agency issued a task order to Unissant for a base year and four 1-year option periods with an anticipated total award value of $131,818,899. Id.; see also Protest, exh. 2, Award Document, Sept. 30, 2019.[1]

Another offeror filed a protest with our Office, challenging various aspects of the agency's evaluation of proposals and award decision. Prior to the due date for filing its report, the agency informed our Office that it would take corrective action consisting of the following:

> (1) The Agency will terminate the task order; [and]
> (2) The Agency will review the requirement and the acquisition process with the intention of breaking up the requirement into two separate procurements, as opposed to continuing with the single solicitation at issue.

Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1. We then dismissed the protest as academic. Customer Value Partners, Inc., B-418193, Oct. 30, 2019, at 1 (unpublished decision). On November 7, this protest followed.[2]

DISCUSSION

Unissant raises various complaints about the agency's corrective action. Unissant primarily argues that the agency's corrective action is unreasonable because "there [was] no flaw in the original evaluation and award." Protest at 11; see also Comments, Dec. 19, 2019, at 1. In response, the agency asserts that its corrective action was reasonable and within its discretion because its earlier procurement actions were flawed--that is, the agency lacked documentation to support its evaluation and award decision. Memorandum of Law (MOL), Dec. 9, 2019, at 5, 7.

We have considered all of the parties' arguments, including those that are in addition to or variations of those specifically discussed below, and find no basis to sustain Unissant's protest.

Agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. See American

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[1] This document refers to the issuance of a "delivery order" and "task[s.]" For consistency with the parties' filings, we refer to the awarded contract vehicle here as a "task order."

[2] This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B).

Warehouse Sys., LLC, B-412543, Mar. 1, 2016, 2016 CPD ¶ 66 at 3; Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. The details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the challenged action. See Government Contracting Servs., LLC, B-416696.2, May 6, 2019, 2019 CPD ¶ 170 at 5; DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Here, the protester's allegation that "there [was] no flaw in the original evaluation and award[,]" Protest at 11, is unsupported by the record. The record shows that the contracting officer made her source selection decision despite what she now acknowledges was "a lack of supporting documentation." COS at 2; see also MOL at 2-3; Agency Report (AR), exh. 1, Email Communications, Aug. 2019 (noting that the contracting officer first became involved in the procurement during the selection phase). Specifically, the contracting officer explains the following:

> In making my source selection decision, I relied on a high-level technical evaluation document which contained technical conclusions regarding final revised proposals. I also had access to the original proposals. I made efforts to gain access to underlying documentation to support the evaluation. However, I was unable to obtain documentation regarding the negotiation and evaluation process, including the evaluation of revisions and updates. I was unable to obtain documentation of discussions and exchanges. Some of the documents were missing, and some were contained in secured zip files to which I could not gain access.

COS at 1; see also AR, exh. 1, Email Communications, Aug. 2019 (discussing plans to revise some documents because "the trade-off analysis is not sufficient to award this requirement"); AR, exh. 3, Email Communications, Aug. 2019 (discussing access to "some of the attached documents"). The contracting officer then asserts that, "[b]ased on the information available, I determined that the task order should be awarded to Unissant." COS at 1.

The record also shows that the agency took corrective action when another offeror protested its evaluation and award decision. Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1. The contracting officer now explains that, upon receipt of that protest:

> I began work to identify and assemble the necessary documentation to defend NIH against the [earlier] protest. As was the case prior to award, documentation regarding the exchanges/discussions that occurred between NIH and the offerors was unavailable or inadequate. Documentation to support the technical evaluation process was inadequate, including a lack of underlying support for conclusions made regarding the rating of offerors' final proposal revisions.

* * * * *

> Due to lack of supporting documentation, I made the decision that NIH could not defend itself against [the] protest, nor could the agency support the task order award to Unissant.

COS at 2.

In other words, as the agency explains, the contracting officer "has conceded that she relied on conclusory technical findings in making her source selection decision, and when these conclusions were contested in the [earlier] protest, she was unable to respond to the [earlier] protest or defend her decision due to lack of supporting documentation." MOL at 5-6.[3]

Under these circumstances, we find no basis to object to the agency's decision to take corrective action. Where, as here, the agency has represented that its earlier procurement actions were flawed and inadequately documented, we find it reasonable for the agency to take corrective action to address its errors, such as terminating an unsupportable task order. Moreover, the protester has not established--nor do we find--that the agency abused its discretion when it decided that it needed to review its requirement and acquisition process. In this regard, we note that, as a general rule, an agency has the discretion to determine its needs and the best way to meet them. See Platinum Servs., Inc.; WIT Assocs., Inc., B-409288.3 et al., Aug. 21, 2014, 2014 CPD ¶ 261 at 5, citing USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 4.

Nonetheless, the protester maintains its view that "GAO should recommend that the agency cancel the corrective action and proceed with performance of the awarded contract." Comments at 20. The protester is, in essence, asking our Office to uphold a procurement that the agency believes was not made in accordance with applicable procurement law and regulation. We decline to do so.

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[3] While Unissant complains that the contracting officer's representations should be discounted because they are, in the protester's view, "thoroughly contradicted by the contemporaneous record," Comments at 16, 18-20, we do not think that they are inconsistent. See, e.g., Computer World Servs. Corp., B-416042, May 22, 2018, 2018 CPD ¶ 191 at 5 (finding agency's post-protest explanations which provided details explaining agency's rationale for its decision to cancel solicitation to be reasonable). Our Office generally considers post-protest explanations where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 6.

As a final matter, while the agency suggested in its notice of corrective action that it has "the intention of breaking up the requirement into two separate procurements," the agency now represents that "a final decision on what strategy the agency will use to meet this requirement has not yet been made." Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1; COS at 2. Therefore, to the extent the protester is challenging any specific changes that the agency may make to the solicitation, we note that such contentions are, at this time, premature. Dayton-Granger, Inc.--Recon., B-246226.2, Feb. 28, 1992, 92-1 CPD ¶ 240 at 2 (protests that merely anticipate improper agency action are speculative and premature).[4]

In sum, Unissant's disagreement with the agency's decision to take corrective action does not provide a basis to sustain the protest. The agency has conceded that it failed to adequately document, and therefore could not properly support, its evaluation and award decision. Under these circumstances, we cannot object to its decision to start over, terminate the task order, and review its requirement and acquisition process.

The protest is denied.

Thomas H. Armstrong
General Counsel

[4] During the development of the record, Unissant attempted to reframe its protest by belatedly claiming that the agency's corrective action was a "pretext." Response to Request for Dismissal, Nov. 27, 2019, at 3; see also Comments at 22. Unissant's revised claim is based solely on various inferences drawn by two of its employees and its counsel, accusing a named agency official of improperly influencing the procurement. We note that Unissant's initial protest mentioned these inferences, but did not specifically allege that the agency's actions were pretextual. Accordingly, since our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues, Unissant's revised claims regarding this matter are not timely filed and will not be considered further. 4 C.F.R. § 21.2(a)(2); see, e.g., International Code Council, B-409146, Jan. 8, 2014, 2014 CPD ¶ 26 at 3 n.3. In any event, we note that government officials are presumed to act in good faith, and a protester's contention that officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. See Veterans Healthcare Supply Sols., Inc., B-411904, Nov. 12, 2015, 2015 CPD ¶ 354 at 8. Moreover, we note that the agency has represented that this agency official was not involved in the decision to take corrective action. See MOL at 7-8; AR, exh. 5, Statement by NIH Official, Dec. 9, 2019, at 1-2.

B- 416158 (Comp.Gen.), 2018 CPD P 200, 2018 WL 3047041

COMPTROLLER GENERAL

Matter of: Chenega Healthcare Services, LLC

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

June 4, 2018

***1** Stowell B. Holcomb, Esq., Mark G. Jackson, Esq., and Kevin A. Rosenfield, Esq., Jackson Rosenfield LLP, for the protester.

Damien C. Specht, Esq., James. A. Tucker, Esq., R. Locke Bell, Esq., and Lauren J. Horneffer, Esq., Morrison & Foerster LLP, for KOpono Government Services, LLC, the intervenor.

John L. Bowles, Esq., and James J. Jurich, Esq., Department of Energy, for the agency.

Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency was required to consider proposed substitute key person for a follow-on procurement based on the agency's prior approval of the proposed substitute on the incumbent contract is denied where the agency elected to proceed without discussions and the initial proposal was technically unacceptable due to the unavailability of the initially proposed key person.

2. Protest that the agency was required to engage in discussions before rejecting the protester's proposal as technically unacceptable is denied where the agency was under no obligation to conduct discussions regarding the protester's technically unacceptable proposal.

DECISION

Chenega Healthcare Services, LLC (CHS), a small business, of San Antonio, Texas, protests the award of a contract to Kupono Government Services, LLC (KGS), a small business, of Honolulu, Hawaii, under request for proposals (RFP) No. DE-SOL-0010843, which was issued by the Department of Energy (DOE), for an indefinitedelivery, indefinite quantity (IDIQ) contract to support the National Training Center at Kirtland Air Force Base in Albuquerque, New Mexico. CHS, the incumbent contractor for the services at issue, challenges its exclusion from the competition because one of its proposed key personnel subsequently became unavailable after the submission of proposals, but prior to award. The protester alleges that the agency unreasonably failed to consider the DOE-approved substitute key person currently performing on CHS' incumbent contract, or otherwise unreasonably failed to engage in discussions to allow the protester to provide a substitute for the subsequently unavailable key person.

We deny the protest.

BACKGROUND

The RFP, which was issued on June 23, 2017, and subsequently amended three times, sought proposals from offerors eligible under the Small Business Administration's 8(a) business development program for an IDIQ contract to support the National Training Center at Kirtland Air Force Base in Albuquerque, New Mexico. RFP at 1-2. [1] Specifically, the contractor may be

required to provide training, training certification, cyber security, information technology planning and management, facilities, safety, security, business operation, custodial, and ground maintenance services. RFP, attach. No. A, Statement of Objectives, at 4-5, 7-10, 12. The RFP contemplated the award of a single IDIQ contract, with the potential for fixed-price or time-and-materials type orders, and an ordering period of 5 years. RFP at 2, 59.

***2** The RFP contemplated a best-value tradeoff basis for award, where the technical and past performance factors were significantly more important than price. *ld.* at 61. The non-price factors, in descending order of importance, were: (1) technical approach; (2) business management approach; (3) relevant corporate experience; and (4) past performance. *ld.* Relevant to the issues in this protest, offerors were required under the technical approach factor to submit a resume and letter of commitment for a general manager, which was the RFP's only designated key position. *ld.* at 42, 64. The offeror was required to demonstrate that its proposed general manager's education, technical expertise, security clearance, and relevant experience met or exceeded the position qualifications included in the RFP. *ld.* at 64. The RFP provided that "failure to submit a letter of commitment may result in the offeror's proposal being eliminated from further consideration for award for failure to submit a responsive, complete and acceptable proposal." *ld.* The RFP further provided as a global instruction that: "The Government will evaluate proposals on the basis of the information provided in the proposal. The Government will not assume that an offeror possesses any capability unless set forth in the proposal. This applies even if the offeror has existing contracts with the Federal government, including the [DOE]." *ld.* at 55. The RFP further provided that the agency intended to evaluate offers and award a contract without discussions. *ld.* at 61.

Prior to the August 16, 2017, RFP closing deadline, DOE received five proposals, including a proposal from CHS. Protest, exh. No. 9, Unsuccessful Proposal Notice, at 1. CHS is the current incumbent providing the services contemplated by the RFP. CHS proposed for the procurement at issue its then general manager on its incumbent contract, including providing the requisite resume and commitment letter. Protest, exh. No. 7, Chenega Corp. Sr. Corporate Contract Manager's Decl., ,r5. In January 2018, CHS' general manager notified CHS that he would not be able to continue in his position due to medical and personal reasons. *ld.,* ,r6. As required under the terms of the incumbent contract, CHS notified DOE of the need to substitute the departed general manager with another candidate; the agency accepted CHS' proposed substitution. *ld.,* ,r,r6-7. Additionally, the protester contacted two contracting officials with the agency to notify them of CHS' intent to propose the substitute manager for the follow-on procurement at issue here. *ld.,* ,r ,r8(1)(b), (2)(b).

***3** On January 31, 2018, the contract specialist for the agency's procurement, emailed CHS a clarification question regarding the commitment letter for the general manager included in its July 19 proposal. Specifically, the agency asked the protester to clarify "whether [the commitment letter] does or does not remain valid." Agency exh. No. D.1, Email from DOE to CHS (Jan. 31, 2018), at 1. The protester confirmed by reply email that the letter included in the proposal was no longer valid. *ld.,* Email from CHS to DOE (Feb. 1, 2018), at 1.

The technical evaluators favorably evaluated CHS' technical proposal, identifying three significant strengths, ten strengths, and two weaknesses. Agency exh. No. C.1, Consensus Eval. Rep., at 25. The agency, however, determined that CHS' technical proposal warranted an "unsatisfactory" rating because, "[n]otwithstanding the strength of this offeror's proposal, the failure to propose a General Manager results in a deficiency and establishes the inadequacy of their approach to perform the work." *ld.* Specifically, the evaluators concluded that "[t]he result of this person no longer being available to perform as [general manager] on this contract is that the Chenega proposal no longer provides a valid proposed General Manager (which is the only Key Person required by this solicitation) or a valid letter of commitment. This constitutes a material failure to meet a Government requirement." *ld.* at 32. The Source Selection Official (SSO) agreed with the technical evaluators' assessment, and, notwithstanding CHS' approximate 4 percent price advantage over KGS, excluded CHS' proposal from further consideration. Agency exh. No. C.2, Source Selection Decision, at 28-29. The SSO selected KGS's proposal, with a total proposed price of $107,367,360, for award as representing the best-value to the government. *ld.* at 29. Following a debriefing, this timely protest to our Office followed.

DISCUSSION

CHS raises two primary arguments challenging the agency's decision to exclude its proposal from the competition due to the unavailability of its initially proposed general manager. [2] First, the protester contends that the agency unreasonably failed to consider its proposed substitute general manager, who is the same individual that the agency previously approved as the substitution on CHS' incumbent contract. Second, the protester alleges that the agency abused its discretion by not entering into discussions to allow CHS to propose a substitute general manager. For the reasons that follow, we find no basis on which to sustain the protest.

Failure to Consider Approved Substitution On Incumbent Contract

CHS first argues that DOE unreasonably failed to consider its proposed substitute general manager. The protester contends that the agency was obligated to consider the individual, who had previously been approved by the agency as the substitute on the CHS' incumbent contract. CHS contends that prior decisions of our Office require the agency to consider such information that was personally known by the evaluators.

***4** The protester is correct that we have recognized that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's past performance when it is "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. *See, e.g., SNAP, lnc.,* B-409609, B-409609.3, June 20, 2014, 2014 CPD ,r187 at 8. Relying on decisions interpreting this limited line of decisions, the protester contends that our decisions have not limited this line of decisions to past performance matters, and that extension of this line to the circumstances here is appropriate. We disagree. CHS' attempts to stretch this limited line of decisions to the facts of this protest are unpersuasive and would undermine the basis for the rule.

CHS misreads our decisions addressing the appropriateness of the extension of this limited line of decisions beyond matters involving past performance. For example, the protester relies on our decision in *Nuclear Production Partners, LLC; lntegrated Nuclear Production Solutions LLC,* B-407948 *et al.,* Apr. 29, 2013, 2013 CPD ,r112, for the proposition that we have at least extended the line of decisions to questions of corporate experience. *See* CHS Br. at 3-4. As our Office clarified in *SNAP, lnc.,* however, the *Nuclear Production Partners* decision "stands for the proposition that an agency may consider close at hand experience information known to the agency," but we expressly declined to obligate an agency to do so. *SNAP, lnc., supra.* Subsequent decisions have made clear that we decline to apply the "too close at hand" line of decisions to situations where the information in question relates to technical requirements of a solicitation, including the qualifications of proposed key personnel. *See, e.g., Valkyrie Enters., LLC,* B-414516, June 30, 2017, 2017 CPD ,r212 at 6; *Consummate Computer Consultants Sys., LLC,* B-410566.2, June 8, 2015, 2015 CPD ,r176 at 6 n.6; *Enterprise Solutions Realized, lnc.; Unissant, lnc.,* B-409642, B-409642.2, June 23, 2014, 2014 CPD ,r201 at 9.

CHS' argument for further extension of the limited past performance related decisions would actually go well beyond the bounds of what our Office already has declined to do in *Valkyrie, Consummate,* and *Enterprise Solutions Realized.* Indeed, the protester argues for no less a principle than that we should extend this limited line of decisions to obligate the agency to allow CHS to amend its proposal by recognizing a substitute key person. This is fundamentally inconsistent with the purpose of the "too close at hand" line of decisions, which seeks to limit the consequences of the agency's failure to consider specific past performance information in its possession about an offeror. We have recognized that the line of decisions is not intended to remedy an offeror's failure to submit an adequate and acceptable proposal. *See, e.g., SNAP, lnc., supra,* at 9. We decline to make such a sweeping change in the applicability of this line of decisions to effectively obligate an agency to allow a protester to amend a technically deficient proposal.

Failure to Engage in Discussions

***5** CHS also protests that DOE abused its discretion by failing to hold discussions with the offerors. The solicitation, however, expressly advised that the agency contemplated making award without discussions. RFP at 61. Additionally, a contracting

officer's discretion in deciding not to hold discussions is quite broad. *Trace Sys., lnc.,* B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ,r116 at 5. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions. *ld.* As a result, an agency's decision not to initiate discussions is a matter we generally will not review. *See, e.g., SOC, LLC,* B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ,r20 at 8; *United Airlines, lnc.,* B-411987, B-411987.3, Nov. 30, 2015, 2015 CPD ,r376 at 11; *Six3 Sys., lnc.,* B-405942.4, B-405942.8, Nov. 2, 2012, 2012 CPD ,r312 at 8; *Booz Allen Hamilton,* B-405993, B-405993.2, Jan. 19, 2012, 2012 CPD ,r30 at 13.

Furthermore, an agency need not conduct discussions with a technically unacceptable offeror. *SOC, LLC, supra.* As addressed above in note two, the unavailability of a key person identified in a proposal renders the proposal technically unacceptable, and the agency has the discretion whether to evaluate the technically unacceptable proposal or to conduct discussions under such circumstances. *See, e.g., General Revenue Corp., et al., supra.* Therefore, we have no basis to question the reasonableness of the agency's exercise of its discretion not to conduct discussions.

The protest is denied.

Thomas H. Armstrong
General Counsel

1 References herein are to the RFP as amended.

2 Our Office has recognized that offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. *See, e.g., Pioneering Evolution, LLC,* B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ,r385 at 8; *Greenleaf Constr. Co., lnc.*B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ,r19 at 10; *Dual, lnc.*B-280719, Nov. 12, 1998, 98-2 CPD ,r133 at 3-6. Additionally, when a solicitation (such as the one here) requires resumes for key personnel, the resumes form a material requirement of the solicitation. *YWCA of Greater Los Angeles,* B-414596 *et al.,* July 24, 2017, 2017 CPD ,r245 at 4. When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal. *General Revenue Corp., et al.,* B-414220.2 *et al.,* Mar. 27, 2017, 2017 CPD ,r106 at 22.

B- 416158 (Comp.Gen.), 2018 CPD P 200, 2018 WL 3047041

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B- 418553 (Comp.Gen.), B- 418553.2, 2020 CPD P 206, 2020 WL 3639639

COMPTROLLER GENERAL

Matter of: M.C. Dean, Inc.

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

June 15, 2020

***1** John R. Prairie, Esq., Samantha S. Lee, Esq., J. Ryan Frazee, Esq., Moshe B. Broder, Esq., Sarah B. Hansen, Esq., and Adam R. Briscoe, Esq., Wiley Rein LLP, for the protester.
Richard B. Oliver, Esq., and J. Matthew Carter, Esq., Pillsbury Winthrop Shaw Pittman LLP, for PTSI Managed Services, Inc., the intervenor.
Laura A. Wallace, Esq., and Kathryn B. Codd, Esq., National Security Agency, for the agency.

John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where record shows that awardee had actual knowledge prior to award that one of its key personnel was unavailable to perform, but failed to notify the agency of this material change in circumstances.

DECISION

M.C. Dean, Inc., of Tysons, Virginia, protests the award of a contract to PTSI Managed Services, Inc. (PTSI), of Pasadena, California, under request for proposals (RFP) No. H98230-19-R-0148, issued by the National Security Agency (NSA), Central Security Service, Maryland Procurement Office to provide maintenance, installation, and distribution services for the agency's comprehensive enterprise class physical security system. M.C. Dean challenges almost every aspect of the agency's evaluation.

We sustain the protest.

BACKGROUND

According to the RFP, the agency's security and counterintelligence (S & CI) organization is responsible for protecting the agency's "classified and sensitive information, facilities, assets, infrastructure and personnel [DELETED], through a comprehensive analysis of risk and deployment of physical and technical security countermeasures." Agency Report (AR), Tab 4, RFP, Statement of Work (SOW) § 1.0. To protect the agency's assets, S & CI created the [DELETED] program, which the RFP explains is "an enterprise class physical security program." *ld.* The objectives of this program include, among other things, upgrading [DELETED], developing [DELETED], enhancing [DELETED], and expanding [DELETED]. *ld.* This procurement, which the RFP refers to as KUVASZ, is for maintenance, installation, and distribution services for the [DELETED] program. [1] These services include [DELETED]. *ld.* § 2.0. Performance of the contract would occur at various agency facilities [DELETED]. *See id.* §§ 4.3, 6.0.

The agency intends to award a single indefinite-delivery, indefinite-quantity contract with fixed-price and time-and-materials delivery orders. RFP, Proposal Evaluation Criteria (PEC) § 1.0. The solicitation provided for a best-value tradeoff decision based on an evaluation of the following factors and subfactors:

Factor 1: Management

Subfactor 1: Quality Assurance Plan

Subfactor 2: Personnel Qualification

Subfactor 3: Configuration Management Plan

Factor 2: Technical

Subfactor 1: Technical Approach

Subfactor 2: Technical Scenario

Factor 3: Price

***2** *ld.* §§ 1.0, 2.1. The management factor was more important than the technical factor, and when combined, the management and technical factors were significantly more important than price. *ld.* § 2.2. The subfactors under the management factor were of equal importance, and the subfactors under the technical factor are listed in descending order of importance in the above table. *ld.* §§ 2.2.1, 2.2.2. The RFP stated that the agency would assign an adjectival rating to each factor and subfactor. [2] *ld.* § 2.1. The RFP listed a number of criteria under each subfactor that the agency would evaluate. *See id.* §§ 3.1.1-3.2.2.

As relevant here, the RFP identified seven key personnel labor categories, including the program manager. SOW § 7.1. The RFP stated that the program manager "will be the [p]rogram [m]anagement [l]ead and the [p]rimary [p]oint of [c]ontact ... and serve as the manager of the application of this contract." *ld.* § 4.1. The RFP further stated that the program manager "shall be responsible for the successful cost, schedule, and performance of the contract." RFP, app. B, Labor Category Description at 8. The RFP also provided security requirements for certain labor categories; the program manager "shall be required to possess [top secret/sensitive compartmented information (TS/SCI)] clearance with a full scope polygraph at award." SOW § 10.0. The program manager would access classified information during performance of the contract. *ld.* Offerors were required to provide resumes for all of the key personnel. RFP, Proposal Preparation Instructions § 3.1.2. Offerors were also required to notify the agency for approval of any changes to the key personnel. SOW § 7.1.

Three offerors, including M.C. Dean, submitted proposals. COS at 7. After a round of discussions, the offerors submitted final proposal revisions (FPRs) in November 2019. *ld.* at 8. The agency evaluated M.C. Dean's and the awardee's FPRs as follows:

	M.C. Dean	**PTSI**
Management	**Acceptable**	**Good**
Quality Assurance Plan	Marginal	Good
Personnel Qualification	Good	Marginal
Configuration Management Plan	Acceptable	Good
Technical	**Marginal**	**Acceptable**
Technical Approach	Marginal	Good
Technical Scenario	Marginal	Acceptable

Price	**$103,153,883**	**$104,503,772**

***3** AR, Tab 13, Source Selection Evaluation Board Recommendation Report at 3-17.

The agency ultimately selected PTSI's proposal for award, noting that it received a good rating for the management factor and an acceptable rating for the technical factor. AR, Tab 15, Source Selection Authority Decision at 5. The agency also stated that PTSI was rated marginal in only one subfactor, personnel qualification, which contained only one significant weakness for the proposed key personnel resumes, but that this was "mitigated by their strong quality assurance and configuration management plans." *ld.* In comparison, M.C. Dean's proposal received marginal ratings in the quality assurance plan, technical approach, and technical scenario subfactors. *ld.* Thus, "[w]hile M.C. Dean submitted a lower priced proposal, its approach to meeting the management and technical requirements for KUVASZ were far weaker than [PTSI's] approach, and did not demonstrate to the [g]overnment its full comprehension of the scope of the contract, and the effort needed to execute successful performance." *ld.*

After M.C. Dean received its required debriefing, it filed this protest with our Office.

DISCUSSION

M.C. Dean protests almost every aspect of the agency's evaluation and award decision, stating that the agency "failed to properly evaluate proposals under essentially every factor and subfactor of the [s]olicitation, resulting in a prejudicially flawed award." Protest at 2. Among the many protest grounds, M.C. Dean contends that PTSI was aware that its proposed program manager, identified in the RFP as one of the key personnel, became unavailable prior to award and remains unavailable to perform on the contract. Supp. Comments at 6-9. M.C. Dean maintains that as a result, PTSI's proposal is unacceptable. *ld.* at 9. For the reasons discussed below, we sustain the protest on this basis.

Our Office has explained that offerors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals. *General Revenue Corp. et al.,* B-414220.2 *et al.,* Mar. 27, 2017, 2017 CPD ,-106 at 22. While an offeror generally is required to advise an agency where it knows that one or more key employees have become unavailable after the submission of proposals, there is no such obligation where the offeror does not have actual knowledge of the employee's unavailability. *DZSP 21, LLC,* B-410486.10, Jan. 10, 2018, 2018 CPD ,-155 at 10. This premise is grounded in the notion that a firm may not properly receive award of a contract based on a knowing material misrepresentation in its proposal. *ld.* When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted without considering the resume of the unavailable employee (where the proposal will likely be rejected as technically unacceptable for failing to meet a material requirement); or open discussions to permit the offeror to amend its proposal. *General Revenue Corp., supra; Pioneering Evolution, LLC,* B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ,-385 at 9.

***4** In its protest, M.C. Dean asserts that PTSI's proposal was technically unacceptable because several of PTSI's proposed key personnel were not available to perform. [3] Protest at 43-44. In response, the agency acknowledges that "subsequent to the KUVASZ award ... the agency was made aware that although 5 of [PTSI's] key personnel remained available, 3 needed to be replaced." Memorandum of Law (MOL) at 22. In this regard, the agency report included a declaration from an employee of PTSI's parent company, which explains that three key personnel are no longer available to perform. AR, Tab 25, PTSI Declaration ,-9. With respect to the program manager, the declaration states:

> [The program manager] is an employee of [PTSI] and is currently available to be assigned to work on this contract. [The program manager] was hired in May of 2019 and worked on the preparations for the possible [KUVASZ] contract until December 12, 2019, when the customer denied [him] a security clearance for this program. [The program manager] received his official denial letter on January 21, 2020. PTSI understood that [the program manager] would be appealing that denial of his security clearance.

> However, on March 16, 2020, after contract award, PTSI learned that [the program manager] has not appealed the denial of his security clearance.

ld.

Based solely on the declaration from PTSI, the agency argues that PTSI "had no reasonable basis to expect either at or before contract award" that the program manager would be unavailable to perform, and therefore had no obligation to inform the agency prior to award that the program manager was unavailable. MOL at 23. M.C. Dean maintains that once the program manager was denied a security clearance, PTSI had actual knowledge prior to award that the program manager was unavailable to perform on the KUVASZ contract, and therefore was required to notify the agency of this change in its proposal. Comments and Supp. Protest at 13, 15; Supp. Comments at 7-8. On this record, we agree with the protester.

The RFP required that the program manager have a security clearance to access classified information specific to the KUVASZ contract. SOW § 10.0. In November 2019, PTSI submitted its FPR in which it proposed this specific program manager. [4] One month later, NSA denied a security clearance for the proposed program manager, who received official notice of this decision in January 2020. [5] As a result of the denial, PTSI had actual knowledge that its program manager would not be able to obtain the security clearance necessary to work on the KUVASZ contract, and thus would not be available to perform. [6] Indeed, PTSI stated that the program manager stopped working on preparations for the KUVASZ contract once he received notice of his denial, suggesting that PTSI understood that the denial rendered him unable to work even on contract preparations, let alone the contract. *See* AR, Tab 25, PTSI Declaration ,-9. PTSI therefore was required to inform the agency of the program manager's unavailability, which it failed to do. *DZSP 21, LLC, supra.*

***5** The agency argues that the program manager had until March 6, 2020, to appeal the denial and "[a]s a result, the proposed [program manager] had not yet exhausted his legal remedies with respect to the adjudication of his NSA access at the time the KUVASZ contract was awarded on February 12." Supp. MOL at 4. The agency asserts that given this timeline and ability to appeal, PTSI "could [not] be charged with actual knowledge of the [program manager's] unavailability, as additional avenues of recourse remained available to him at the time of award to appeal his initial access denial." *ld.* at 5.

We disagree. As noted above, PTSI stated that it merely "understood" that the program manager was going to appeal the security clearance denial. AR, Tab 25, PTSI Declaration ,-9. There is nothing in the record addressing whether or why PTSI believed an appeal would be successful, much less that an appeal would be successfully adjudicated prior to contract award. In fact, the program manager never actually appealed the denial. *ld.* Thus, the fact that the program manager could appeal the denial does not, by itself, excuse PTSI from having actual knowledge of the unavailability of its proposed program manager. [7]

The agency also repeatedly argues that it does not matter whether the program manager was unavailable because the agency's reliance on the program manager's resume was not material to its evaluation. MOL at 23, Supp. MOL at 6. In this regard, the agency notes that it assigned a weakness to the proposed program manager's resume for only minimally meeting the experience requirements. *ld.* The agency's argument conflates the standard for assessing whether a "bait and switch" occurred with the requirement for offerors to notify the agency when proposed key personnel become unavailable prior to award. [8] As noted above, where, as here, an offeror has actual knowledge that a proposed key person has become unavailable before award, they are required to notify the agency of this development. It is thus irrelevant whether the program manager's resume was material to the agency's evaluation of PTSI's proposed key personnel.

We find that PTSI had actual knowledge prior to award that its program manager would not be able to perform on the KUVASZ contract after he was denied a security clearance. Thus, PTSI had an obligation to inform the agency of the unavailability of its program manager, which it did not do. Accordingly, we sustain the protest on this basis. [9]

RECOMMENDATION

We recommend that the agency either evaluate PTSI's proposal as submitted, without considering the previously proposed program manager, or open discussions with all offerors and allow for revised proposals to be submitted. We also recommend that the agency reimburse M.C. Dean the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1).

***6** M.C. Dean should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel

1 The RFP does not indicate that [DELETED] or KUVASZ are acronyms, but refers to them using all capital letters, so we do the same in this decision. For reference, the prior contract, on which M.C. Dean was the incumbent, was referred to as MAREMMA. Protest at 1; Contracting Officer Statement (COS) at 2.

2 The ratings were outstanding, good, acceptable, marginal, and unacceptable, and were to reflect a consideration of how well the proposal met and understood the requirements, as well as an evaluation of the risk of unsuccessful performance. RFP, PEC § 2.1.

3 This initial allegation was based on multiple job postings on PTSI's website that matched the descriptions for at least four of the key personnel positions. Protest at 43-44.

4 We note that PTSI's proposal explained how the skillset of the proposed program manager would be beneficial to PTSI achieving the requirements of the contract. For example, PTSI's proposal stated "[t]o highlight our agility, we introduce our [program manager]. His extensive management experience on similar projects with [intelligence community] customers, along with his detailed knowledge of the technical systems already installed, will make him the ideal single point of contract for both management and technical matters [DELETED]." AR, Tab 22, PTSI Proposal Vol. I, Management at 2. The proposal also stated that the program manager "will direct [DELETED]." AR, Tab 23, PTSI Proposal Vol. II, Technical at 2.

5 The declaration from PTSI's parent company stated that the program manager was denied a security clearance "for this program." AR, Tab 25, PTSI Declaration ,-9. However, the agency clarified that the denial was not for the KUVASZ contract, but rather for a different NSA contract. Supp. MOL at 4; *see also* AR, Tab 31, Security Clearance Document (showing denial was for a contract other than KUVASZ). The agency explained [DELETED]. Neither the agency nor PTSI has claimed that there is a difference in the contracts such that the program manager could have received a security clearance for KUVASZ despite the denial on another contract.

6 Although the declaration states that the program manager "is currently available to be assigned to work on this contract," neither the agency nor PTSI has claimed that he would be able to work as the program manager. Given that this employee was identified in PTSI's proposal as the program manager, and that this position requires a valid security clearance, we find this statement in the declaration irrelevant to the issue at hand.

7 PTSI also claims that GAO should dismiss this protest ground because it involves a matter of contract administration since the agency-specific security clearance process would happen after award. Intervenor Supp. Comments at 11.

However, whether PTSI had actual knowledge of the unavailability of its program manager prior to award, and was therefore required to notify the agency of this development, is not a question of contract administration.

8 In order to establish an impermissible "bait and switch," a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. *Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ,-145 at 4.

9 We have considered M.C. Dean's various additional assertions, including its arguments regarding the availability of other key personnel, whether PTSI or its affiliated entities would be providing resources for the contract, the agency's evaluation, and that PTSI took exception to material terms of the RFP. In light of our decision that the PTSI had actual knowledge of the unavailability of a key person but failed to notify the agency, along with our recommendation below that the agency either exclude PTSI's proposal or reopen discussions, we need not address these allegations.

B- 418553 (Comp.Gen.), B- 418553.2, 2020 CPD P 206, 2020 WL 3639639

B- 417805.5 (Comp.Gen.), B- 417805.6, B- 417805.7, 2020 CPD P 104, 2020 WL 1285436

COMPTROLLER GENERAL

Matter of: NCI Information Systems, Inc.

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

March 12, 2020

***1** Daniel P. Graham, Esq., Jamie F. Tabb, Esq., Elizabeth Krabill McIntyre, Esq., and John M. Satira, Esq., Vinson & Elkins LLP, for the protester.

Paul A. Debolt, Esq., Emily A. Unnasch, Esq., and Christina E. Wood, Esq., Venable, LLP, for DCS Corporation, the intervenor.

Dylan C. Bush, Esq., and Wade L. Brown, Esq., Department of the Army, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of offerors' professional compensation plans is denied where the record demonstrates that the evaluation was reasonable and consistent with the terms of the solicitation and the requirements of Federal Acquisition Regulation provision 52.222-46.

2. Protest that awardee's proposal is unacceptable because the awardee failed to notify the agency during corrective action that a proposed key person is unavailable is denied where the record contains no evidence that the awardee had actual knowledge that the proposed key person is unavailable.

3. Protest challenging agency's evaluation of awardee's small business participation plan is denied where the agency reasonably evaluated the awardee's proposal in accordance with the solicitation's evaluation criteria.

DECISION

NCI Information Systems, Inc. (NCI), of Reston, Virginia, protests the issuance of a task order to DCS Corporation (DCS), of Alexandria, Virginia, under request for proposals (RFP) No. RS3-19-R-0001, issued by the Department of the Army, Army Contracting Command-Aberdeen Proving Ground, for a wide variety of systems engineering and technical assistance (SETA) services. The protester contends that the agency's evaluation and selection decision are unreasonable.

We deny the protest.

BACKGROUND

The Army issued the RFP on February 13, 2019, to holders of the Army's Responsive Strategic Sourcing for Services multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts to provide systems engineering and technical support services for the Army's Program Manager for Soldier Protection and Individual Equipment (PM-SPIE). Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. The procurement was conducted pursuant to Federal Acquisition Regulation (FAR) § 16.505 procedures. Agency Report (AR), Tab 6, RFP, at 23. The RFP contemplated award of a cost-plus-fixed-fee and cost-

reimbursement task order on a best-value tradeoff basis with a period of performance consisting of a 12-month base period and four 12-month option periods. Id. at 1.

***2** The RFP stated that a task order would be awarded to the offeror whose proposal represented the best value to the government under the following four evaluation factors: technical, past performance, small business participation, and cost/price. RFP at 14. The technical factor included the following subfactors: transition plan; recruitment, retention, and staffing; key personnel/resumes; and corporate experience. Id. at 15. The agency was to assign the following adjectival ratings under the recruitment, retention, and staffing subfactor: outstanding, good, acceptable, and unacceptable. Id. For all other technical subfactors and the small business participation plan factor, the agency was to assign a rating of acceptable or unacceptable. [1] Id. To be considered for award, a proposal must have received a rating of acceptable or greater in every non-cost/price factor and subfactor. Id. For purposes of the best-value tradeoff, the technical factor was significantly more important than past performance, which was more important than cost/price. Id. at 14.

The RFP stated that the agency would evaluate the cost/price factor to ensure that proposed costs were fair, reasonable, and realistic in accordance with FAR § 15.404-1. RFP at 20. The RFP further stated: "For purposes of this solicitation, each offeror's proposed direct labor rates will be analyzed. If more than 16% of the individual direct labor rates[] are determined to be unrealistic, the Offeror's entire cost proposal may be determined to be unrealistic and unawardable." Id. at 21 (emphasis omitted). In addition, the RFP stated that the government would evaluate proposals in accordance with FAR provision 52.222-46, Evaluation of Compensation for Professional Employees. Id.

The agency received three proposals by the solicitation due date. See AR, Tab 92, Source Selection Evaluation Board (SSEB) Tradeoff Recommendation, at 3. The Army's final evaluation of the DCS and NCI proposals was as follows:

	DCS	NCI
Technical	Outstanding	Acceptable
Transition Plan	Acceptable	Acceptable
Recruitment, Retention, and Staffing	Outstanding	Acceptable
Key Personnel / Resumes	Acceptable	Acceptable
Corporate Experience	Acceptable	Acceptable
Past Performance-Relevance	Relevant	Relevant
Past Performance-Confidence	Substantial	Substantial
Small Business Participation Plan	Acceptable	Acceptable
Total Cost	$145,527,583	$137,357,651

***3** Id. at 1. On July 12, the agency notified NCI that its proposal had not been selected for award. AR, Tab 99, NCI Award Notification Letter. NCI received a debriefing, which was closed on July 22. See AR, Tab 107, NCI Debriefing Slides; Tab 109, NCI Debriefing Questions.

On July 29, NCI filed a protest with our Office and alleged, among other things, that the agency failed to properly evaluate proposals in accordance with the RFP and FAR provision 52.222-46. On October 31, our Office conducted an outcome prediction alternative dispute resolution telephone conference, during which the parties were advised that the protest was likely

to be sustained on these bases. Our Office dismissed the protest as academic because the agency advised that it would take the following corrective action: (1) reevaluate offerors' final proposal revisions under the technical factor, recruitment, retention and staffing subfactor, and the cost/price factor, as they relate to the offerors' proposed compensation plans, (2) document the results of the reevaluation, particularly with regard to FAR provision 52.222-46 and subcontractors' compensation plans, and (3) make and document a new award decision. NCI Info. Sys., Inc., B-417805 et al., Nov. 5, 2019, at 1 (unpublished decision).

On November 27, the Army advised NCI that it had reaffirmed its decision to make award to DCS. AR, Tab 173, Notice of Completion of Corrective Action. This protest followed. [2]

DISCUSSION

The protester challenges certain aspects of the agency's evaluation of proposals and its best-value tradeoff decision. As discussed below, we find no basis to sustain the protest.

Evaluation of Compensation for Professional Employees

NCI argues that the agency failed to evaluate offerors' and their subcontractors compensation for professional employees as required by the RFP under the transition plan, and the recruitment, retention and staffing plan subfactors, and under FAR provision 52.222-46. Supp. Protest at 2-5. In particular, the protester argues that DCS proposed to staff the task order primarily by hiring NCI's incumbent employees, but proposed compensation that is substantially lower than the employees' current earnings. Id. at 3-4. The protester also argues that the agency reached a flawed conclusion that DCS's proposed fringe benefits merited three strengths. Comments & 2nd Supp. Protest at 14-16.

The agency argues it properly evaluated professional employee compensation as required by the RFP and the FAR. COS/MOL at 10-15. The agency notes first that it evaluated both direct pay and 26 categories of fringe benefits provided by the offerors and their proposed subcontractors. The agency also contends that DCS's approach to hiring incumbent employees is consistent with the RFP's request for "realized retention rates for incumbents on contracts ... similar in size and scope" to the requirement. Id. at 12. The agency also notes that there are instances across the labor categories where DCS has in fact proposed rates higher than NCI, and that only "a handful of incumbent NCI employees may not fit into DCS's proposed compensation structure." Id. at 13. The agency further states that it specifically considered the following features of the compensation plan proposed by DCS that outweigh those proposed by NCI: [DELETED]. Id. at 11-12.

***4** The evaluation of proposals in a task order competition, including the determination of the relative merits of proposals, is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD 163 at 6. An offeror's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. STG, Inc., B-405101.3 et al., Jan. 12, 2012, 2012 CPD 148 at 7. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD 1219 at 4-5.

For the transition plan subfactor, the RFP required that an offeror's proposal include a plan demonstrating the ability to execute a successful transition of the incumbent or new workforce within 60 days of award. RFP at 4. For the recruitment, retention, and staffing subfactor, the RFP required that offerors provide a detailed narrative to "maintain a qualified and capable workforce throughout the contract," and identified multiple topics that offerors should specifically address in their proposals. Id. at 4-5. As relevant to the allegations here, the RFP required that offerors specifically address their compensation plans under this subfactor, as follows:

> Proposed compensation plan and structure and how that structure supports their recruitment and retention plan. [Offerors] must comply with the reporting requirements of FAR 52.222-46 as part of the cost volume and provide convincing data on its professional compensation plan and its impact on recruitment and retention. While the complete compensation plan is required under the cost volume, this technical section requires the vendor to summarize the basic elements of the compensation plan and why that is attractive enough to recruit and retain qualified personnel in a competitive environment.

Id. at 5. The RFP stated that the agency's overarching evaluation for technical factors, including these subfactors, would consider the adequacy of the response and feasibility of the approach provided by each offeror. Id. at 15-16.

Under the cost/price factor, the RFP further stated that the agency would evaluate compensation for professional employees in accordance with FAR provision 52.222-46, and that "the Offeror and its subcontractor(s) shall provide documentation and submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract that assures that it reflects a sound management approach and understanding of the contract requirements." Id. at 12. The RFP further stated the agency would evaluate compensation plans as follows:

> ***5** [In accordance with] FAR 52.222-46, Evaluation of Compensation for Professional Employees, [t]he Government will evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the Offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation. The Government is concerned with the quality and stability of the work force to be employed on this contract. Professional compensation that is unrealistically low or not in reasonable relationship to the various job categories, since it may impair the Contractor's ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements. Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.

Id. at 21-22.

The record also shows that the Army conducted two rounds of discussions, during which the agency identified unrealistic direct labor rates proposed by offerors and their subcontractors, and issued evaluation notices. [3] AR, Tab 50, Initial Price/Cost Report, at 7, 26-27, 31, 35-36, 39-42; Tab 71, Interim Price/Cost Report, at 7, 27-29, 33-34, 38-40, 43, 46-48, 50. In its cost realism analysis, the agency evaluated offerors' proposed direct labor rates to identify if any were "outliers"; if no outliers existed, the agency performed a standard deviation analysis. AR, Tab 89, Final Price/Cost Report, at 6. If outliers existed, the agency performed a median absolute deviation analysis. Id. The agency also considered Economic Research Institute data and a variety of documentation submitted by offerors as required by the RFP to perform its realism analysis of direct labor rates. Id. In its evaluation of offerors' final proposal revisions, the agency concluded that "there were no unrealistic direct labor rates for any of the offerors." Id. at 7.

During the agency's corrective action, the cost/price analyst performed a comparative review of the compensation plans offered by each prime and their proposed subcontractors. AR, Tab 169, Corrective Action Cost/Price Report, at 8-11. This review considered a variety of features included in each company's compensation plans, such as paid time off and other leave (e.g.,

military and bereavement), health benefits, life and disability insurance, retirement savings contributions, tuition assistance, and bonuses. Id.; see also Tab 168, Cost/Price Report Fringe Benefit Analysis. The cost/price analyst concluded as follows:

> ***6** While the three offerors do not offer the same benefits, when taken as a whole, they are relatively similar. Based on the valuation of each compensation plan in congruence with the rates provided, a reasonable employee would take no issue with each company's total compensation plan. The risk of staffing this requirement with qualified, skilled individuals to provide uninterrupted, high-quality work is low....

AR, Tab 169, Corrective Action Cost/Price Report, at 11.

The cost/price analyst's evaluation was provided to the SSEB, which concluded that the strengths identified in its previous evaluation of DCS's technical proposal for the recruitment, retention and staffing subfactor "are still valid and justified," and that there should be no change to the technical evaluation. AR, Tab 170, Corrective Action Addendum to SSEB Comparative Analysis-Tradeoff Recommendation. In its evaluation of DCS, the agency identified three strengths, two of which related to DCS's compensation plan, and assigned a rating of outstanding. AR, Tab 90, SSEB Report, at 7-9. The SSEB identified as a strength DCS's provision of [DELETED] paid time off to employees with [DELETED] of employment, with additional days off for [DELETED], and concluded this feature presented a valuable recruiting and retention tool. Id. at 8. The evaluators concluded that DCS's proposed paid time off "would provide [an] immediate benefit to [PM-SPIE] as it is [DELETED]% more [paid time off] than even the most experienced employees receive with the incumbent SETA contractor." Id. Another strength related collectively to multiple other features of DCS's compensation plan. The evaluators concluded these features were unique, exceptional, and added to the standard benefits offered by almost all companies, and would be beneficial to recruitment, retention, and staffing. Id.

The contracting officer, who also served as the selection official, concurred with the SSEB. The selection official affirmed the prior evaluation and assigned DCS a rating of acceptable under the transition plan subfactor, and outstanding under the recruitment, retention, and staffing subfactor. AR, Tab 172, Task Order Decision Document, at 3.

As discussed above, the record shows that the agency evaluated proposed labor rates, identified rates deemed unrealistic, addressed the issues in discussions, and concluded in its final evaluation that all proposed direct labor rates were realistic. The agency evaluated DCS's technical proposal and identified strengths related to DCS's compensation plan. Further, the agency reviewed the compensation plans of all primes and their proposed subcontractors and concluded that they were relatively similar, a reasonable employee would "take no issue" with the plans, and there was low risk that any offeror would be unable to staff the requirement with qualified, skilled individuals to successfully perform the work. Finally, the record shows that the agency meaningfully considered the extent to which the compensation plans would impact "the quality and stability of the work force," which is the concern expressly stated in the RFP and FAR provision 52.222-46. Accordingly, we find the agency's evaluation to be reasonable.

Key Personnel

***7** The protester argues that the agency should have found DCS's proposal unacceptable because DCS failed to advise the agency during the corrective action period that a proposed key person is no longer available. Protest at 12-13. NCI argues that it is evident, based on publicly available information, that DCS's proposed materials engineer III relocated from the Washington, D.C. area to Tucson, Arizona, and accepted a new position with another company in October 2019. Id.

The agency responds that the corrective action did not include a reevaluation of key personnel, and NCI raised no objection to the scope of the corrective action. COS/MOL at 9-10. The agency further argues that DCS had no obligation to report

unavailability of the proposed key person, who was not a DCS employee, because the individual has not notified DCS that he is no longer available to perform the task order. Supp. COS/MOL at 5-8.

Our Office has explained that offerors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals. General Revenue Corp., et al., B-414220.2 et al., March 27, 2017, 2017 CPD 1106 at 22. While an offeror generally is required to advise an agency where it knows that one or more key employees have become unavailable after the submission of proposals, there is no such obligation where the offeror does not have actual knowledge of the employee's unavailability. DZSP 21, LLC, B-410486.10, Jan. 10, 2018, 2018 CPD 1155 at 10. This premise is grounded in the notion that a firm may not properly receive award of a contract based on a knowing material misrepresentation in its proposal. Id.

With respect to the key personnel subfactor, the RFP identified 10 positions and required that "letters of intent/commitment shall be provided for each position." RFP at 6. In its proposal, DCS identified 10 individuals for each of the required positions, and provided resumes and letters of intent for each. AR, Tab 63, DCS Interim/Final Technical Proposal, at 29, Appendix E. Specifically, the resume submitted for the individual proposed by DCS as its materials engineer III indicates that he has never been employed by DCS. Id. at E-9 to E-10. However, the proposed individual provided the required letter of intent, dated February 22, 2019, stating: "I am available and committed to pursuing employment with DCS Corporation to support the Program Executive Office (PEO) Soldier, Project Manager Soldier Protection and Individual Equipment (PM-SPIE) effort " Id. at E-38. As noted, the agency concluded that DCS's proposal was acceptable under the key personnel subfactor. AR, Tab 90, SSEB Report, at 4, 7.

***8** In response to this protest allegation, the intervenor provided a declaration from a corporate official that states, in pertinent part, as follows:

> [N]one of DCS's proposed key personnel have rescinded their letters of intent, nor have any of DCS's proposed key personnel notified DCS that they are unavailable to fill the position for which they provided a signed letter of intent. DCS had no reason to believe, prior to contract award, that any of its key personnel would be unavailable for contract performance. Indeed, to this day, DCS has no reason to believe any of its proposed key personnel have withdrawn their availability and intent to perform the contract effort.

AR, Tab 185, Decl. of DCS Vice President, at 2 (17).

Here, the resume of the proposed key person indicates that the individual was not employed by DCS, and DCS states that it has not been notified by any of its proposed key personnel that they are unavailable to perform the contract. Under these circumstances, DCS had no obligation to inform the agency that any of its key personnel were unavailable. Accordingly, we find the agency's evaluation unobjectionable.

Small Business Participation Plan

The protester also argues that the agency's evaluation of DCS's small business participation plan was unreasonable, and DCS should have been rated as unacceptable. Protest at 7-11. Specifically, NCI argues that DCS failed to identify subcontractors that would meet the woman-owned small business (WOSB) or historically-underutilized business zone (HUBZone) small business goals set forth in the RFP. Id. at 7-8. The protester additionally argues that DCS's proposal should have been rejected for failing to meet a material RFP requirement because the RFP required offerors to identify all of their proposed subcontractors, and none of the [DELETED] subcontractors identified by DCS in its proposal are WOSB or HUBZone small businesses. Id. at 9-11. The agency argues that it properly evaluated DCS's small business participation plan in accordance with the terms of the solicitation, and reasonably concluded that the plan was acceptable. COS/MOL at 6-8.

The evaluation of an offeror's proposal under a small business participation factor is a matter within the agency's discretion. Mission Essential Pers., LLC, B-410431.9,

B-410431.10, Mar. 18, 2015, 2015 CPD 1109 at 7. In reviewing an agency's evaluation, our Office will not reevaluate proposals; instead, we will examine the record to ensure that the evaluation was reasonable and consistent with stated evaluation criteria and applicable procurement statutes and regulations. Id. at 7-8; Cajun Constructors, Inc., B-409685, July 15, 2014, 2014 CPD 1212 at 7.

Here, the RFP required that offerors complete a table providing their proposed small business participation plan percentages, and stated that the agency would rate the small business participation plan as acceptable or unacceptable. RFP at 10, 20; AR, Tab 10, Small Business Participation Plan Template. The RFP defined an acceptable rating as follows: "The Small Business Participation Plan indicates an adequate approach and understanding of small business objectives." RFP at 20. In pertinent part, the RFP stated as follows:

> ***9** All Offerors (both large and small businesses) will be evaluated on the level of proposed participation of small businesses in the performance of [this] acquisition (as small business prime Offerors or small business subcontractors) relative to the objectives and goals established herein. The Government will evaluate the extent to which the Offeror meets or exceeds the goals[.]

Id. The goals for this procurement were that 13 percent of the total contract value be subcontracted to small businesses, inclusive of the goals that 0.5 percent of the total contract value be subcontracted to each of the following subcategories of small business: small disadvantaged business (SDB), WOSB, HUBZone small business, veteran-owned small business (VOSB), and service-disabled VOSB (SDVOSB). Id.

In its small business participation plan, DCS proposed goals identical to those stated in the RFP. AR, Tab 36, DCS Small Business Participation Plan. In its cost proposal, DCS otherwise indicated that its performance would account for [DELETED] percent of the proposed labor cost, and the remainder of the task order would be performed by its [DELETED] subcontractors, all of which were small businesses. AR, Tab 82, DCS Final Cost Proposal, at 4. Specifically, the DCS proposal indicated that its major small business subcontractor would account for [DELETED] percent of the proposed labor cost, and the remaining [DELETED] percent of the task order would be performed by the [DELETED] other small business subcontractors, all of which were also SDBs, VOSBs, and SDVOSBs. Id. As noted, the agency concluded that DCS's small business participation plan was acceptable. AR, Tab 90, SSEB Report, at 4, 9.

We find the agency's evaluation reasonable. The RFP stated that the agency would evaluate "the extent to which the Offeror meets or exceeds" the RFP's small business participation goals. The RFP did not require offerors identify specific small businesses that would be utilized to meet each goal. The record shows that DCS proposed to meet all of the RFP's stated small business participation goals, and did not take exception to any of the goals stated in the RFP. The DCS proposal otherwise indicated that it would exceed some of the small business subcontracting goals, by subcontracting at least [DELETED] percent of the total labor costs of the task order to small businesses, of which [DELETED] percent would be performed by SDB, VOSB, and SDVOSB small businesses. On this record, we find reasonable the agency's conclusion that DCS's small business participation plan was acceptable.

Best-Value Tradeoff

Finally, the protester challenges the agency's best-value tradeoff based on the alleged underlying evaluation errors. Protest at 14. Specifically, NCI argues that two of the three strengths identified by the agency as discriminators in DCS's proposal related to DCS's compensation plan, but are illusory because they impact only DCS employees and do not otherwise benefit employees

of DCS's subcontractors. Comments & 2nd Supp. Protest at 14-16. NCI further argues that these discriminators conflict with the cost/price analyst's conclusion that all offerors' and their subcontractors' compensation plans were "relatively similar." Id. at 16-17. The agency argues that its best-value tradeoff is reasonable and rational and in accordance with the RFP. COS/MOL at 16; Supp. COS/MOL at 1-5.

***10** Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost and technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. Booz Allen Hamilton Inc., B-414283, B-414283.2, Apr. 27, 2017, 2017 CPD 1159 at 13-14. In reviewing protests of an agency's source selection decision, even in a task order competition as here, we do not reevaluate proposals but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. Intelligent Waves LLC, B-416169, B-416169.2, June 12, 2018, 2018 CPD 1211 at 12.

Here, as discussed above, we conclude that the agency's evaluation was reasonable. As noted, the evaluators identified three strengths in DCS's technical proposal and assigned a rating of outstanding; no strengths were identified in NCI's technical proposal, which was rated acceptable. Based on its evaluation, the SSEB recommended that award be made to DCS. AR, Tab 170, Corrective Action Addendum to SSEB Comparative Analysis-Tradeoff Recommendation. The contracting officer, who also served as the selection official, concurred with the SSEB and concluded that the superiority of DCS's proposal warranted the approximately $8.1 million price premium associated with an award to DCS. AR, Tab 172, Task Order Decision Document, at 4-6. Contrary to the protester's assertion, the fact that DCS's compensation plan applies only to a portion of its entire proposed workforce does not negate the benefits identified by the agency for those personnel, or establish that the benefits do not exceed what some incumbent employees currently receive. Likewise, the agency's conclusion that compensation plans across primes and their proposed subcontractors were "relatively similar" does not preclude the agency from also concluding that the compensation plan offered by DCS was superior to that offered by NCI. On this record, we find no basis to question the agency's best-value tradeoff decision.

The protest is denied.

Thomas H. Armstrong
General Counsel

1 Past performance was to be evaluated and rated based on relevance (relevant or not relevant) and confidence (substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence). RFP at 18-19.

2 The task order at issue is valued in excess of $25 million, and was placed under an IDIQ contract established by the Army. Accordingly, our Office has jurisdiction to consider NCI's protest. 10 U.S.C. § 2304c(e)(1)(B).

3 The agency also identified subcontractors that did not provide a compensation plan with their cost proposals, and requested that they be submitted with the offerors' final proposal revisions. AR, Tab 50, Initial Price/Cost Report, at 10-11, 28, 32-33, 43-44; Tab 71, Interim Price/Cost Report, at 10, 30, 35-36, 49, 51.

B- 417805.5 (Comp.Gen.), B- 417805.6, B- 417805.7, 2020 CPD P 104, 2020 WL 1285436

United States Court of Appeals for the Federal Circuit

INSERSO CORPORATION,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

FEDITC, LLC, RIVERSIDE ENGINEERING, LLC,
Defendants

2019-1933

Appeal from the United States Court of Federal Claims in No. 1:18-cv-01655-LAS, Senior Judge Loren A. Smith.

Decided: June 15, 2020

RICHARD P. RECTOR, DLA Piper LLP (US), Washington, DC, for plaintiff-appellant. Also represented by DAWN STERN; CARL BRADFORD JORGENSEN, Austin, TX.

ANTHONY F. SCHIAVETTI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., DOUGLAS K. MICKLE.

Before REYNA, MAYER, and TARANTO, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TARANTO.

Dissenting opinion filed by *Circuit Judge* REYNA.

TARANTO, *Circuit Judge*.

The United States Defense Information Systems Agency (DISA), which is part of the U.S. Department of Defense, awarded contracts to multiple firms that bid for the opportunity to sell information technology services to various federal government agencies. Inserso Corporation unsuccessfully competed to be one of the firms awarded a contract. In an action filed against the United States in the Court of Federal Claims, Inserso alleged that DISA disclosed information to certain other bidders but not Inserso, giving the rival bidders an unfair competitive advantage. The Court of Federal Claims held that DISA's disclosure did not prejudice Inserso in the competition and on that basis entered judgment in favor of the government. *Inserso Corp. v. United States*, 142 Fed. Cl. 678 (2019).

We agree that judgment in favor of the government is appropriate, but on a different ground. We conclude that, because Inserso did not object to the solicitation when it was unreasonable to disregard the high likelihood of the disclosure at issue, Inserso forfeited its ability to challenge the solicitation in the Court of Federal Claims. We do not reach the prejudice portion of the court's decision. We therefore vacate that decision and remand for the court to enter judgment consistent with this opinion.

I

On March 2, 2016, DISA publicly posted Solicitation No. HC1028-15-R-0030 (Encore III). The solicitation invited firms to bid for the opportunity to enter into indefinite-delivery/indefinite-quantity contracts under which the awardees would provide information-technology services to

the Department of Defense and other federal agencies. The solicitation states that the contracts would involve fixed-price and cost-reimbursement task orders and that awards of contracts would be made to offerors whose proposals provided the best value to the government and satisfied the evaluation criteria.

The solicitation lists three criteria for evaluating proposals: (1) the bidder's technical/management approach, (2) the bidder's past performance, and (3) cost/price information. For the evaluation of price, the solicitation states, DISA would calculate a "total proposed price" and a "total evaluated price." J.A. 101918. The total proposed price would be calculated by applying government-estimated labor hours for each year of contract performance to each offeror's proposed fixed-price and cost-reimbursement labor rates; in turn, the total evaluated price would be calculated by adjusting any cost-reimbursement rates that DISA determined were unrealistic. The proposals with the lowest total evaluated price would then be evaluated for compliance with the other terms of the solicitation.

DISA divided the Encore III competition into two competitions. One competition would award a "suite" of contracts in a "full and open" competition; the other would award a suite of contracts to small businesses. J.A. 101891. DISA anticipated awarding up to twenty contracts in each competition.

Importantly, the solicitation expressly states that small businesses could compete in both competitions but could receive only one award. J.A. 101892. The solicitation also provides that firms could compete through joint ventures or partnerships. J.A. 101907. Under those provisions, several firms that bid in the small-business competition in fact also competed in the full-and-open competition as part of joint ventures. Inserso competed only in the small-business competition.

Bidders in both competitions submitted their proposals by October 21, 2016. But the timing of the two competitions quickly diverged. On November 2, 2017, DISA notified successful and unsuccessful bidders in the full-and-open competition of their award status. By November 8, 2017, *i.e.*, less than a week later, DISA completed the debriefing process by which it discloses certain details of the agency's selection decision to winners and losers. *See* 48 C.F.R. § 15.506.

DISA had not yet completed evaluating the proposals submitted in the separate small-business competition and was still communicating with bidders in that competition. By October 18, 2017, DISA had received responses to the first round of evaluation notices it had sent to small-business bidders. Even after November 2, 2017, DISA sent several more rounds of evaluation notices to small-business bidders. DISA did not request final proposal revisions from the small-business bidders until April 2018. *See* 48 C.F.R. § 15.307. Ultimately, such bidders had until June 20, 2018, to submit their final revised proposals for the small-business competition.

DISA notified successful and unsuccessful bidders of its award decisions for the small-business suite on September 7, 2018. Inserso did not receive an award because its total evaluated price was the 23rd lowest in a competition for twenty slots. DISA attached a debriefing document to its notice to Inserso. The debriefing included—among other things—the total evaluated price for the twenty awardees and some previously undisclosed information on how DISA had evaluated the cost element of the proposals.

In response to its debriefing, Inserso sent follow-up communications to DISA. Inserso noted that several awardees in the small-business competition had also competed in the full-and-open competition as part of joint ventures or partnerships, and it asked whether those entities had received similarly detailed debriefings at the

conclusion of the full-and-open competition (in fall 2017). Inserso expressed concern that, if so, the earlier debriefing would have provided unequal information giving a competitive advantage to some of the bidders in the pending small-business competition. In response, DISA stated that all unsuccessful bidders in both competitions were given similarly detailed information in their debriefings.

On September 12, 2018, Inserso filed a protest in the United States Government Accountability Office (GAO). *See* 4 C.F.R. §§ 21.1–21.2. On October 17, 2018, GAO dismissed Inserso's protest because another party was challenging the same solicitation at the Court of Federal Claims. *See id.*, § 21.11(b).

On October 25, 2018, Inserso filed its own complaint in the Court of Federal Claims, alleging that the full-and-open debriefing gave certain offerors in the small-business competition a competitive advantage by providing them, but not other bidders, the total evaluated price for all full-and-open awardees and previously undisclosed information regarding DISA's evaluation methodology. Inserso alleged that this unequal provision of information created an organizational conflict of interest in violation of 48 C.F.R. §§ 9.504, 9.505 and, in addition, violated at least one regulation specifically addressed to disparate treatment of bidders, 48 C.F.R. § 1.602-2(b). Inserso moved for judgment on the administrative record, and the government opposed Inserso's motion and cross-moved for judgment on the administrative record.

The Court of Federal Claims ruled in favor of the government. Without definitively finding a violation, the court recognized that the challenged disclosure of information might have violated the identified regulatory standards, stating in particular that the total evaluated prices of the winners of the full-and-open competition "provided a useful comparison tool that [small-business-competition] offerors could utilize as a benchmark in revising their price

proposals." *Inserso*, 142 Fed. Cl. at 684. The court also stated that "[p]rejudice is presumed once a potentially significant [organizational conflict of interest] is identified." *Id.* Here, however, the court concluded, the government demonstrated lack of prejudice to Inserso, a conclusion that defeated Inserso's claim as to both sets of regulations at issue. *Id.* at 684–85. The court entered judgment on April 2, 2019. J.A. 6.

Inserso timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

On appeal, Inserso argues that the Court of Federal Claims erred in its treatment of the presumption of prejudice, including in its determination that the government rebutted such a presumption. Inserso also argues that, even apart from a presumption of prejudice, it was entitled to a finding that it was prejudiced by the challenged unequal disclosure. The government—in addition to defending the trial court's analysis—argues in this court, as it did in the trial court, that Inserso forfeited its right to challenge DISA's disclosure by not raising the issue in a timely manner.

Under 28 U.S.C. § 1491(b), the Court of Federal Claims has "jurisdiction to render judgment on an action by an interested party objecting to" a solicitation or contract award made by a federal agency. We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1335 (Fed. Cir. 2009). "When making a prejudice analysis in the first instance, [the Court of Federal Claims] is required to make factual findings." *Bannum, Inc. v. United States*, 404 F.3d 1346,1357 (Fed. Cir. 2005). Whether the court applied the appropriate legal standard to its factual findings is a question of law. *See Shell Oil Co. v. United States*, 688 F.3d 1376, 1381 (Fed. Cir. 2012).

A

Inserso alleges that DISA violated two sets of regulations that are part of the Federal Acquisition Regulation (FAR). *First*, it alleges that DISA violated FAR subpart 9.5, which directs contracting officers to avoid, neutralize, or mitigate "organizational conflicts of interest." 48 C.F.R. § 9.505. Section 9.505 describes the dual aims of "[p]reventing the existence of conflicting roles that might bias a contractor's judgment" and "[p]reventing unfair competitive advantage." *Id.*, § 9.505(a), (b). An unfair competitive advantage can exist when a contractor possesses "[p]roprietary information that was obtained from a Government official without proper authorization" or "[s]ource selection information (as defined in [48 C.F.R. §] 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." *Id.*, § 9.505(b). *Second*, Inserso alleges that DISA failed to treat it fairly and equally, as required by several provisions of the FAR. *See*, *e.g.*, *id.*, §§ 1.102(b)(3), 1.602-2(b), 3.101-1.

Both of Inserso's regulatory arguments arise from the same underlying DISA action, having the same alleged wrongful effect on the small-business competition. Specifically, both arguments challenge the disclosure of certain information to firms that (directly or through partnerships or joint ventures) bid for the full-and-open suite of contracts when some of those firms (directly or through partnerships or joint ventures) were still preparing bids for the small-business suite. Because "the scope of work and evaluation factors are nearly identical for each suite," *Inserso*, 142 Fed. Cl. at 684, and the information was relevant to the evaluation of bids, Inserso alleges, DISA's failure to disclose that same information to all bidders in the small-business competition gave those bidders with the information an unfair competitive advantage.

Inserso focuses on two categories of disclosed information: (1) the total evaluated prices of those firms which won contracts in the full-and-open competition; and (2) details of how DISA evaluated the costs built into the proposals made by bidders in that competition. Inserso contends, and the trial court recognized, that knowledge of the winning total evaluated prices from the full-and-open competition would provide a small-business-competition bidder a target range in which it could be confident that it would win an award. Inserso also contends that the cost-evaluation information would have been useful to a small-business-competition bidder who was considering how to reduce the price of its bid in a way that DISA would find acceptable.

Inserso, however, did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition. We conclude that, by waiting until the awards were made, Inserso forfeited the objection.

B

In *Blue & Gold Fleet, L.P. v. United States*, we held that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." 492 F.3d 1308, 1313 (Fed. Cir. 2007). We have since held that this reasoning "applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so." *COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012). The Court of Federal Claims has correctly applied this rule in organizational-conflict-of-interest cases, including cases dealing with the disclosure of pricing information during debriefing. *See Ceres Envtl. Services, Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011).

A defect in a solicitation is patent if it is an obvious omission, inconsistency, or discrepancy of significance. *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312 (Fed. Cir. 2016). Additionally, a defect is patent if it could have been discovered by reasonable and customary care. *Id.* at 1313; *see also K-Con, Inc. v. Secretary of Army*, 908 F.3d 719, 722 (Fed. Cir. 2018) ("A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice."). "Whether an ambiguity or defect is patent is an issue of law reviewed de novo." *Per Aarsleff*, 829 F.3d at 1312.[1]

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[1] The dissent, but not Inserso, suggests that this court's *Blue & Gold* line of authority has been superseded by the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017). We do not read *SCA Hygiene* as having the broad implication that the dissent suggests but rather as holding only that the general non-statutory equitable timeliness doctrine of laches does not override the congressionally enacted statute of limitations applicable to legal actions for damages. 137 S. Ct. at 959–67. *Blue & Gold*, in contrast, establishes a "waiver rule" under a specific statutory authorization—the congressional command that bid-protest jurisdiction under 28 U.S.C. § 1491(b) be exercised with "due regard to the . . . need for expeditious resolution of the action," 28 U.S.C. § 1491(b)(3)—with support from longstanding substantive contract law and from regulations under a related statutory regime specific to bid protests. *See Blue & Gold*, 492 F.3d at 1313–14 (discussing "patent ambiguity" and "*contra proferentem*" doctrines and General Accountability Office regulations).

The dissent also suggests that we refrain from ruling on the *Blue & Gold* issue. But Inserso does not dispute that the issue was raised in the trial court, and it is an issue of law that we see no impediment to resolving ourselves.

C

Those principles defeat Inserso's claims. Inserso should have challenged the solicitation before the competition concluded because it knew, or should have known, that DISA would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards. Inserso knew that the Encore III solicitation process was divided into two competitions and that small businesses could compete for both suites, either individually or as part of a joint venture or partnership. J.A. 101907. It is undisputed that Inserso knew that the full-and-open competition had been completed in November 2017. *See* Appellee Br. 41; *see also* Encore III Full & Open, Sam.gov, https://beta.sam.gov/opp/96e2d2943ebc322905ebf27cf711e158/view#award (noting that contract award was originally published Nov. 7, 2017).

The FAR indicates that the winning total evaluated prices would have been provided to all unsuccessful offerors in the competitive range within three days of the award. 48 C.F.R. § 15.503(b)(1)(iv) ("Within 3 days after the date of contract award, the contracting officer *shall* provide written notification to each offeror whose proposal was in the competitive range but was not selected for award . . . . The notice *shall* include . . . [t]he items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, *only the total contract price need be furnished* in the notice.") (emphasis added). And DISA in fact included the awardees' total evaluated prices in its notifications to unsuccessful full-and-open offerors. *See*, *e.g.*, J.A. 186838–39.

Offerors in a government solicitation are "charged with knowledge of law and fact appropriate to the subject matter." *Per Aarsleff*, 829 F.3d at 1314 (citing *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004)). Here, that knowledge includes knowing

that the total evaluated prices would be disclosed to bidders in the full-and-open competition at or shortly after the announcement of the awards in that competition. It also includes knowing that the express terms of the solicitation contemplated overlap of bidders in the two competitions (directly or through partnerships or joint ventures), so that Inserso, if it had taken reasonable care, would have known that recipients of the information at issue could include bidders in the small-business competition. The law and facts made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices that Inserso now challenges.

We reach a similar conclusion about the information regarding DISA's evaluation methodology that Inserso alleges would have provided a competitive advantage to bidders in the small-business competition. Although the FAR does not require disclosing such information in the award notice, Inserso should have known that disclosure of this information was likely to be a part of the competitively valuable information required by the FAR to be included in the post-award debriefing. For example, post-award debriefings must include, at a minimum, "[t]he Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal", "[t]he overall evaluated cost or price . . . , and technical rating, if applicable, of the successful offeror and the debriefed offeror," "[t]he overall ranking of all offerors," and "[a] summary of the rationale for award." 48 C.F.R. § 15.506(d). Although it may have been impossible to know the precise contents of the full-and-open competition's debriefings, Inserso should have known that those debriefings were bound to contain information that would provide a competitive advantage in the small-business competition, including the "overall evaluated cost or price" of the successful offerors. *Id.*, § 15.506(d)(2).

In response to the government's forfeiture argument, Inserso argues that it could not have known that DISA would debrief the bidders in the full-and-open competition

while the small-business offerors were still revising their proposals. Appellant's Reply Br. 29–30. Inserso points out that the regulations do not set a strict time limit on debriefing; rather, they require only that "[t]o the maximum extent practicable, the debriefing should occur within 5 days" after an offeror requests debriefing. 48 C.F.R. § 15.506(a)(2). Therefore, Inserso argues, DISA should not have conducted the debriefing for the full-and-open competition before the small-business competition closed.

We do not think it reasonable for Inserso to have believed that DISA would delay—for three quarters of a year—the post-award debriefing of the bidders in the full-and-open competition. The debriefing process is an important part of the award process, and the expressly stated baseline rule of five days demonstrates the very short time scale understood to be important. The "practicable" qualifier gives some flexibility: one treatise notes that when there are many offerors, debriefing may not be completed for *weeks*. Government Contract Bid Protests: A Practical & Procedural Guide § 2:11. But no evidence or authority presented to us suggests that the "practicable" qualifier has been used, or could be reasonably counted on by Inserso to be used, to delay debriefing for many months. Nor could Inserso reasonably rely on DISA to decide to delay the debriefing based on a possibility of unequal advantage in the small-business competition where nobody had called the issue to its attention. The *Blue & Gold* forfeiture standard exists in recognition of the need for interested bidders to call the agency's attention to solicitation problems of which they reasonably should be aware.

Moreover, Inserso should have known that DISA had debriefed the bidders in the full-and-open competition once the GAO publicly dismissed a post-award protest of the awards in that competition. GAO's regulations specify that for "a procurement conducted on the basis of competitive proposals under which a debriefing is requested . . . , the initial protest *shall not be filed before the debriefing date*

offered to the protestor, but shall be filed not later than 10 days after the date on which the debriefing was held." 4 C.F.R. § 21.2(a)(2) (emphasis added). On February 21, 2018, GAO dismissed a post-award bid protest challenging DISA's awards in the full-and-open competition. *Planned Systems Int'l, Inc.* B-413028.5, 2018 WL 1898124 (Comp. Gen. Feb. 21, 2018). Inserso should have known, from the existence of a relevant protest at GAO, that the bidders in the full-and-open competition had been debriefed. Indeed, the GAO decision states as much. *Id.* at *3. The decision is not subject to a protective order, and there is no indication that it would not have been publicly available on the day it issued. Therefore, Inserso is properly charged with knowing, on or shortly after February 21, 2018, that the bidders in the full-and-open competition had been debriefed.[2]

Because a bidder in the small-business competition exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the awards were made, Inserso forfeited its right to raise its challenge by waiting until awards were made. Whether starting from the November 2017 award in the full-and-open competition or from the February 2018 GAO denial of a protest in that competition, Inserso had months to notify DISA of this defect before it submitted its final revised proposals. J.A. 178905. It had an additional two

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[2] The dissent cites a solicitation provision that states: "The estimated labor hours used for evaluation purposes will not be provided to the offerors until after award." J.A. 101918. That provision does not generally negate the expected normal operation of the debriefing process in the full-and-open competition. It applies only to estimated labor hours—thereby highlighting the obviousness of the defect by omitting mention of any other competitively advantageous information.

months before DISA selected the small-business awardees. J.A. 179528. Our previous cases establish that this amount of time is more than sufficient. *See COMINT*, 700 F.3d at 1383 ("Here, Comint had two and a half months between the issuance of Amendment 5 and the award of the contract in which to file its protest. That was more than an adequate opportunity to object.").

D

Enforcing our forfeiture rule implements Congress's directive that courts "shall give due regard to . . . the need for expeditious resolution" of protest claims. 28 U.S.C. § 1491(b)(3). The rule serves the interest in "reducing the need for the inefficient and costly process of agency rebidding after offerors and the agency have expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation." *Bannum, Inc. v. United States*, 779 F.3d 1376, 1381 (Fed. Cir. 2015) (quoting *Blue & Gold*, 492 F.3d at 1314) (quotation marks and brackets omitted); *see also Per Aarsleff*, 829 F.3d at 1317 (Reyna, J. concurring).

The policy behind the forfeiture rule is served in this case. In its suit in the Court of Federal Claims, Inserso asked the court to provide all bidders in the small-business competition access to the unequally disclosed information and to reopen the competition to accept revised proposals. Had Inserso objected to the solicitation before the submission of final proposals, raising its concern that some bidders might have received information by participating in the full-and-open competition, DISA could have confirmed that an unequal disclosure occurred and provided the nonproprietary debriefing information to all bidders in the small-business competition. *Cf.* 48 C.F.R. § 15.507. Inserso is now seeking the relief it could have gotten from DISA earlier, before DISA had already expended considerable time and effort evaluating the bidders' proposals. Inserso has forfeited its right to this relief.

III

The Court of Federal Claims entered judgment on the administrative record "pursuant to the court's Opinion and Order, filed April 1, 2019." J.A. 6. Because the cited Opinion and Order relied on the determination that Inserso was not prejudiced by DISA's disclosure—an issue we do not reach—we think it appropriate to vacate the judgment and remand for entry of judgment on the ground of waiver, consistent with this opinion.

The parties shall bear their own costs.

VACATED AND REMANDED

United States Court of Appeals for the Federal Circuit

INSERSO CORPORATION,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

FEDITC, LLC, RIVERSIDE ENGINEERING, LLC,
Defendants

2019-1933

Appeal from the United States Court of Federal Claims in No. 1:18-cv-01655-LAS, Senior Judge Loren A. Smith.

REYNA, *Circuit Judge,* dissenting.

The majority decides that appellant's claims are barred under the *Blue & Gold* "waiver rule." This decision rests on shaky, legal ground and cannot stand. First, the validity of the *Blue & Gold* "waiver rule" is undermined by the reasoning in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017). Second, the undermined *Blue & Gold* "waiver rule" does not apply to appellant's claims, which arise from latent errors not apparent from the solicitation. Third, the majority decides to bar appellant's claims under the *Blue & Gold* "waiver rule" in the first instance. We should not

engage in such overreach given that the parties did not brief, and the Claims Court did not discuss, the interplay between *Blue & Gold* and *SCA Hygiene*. I respectfully dissent.

I

First, the majority's opinion turns on the so-called *Blue & Gold "*waiver rule," a hard-and-fast rule that this court created. This rule runs afoul of the separation of powers principle articulated in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, and for this and other reasons should not be the deciding factor in this case.

In *Blue & Gold*, we created a "waiver rule" for claims filed at the United States Court of Federal Claims ("Claims Court") challenging a patent error in a solicitation for a government contract. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007). Although we called it a "waiver rule," this is a misnomer. Waiver is an equitable defense, the application of which is left to the trial court's discretion. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019 (Fed. Cir. 2008). To prove waiver, the defendant must show that the plaintiff *intentionally* relinquished its right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Given the draconian effect of waiver, "[t]he determination of whether there has been an intelligent waiver of right . . . must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* The *Blue & Gold* waiver rule does not fit this definition. A court applying this rule gives no regard to the protestor's intent and is afforded no discretion in its application. These are not the marks of true waiver.

Rather, the *Blue & Gold "*waiver rule," in theory and in practice, is a judicially-created time bar. *See Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1316–17 (Fed. Cir. 2016) (Reyna J., concurring) (noting that under the *Blue & Gold* "timeliness bar" "[d]ismissal is mandatory, not

discretionary" (internal citations omitted)); s*ee also Bannum, Inc. v. United States*, 779 F.3d 1376, 1381 (Fed. Cir. 2015); *Contract Servs., Inc. v. United States*, 104 Fed. Cl. 261, 273 (2012); *Unisys Corp. v. United States*, 89 Fed. Cl. 126, 137 (2009). The bar is triggered solely by the timing of a protestor's challenge. Specifically, if a protestor files a claim challenging a patent error in a solicitation *prior to the close* of the bidding process, the protestor's claim is deemed timely. *Blue & Gold*, 492 F.3d at 1313. If, however, the protestor files such a claim *after the close of bidding*, without having previously objected to such an error, the protestor's claim is untimely and will be dismissed. *Id.* at 1315; *Bannum*, 779 F.3d at 1380; *see* Maj. Op. at 8. There are no exceptions to this rule; its application is hard and fast. *See Per Aarsleff*, 829 F.3d at 1316.[1] The *Blue & Gold* "waiver rule" therefore poses as a rule of equitable waiver but is in fact a timeliness rule.

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[1] In creating the "waiver rule," this court relied on various analogous timeliness doctrines. First, we noted that our rule virtually tracks the "timeliness regulation" for bid protests filed before the Government Accountability Office ("GAO"), a federal agency which adjudicates bid protests. *Blue & Gold*, 492 F.3d at 1314. The GAO's timeliness rule is a self-imposed filing deadline for bid protests, functioning much like a statute of limitations. *See* 4 C.F.R. § 21.2(a).

We also found support in *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), a patent case where we relied on the equitable doctrines of laches and estoppel to bar relief, and in a long line of Claims Court cases applying the defense of laches. *Blue & Gold*, 492 F.3d at 1314–15. Notably, *SCA Hygiene* abrogated *Aukerman*. *See SCA Hygiene*, 137 S. Ct. at 967. Also, the Claims Court no longer applies laches to bar bid

In *SCA Hygiene*, the Supreme Court clarified that: "[w]hen Congress enacts a statute of limitations, *it speaks directly to the issue of timeliness* and provides a rule for determining whether a claim is timely enough to permit relief." *SCA Hygiene*, 137 S. Ct. at 960 (emphasis added). Specifically, the Supreme Court "stressed" that "courts are not at liberty to jettison Congress' judgment on the *timeliness of suit*," even if the statute of limitations gives rise to "undesirable" "policy outcomes." *Id.* at 960, 961 n.4 (internal quotation marks omitted) (emphasis added). Relying on this principle, the Supreme Court held that a court cannot rely on the doctrine of laches, an equitable doctrine primarily focused on the timelines of a claim, to preclude a claim for damages incurred within the Patent Act's statute of limitations. *Id.* at 967; *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014) ("For laches, timeliness is the essential element."). Yet this is precisely what we are doing in this case.

The Supreme Court rejected the same concern we articulated as the driving force in *Blue & Gold*—that a plaintiff could sit on its rights to the detriment of the defendant—as justification for a timeliness rule distinct and separate from a statute of limitations. In *SCA Hygiene*, the dissent argued that laches filled a "gap" in the statute of limitations which allowed patentees to "wait until an infringing product has become successful before suing for infringement." *SCA Hygiene*, 137 S. Ct. at 961 n.4. The Supreme Court explained that such argument "implies that, insofar as the lack of a laches defense could produce policy outcomes judges deem undesirable, there is a 'gap' for laches to fill, notwithstanding the presence of a statute of limitations." *Id.* The Supreme Court explained such gap-filling is "precisely the kind of legislation-

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protests in light of *SCA Hygiene*. *See, e.g.*, *ATSC Aviation, LLC v. United States*, 141 Fed. Cl. 670, 696 (2019).

overriding judicial role" a court cannot take on. *Id.* (internal quotation marks omitted). Yet, in the face of this admonition, this court once again assumes such a legislative role.

Key here, and not discussed in *Blue & Gold*, is that Congress has spoken to the timeliness of challenges to patent errors in the solicitation. Congress provided that "***[e]very claim*** of which the United States Court of Federal Claims has jurisdiction," which includes challenges to patent errors in the solicitation, "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (emphasis added); *see also* 28 U.S.C. § 1491(b)(1); *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 79 Fed. Cl. 453, 460–61 (2007) (applying the six-year statute of limitations to bid protest claims). Congress also provided that the Claims Court has jurisdiction over solicitation challenges "*without regard to whether suit is instituted before or after the contract is awarded*." 28 U.S.C. § 1491(b)(1) (emphasis added). Given this clear congressional directive, we cannot curtail the six-year limitations period for challenges to patently defective solicitations. *See SCA Hygiene*, 137 S. Ct. at 967. Thus, the *Blue & Gold* time bar directly conflicts with the reasoning in *SCA Hygiene*.

Additionally, our interest in reducing costly after-the-fact litigation and procurement delays does not save the *Blue & Gold* time bar from *SCA Hygiene*'s reach. We cannot override the Claims Court's six-year statute of limitations based on our own policy concerns. *Id.* ("[W]e cannot overrule Congress's judgment based on our own policy views."). To do so is to challenge policy judgments made by Congress in enacting the six-year statute of limitations. *Petrella*, 572 U.S. at 686 (noting that it is "not within the Judiciary's ken to debate the wisdom" of the applicable statute of limitations).

Instead, we consider the prejudicial effects of delay at the remedy phase. *Id.* at 685, 687 (noting that in "extraordinary circumstances, . . . the consequences of a delay in commencing suit may be sufficient to warrant . . . curtailment of the relief equitably awarded"). Here, the Claims Court has the discretion to "award *any relief* that the court considers proper," including declaratory relief, injunctive relief, and monetary relief limited to bid and proposal costs. 28 U.S.C. § 1491(b)(2) (emphasis added). Additionally, the Claims Court "shall give due regard to . . . the need for expeditious resolution of the action." *Id.*, § 1491(b)(3). Thus, the Claims Court is empowered to consider a protestor's prejudicial delay when fashioning relief. Additionally, it is in the public interest that government-made errors in a solicitation do not go unreviewed, even if the only feasible remedy given a protestor's delay is a declaratory judgment that the government erred. *See Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 429 (2018) (noting that an "important public interest" is served through "honest, open, and fair competition" because such competition "improves the overall value delivered to the government in the long term" (internal quotation marks omitted)).

The majority recognizes that Congress imposed a six-year statute of limitations on bid protests before the Claims Court. The majority contends, however, that the *Blue & Gold* time bar is statutorily authorized because Congress instructed the Claims Court to give "due regard to the . . . need for expeditious resolution of the action." Maj. Op. at 9 (quoting 28 U.S.C. § 1491(b)(3)). The majority misreads Section 1491(b)(3).

First, a general and broad "need for expeditious resolution" of all bid protest claims does not translate into a discrete statute of limitations for a subset of bid protest claims, namely solicitation challenges. *See Blue & Gold* 492 F.3d at 1315 (noting that "it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time

limit requiring a solicitation to be challenged before the close of bidding"). Specifically, per its plain language, Section 1491(b)(3) requires the Claims Court to give "due regard" to expeditious resolution of an action, not license to override the Claims Court's six-year statute of limitations.

Additionally, Section 1491(b)(3) must be read in context with the preceding provision, Section 1491(b)(2), which gives the Claims Court discretion in affording "any relief that the court considers proper." 28 U.S.C. § 1491(b)(2); *see, e.g.*, *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (noting that "statutory language *must always* be read in its proper context" and not in isolation (emphasis added)). When both provisions are read in harmony, the "due regard" provision refers to the Claims Court's need to consider expeditious resolution of bid protests when deciding the proper relief. Specifically, the Claims Court should consider whether to order the government to restart the procurement process underlying the bid protest or to award relief which would not extend the procurement process, such as bid and proposal costs or declaratory relief.

Lastly, the majority's reading of Section 1491(b)(3) runs afoul of the Supreme Court's reasoning in *SCA Hygiene*. As the Supreme Court explained, once Congress enacts a statute of limitations, the statute governs the timeliness of claims even in the face of other statutory provisions. *SCA Hygiene*, 137 S. Ct. at 963. In *SCA Hygiene*, the respondent argued that the Patent Act codified a laches defense, and, thus, laches could apply even in the face of a statute of limitations. *Id.* The Supreme Court explained that even assuming that the statute provided for laches "of some dimension," it did not follow that such a statutory defense could be invoked to bar a claim filed within the statute of limitations. *Id.* The Supreme Court explained that "it would be exceedingly unusual, if not unprecedented," for Congress to include both a statute of limitations and a laches provision. *Id.* The Supreme Court further explained that it was not

aware of "a single federal statute that provides such dual protection against untimely claims." *Id.* As in *SCA Hygiene*, it would be unusual for Congress to provide dual protection against untimely solicitation-related claims via the broad discretionary language in Section 1491(b)(3) and the Claims Court's clear six-year statute of limitations. If no federal statute provides such dual protection, it would be unreasonable to impose a court-made timeliness bar to overcome a statute of limitations imposed by Congress.

For the above reasons, *Blue & Gold* conflicts with the reasoning in *SCA Hygiene*, and, thus, should not decide the outcome of this case.

II

Second, the majority improperly shoehorns Inserso's claims into the narrow and now undermined *Blue & Gold* domain. The *Blue & Gold* time bar applies only to challenges of *patent errors* in a solicitation. Inserso's claims, which do not challenge any patent errors in the solicitation, are not subject to this rule.

The *Blue & Gold* time bar applies only to challenges against *patent errors* in the solicitation. *Blue & Gold*, 492 F.3d at 1313. "Latent errors or ambiguities are not, of course, subject" to the *Blue & Gold* time bar. *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1382 n.5 (Fed. Cir. 2012). An error is "patent" if it is "an obvious omission, inconsistency or discrepancy of significance." *Per Aarsleff*, 829 F.3d at 1312 (internal quotation marks omitted). By contrast, "[a] latent ambiguity is a hidden or concealed defect which is not apparent on the face of the document, could not be discovered by reasonable and customary care, and is not so patent and glaring as to impose an affirmative duty on plaintiff to seek clarification." *Id.*

Here, Inserso brought two claims before the Claims Court: an organizational conflict of interest ("OCI") claim and, in the alternative, a claim alleging that the

government unequally treated offerors. Both of these claims arise from the government's disclosure of allegedly competitive pricing information to only the bidders in the Full & Open suite—one of two suites at issue.[2] This unequal disclosure occurred only as a result of a divergence in the timing of the competitions of both suites. This timing discrepancy between the two suite competitions developed well after the release of the solicitations.

There is no obvious error, inconsistency, or discrepancy from the face of the solicitation indicating that the government would unequally disclose competitive pricing information. To the contrary, the solicitation informed bidders that the government (a) recognized that pricing information from one suite could be competitively valuable in the other suite, and (b) would take necessary measures to prevent unequal disclosure of such information. For example, the solicitation provided that the government would not release its estimated labor hours, a key pricing data point, until the competition for both suite competitions concluded. J.A. 101918. The solicitation also provided that the government would identify any potential

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[2] The competition at issue was divided into two "suites": one in which businesses of any size could compete (the "Full & Open" suite), and one in which businesses which qualify as "small business concerns" could compete (the "Small Business" suite). J.A. 101891. Large businesses could compete in the Small Business suite as part of a joint venture with a small business. The solicitation also noted that Full & Open and Small Business suite competitions would begin simultaneously. As it played out, the agency completed the Full & Open suite competition months before the Small Business suite competition. Inserso competed in the Small Business suite competition.

OCIs. J.A. 101815 ("If any [conflicts of interests] become known to the Government, as defined by FAR Part 9.5, *they will be identified*." (emphasis added)).

To hold otherwise places an undue and unjustified burden on contractors to actively investigate, anticipate, and preemptively challenge all conflicts of interest that could potentially arise under a solicitation. Inserso is not the government's keeper. *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 523 n.17 (2011) ("No doctrine or case requires a potential protestor to be clairvoyant or to police an agency's general noncompliance with the FAR on the possibility that such misfeasance might become relevant in a protest."). Additionally, for small business contractors, like Inserso, such a burden could disincentivize entry to the federal procurement market. Rather, it is the government's burden to thoroughly investigate OCIs. For all federal government procurements, "contracting officers shall analyze planned acquisitions in order to . . . [i]dentify and evaluate potential organizational conflicts of interests as early in the acquisition process as possible; and . . . [a]void, neutralize, or mitigate significant potential conflicts before contract award." 48 C.F.R. § 9.504(a); *id.*, § 9.504(e).[3]

The majority argues that Inserso should have known that the government would disclose competitive pricing

[3] Courts should exercise caution in applying the *Blue & Gold* time bar to OCI claims, if at all. An OCI is a significant error that undermines the integrity of the procurement process. *See NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 380 (Fed. Cir. 1986) (explaining that an "unfair competitive advantage . . . damages the integrity of the proposal system"). Given this gravity, and in light of *SCA Hygiene*, a court should review the merits of an OCI claim rather than bar such claim due to timeliness concerns.

information, specifically, details regarding its price evaluation methodology, to Full & Open competitors during the debriefing process.[4] Maj. Op. at 11. Thus, the majority reasons, Inserso should have challenged such disclosure from the outset of the competition. *See id.* The majority misunderstands the nature of agency debriefings. Apart from certain baseline required disclosures not at issue here, a government agency has discretion as to what it will disclose in a debriefing. *See* 48 C.F.R. § 15.506(d). Agencies can fail to provide any meaningful information to bidders. *See* Anna Sturgis, *The Illusory Debriefing*: *A Need for Reform*, 38 Pub. Cont. L.J. 469, 470, 2009. Thus, Inserso could not have reasonably known that the government would release detailed price evaluation methodology information in the Full & Open suite debriefings. The majority reaches a contrary conclusion through the lens of 20/20 hindsight.

The majority also suggests, without any articulated principled rationale, that the *Blue & Gold* time bar can extend to non-solicitation challenges. The majority's sole support is a non-binding Claims Court case. *See* Maj. Op. at 8 (citing *Ceres Envtl. Servs., Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011)). We have never previously extended *Blue & Gold* beyond challenges to the solicitation. *See, e.g.*, *Bannum*, 779 F.3d at 1380; *Sys. Application &*

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[4] Once a competition concludes, a bidder may request a debriefing. *See* 48 C.F.R. § 15.506(a)(1). A debriefing is an opportunity for the government to discuss certain aspects of the competition and its evaluation of the bidder's proposal. If requested, the government is required to debrief the bidder. *Id.* Generally, bidders request a debriefing as a matter of course. Here, the government completed the Full & Open suite competition before the Small Business suite competition. Thus, the government debriefed the Full & Open suite competitors before the Small Business suite competitors.

Techs., Inc. v. United States, 691 F.3d 1374, 1385 (Fed. Cir. 2012); *COMINT*, 700 F.3d at 1382; *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1363 (Fed. Cir. 2009). We should not do so today. Specifically, such an extension is contrary to the express reasoning in *Blue & Gold*. In *Blue & Gold*, we relied on a determination that the defect at issue pertained to the "decision during the solicitation, not evaluation, phase of the bidding process." 492 F.3d at 1313. We also noted that a time bar against post-award challenges stemmed from the Claims Court's jurisdiction to adjudicate claims "***objecting to a solicitation*** by a Federal agency." *Id.* (quoting 28 U.S.C. § 1491(b)(1)) (emphasis added). Therefore, *Blue & Gold* made clear that any bar applies strictly to solicitation challenges only.

III

Lastly, the majority acts with improper haste when it bars *in the first instance* Inserso's claims pursuant to the undermined *Blue & Gold* time bar. As a general matter, a federal appellate court "does not consider an issue not passed upon below." *TriMed, Inc. v. Stryker Corp.*, 608 F.3d 1333, 1339 (Fed. Cir. 2010). There are, however, "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (internal quotation marks and citations omitted). This is not such a case.

Here, the parties narrowly briefed the applicability of *Blue & Gold* below and on appeal. Specifically, neither party briefed *Blue & Gold* post-*SCA Hygiene* and instead primarily focused on the merits of Inserso's claims. Most notably, the Claims Court did not address whether Inserso's claims were time-barred under *Blue & Gold* but instead reached the merits of Inserso's claims. Thus, given this backdrop, we should not apply *Blue & Gold* in the first instance. *See Wood v. Milyard*, 566 U.S. 463, 473 (2012)

(noting that appellate "restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal"). We should instead reach the merits of Inserso's claims.

I respectfully dissent.

146 Fed.Cl. 799
United States Court of Federal Claims.

HARMONIA HOLDINGS GROUP, LLC, Plaintiff,
v.
The UNITED STATES, Defendant,
and
Dev Technology Group, Inc., Defendant-Intervenor.

No. 19-674
|
Filed: January 16, 2020
|
Reissued: February 3, 2020 [1]

Synopsis

Background: Disappointed bidder, a small business contractor, filed pre- and post-award bid protest challenging evaluation of bids and award decision by Customs and Border Protection (CBP) for application development and operations and maintenance support services for cargo systems program directorate (CSPD). Following intervention by awardee, as defendant-intervenor, parties cross-moved for judgment on administrative record, and government moved to dismiss for lack of subject matter jurisdiction.

Holdings: The Court of Federal Claims, Loren A. Smith, Senior Judge, held that:

[1] bidder had standing to pursue pre- and post-award protest;

[2] bidder waived pre-award challenge to solicitation amendments;

[3] substantial evidence supported bidder's high-risk rating on management approach; and

[4] substantial evidence supported bidder's high-risk rating on quality assurance.

Plaintiff's motion denied; defendants' cross-motion granted; defendant's motion denied.

Procedural Posture(s): Review of Administrative Decision; Motion for Judgment on Administrative Record; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (32)

[1] **Public Contracts** Judicial Remedies and Review
United States Judicial Remedies and Review

The Tucker Act's grant of authority to Court of Federal Claims for exercise of jurisdiction over a bid protest challenging a federal procurement exists without regard to whether suit is instituted before or after the contract is awarded. 28 U.S.C.A. § 1491(b).

[2] **Public Contracts** Judicial Remedies and Review
United States Judicial Remedies and Review

Though the Court of Federal Claims ordinarily does not have jurisdiction over task order awards by virtue of the statutory framework set forth under the Federal Acquisition Streamlining Act, that statutory constraint does not apply to the court's Tucker Act jurisdiction over task order protests under the General Services Administration (GSA) Federal Supply Schedule (FSS) contracts. 10 U.S.C.A. § 2304c(e)(1); 28 U.S.C.A. § 1491(b).

1 Cases that cite this headnote

[3] **United States** Standing

Whether a plaintiff has standing to pursue its claim in the Court of Federal Claims is a threshold jurisdictional issue.

[4] **Public Contracts** Parties; standing
United States Parties; standing

Standing in bid protests is framed by the Tucker Act, which requires that the bid protest be brought by an interested party. 28 U.S.C.A. § 1491(b)(1).

[5] **Public Contracts** Parties; standing
United States Parties; standing

A bid protestor is an "interested party," within the meaning of the Tucker Act's standing requirements, if it is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract. 28 U.S.C.A. § 1491(b)(1).

[6] **Public Contracts** Parties; standing
United States Parties; standing

A bid protester's burden of establishing standing differs depending upon the nature of the protest.

[7] **Public Contracts** Parties; standing
United States Parties; standing

In the context of a pre-award bid protest, in order to establish standing the plaintiff must establish a non-trivial competitive injury which can be addressed by judicial relief.

[8] **Public Contracts** Parties; standing
United States Parties; standing

In a post-award bid protest, in order to establish standing the plaintiff must show that there was a substantial chance it would have received the contract award but for the alleged error in the procurement process.

[9] **United States** Dismissal
United States Construction and presumptions as to pleadings

When considering a motion to dismiss for lack of subject matter jurisdiction, Court of Federal Claims must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff. RCFC, Rule 12(b)(1).

[10] **United States** As to jurisdiction

The plaintiff bears the burden of establishing that the Court of Federal Claims has jurisdiction by a preponderance of the evidence.

[11] **Public Contracts** Parties; standing
United States Parties; standing

As the Court of Federal Claims must analyze prejudice for purposes of standing before deciding the merits of a bid protest, the former is more properly considered as a question of potential rather than actual prejudice, and assessed based on the cumulative impact of the well-pleaded allegations of agency error, which are assumed true at this juncture of proceedings on a motion to dismiss for lack of subject matter jurisdiction. RCFC, Rule 12(b)(1).

[12] **Public Contracts** Parties; standing
United States Parties; standing

A prejudice determination for the purpose of evaluating standing to pursue a bid protest is a limited review that seeks minimum requisite evidence necessary for plaintiff to demonstrate prejudice and therefore standing.

[13] **United States** Standing

Federal government cannot require a plaintiff to prove the merits of its case in order to demonstrate standing; if the Court of Federal Claims were to do so, it would lead the court in a round-robin through the arguments on the merits in order to resolve a jurisdictional issue, which is not a desirable or appropriate procedure.

[14] **Public Contracts** Parties; standing
United States Parties; standing

In assessing whether a plaintiff has standing, Court of Federal Claims should look to plaintiff's allegations, not prejudge the merits of a bid protest.

[15] **Public Contracts** Parties; standing

United States Parties; standing

Disappointed bidder for Customs and Border Protection's (CBP) solicitation for application development and operations and maintenance support services was "interested party," within meaning of Tucker Act, and thus, bidder had standing to pursue pre- and post-award bid protest; bidder had direct economic interest in resolution of protest, since but for CBP's alleged error in assigning bidder high-risk ratings, bidder would have been considered in best value tradeoff decision and in turn would have had substantial chance of receiving task order award.

28 U.S.C.A. § 1491(b)(1).

[16] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

A party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

[17] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Although disappointed bidder timely filed agency-level protest challenging Customs and Border Protection's (CBP) amendments to solicitation for application development and operations and maintenance support services, bidder waived pre-award protest of amendments, where bidder waited five months to re-raise its pre-award arguments with its post-award protest grounds after CBP awarded task order, so allowing bidder to re-raise pre-award arguments months after award would give bidder second bite at the apple and, if successful, would result in procurement delay and waste of agency resources.

1 Cases that cite this headnote

[18] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Where bringing the bid protest challenge prior to the contract award is not practicable, it may be brought thereafter; but, assuming that there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the federal contract.

[19] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The "waiver rule," providing that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims, exists in large part to prevent contractors from taking advantage of the government and other bidders, and to avoid costly after-the-fact litigation.

[20] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

The waiver rule, providing that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise

the same objection subsequently in a bid protest action in the Court of Federal Claims, does not apply to a protestor that diligently pursued its position in a timely manner by, for example, continuously contesting the agency's decision in one forum or another.

[21] **Public Contracts** Administrative procedures in general

United States Administrative procedures in general

Under the waiver rule, providing that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims, the proper inquiry is to assess whether a party has timely pursued an alleged defect in a solicitation as allowed by law, and whether the party has diligently pressed its position without waiver at each step of the way.

[22] **United States** Judgment on administrative record

A party may file a motion for judgment on the administrative record for the Court of Federal Claims to determine whether an administrative body, given all disputed and undisputed facts in the record, acted in compliance with the legal standards governing the decision under review. RCFC, Rule 52.1.

[23] **United States** Judgment on administrative record

On a motion for judgment on the administrative record, Court of Federal Claims will determine whether a party has met its burden of proof based on the evidence in that record. RCFC, Rule 52.1.

[24] **Public Contracts** Scope of review

United States Scope of review

The highly deferential standard of review for bid protests, under the Administrative Procedure Act (APA), providing that agency procurement actions may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, exists in large part because agencies and their contracting officers in particular are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process. 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4).

[25] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests

United States Rights and Remedies of Disappointed Bidders; Bid Protests

When a bid protestor claims that a federal agency's procurement decision violates a statute, regulation, or procedure, the protestor must show that such alleged violation was clear and prejudicial.

1 Cases that cite this headnote

[26] **Public Contracts** Scope of review

United States Scope of review

In reviewing a bid protestor's claims, Court of Federal Claims cannot substitute its judgment for that of a procuring agency, even if reasonable minds could reach differing conclusions.

[27] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims will interfere with the government procurement process only in extremely limited circumstances.

[28] **Public Contracts** Evidence

United States Evidence

A disappointed bidder bears a heavy burden of showing that the government's contract award decision had no rational basis.

[29] **Public Contracts** Scope of review

United States Scope of review

Court of Federal Claims will defer to a federal agency's expertise in making procurement decisions unless the agency has entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or issued a decision that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

1 Cases that cite this headnote

[30] **Public Contracts** Scope of review

United States Scope of review

The evaluation of bids for their technical excellence or quality is a process that often requires the special expertise of government procurement officials, and thus, the Court of Federal Claims gives the greatest deference possible to these determinations.

[31] **Public Contracts** Acceptance or Rejection

United States Acceptance or Rejection

Customs and Border Protection's (CBP) exclusion of bidder, as small business contractor, from best value tradeoff and resulting award of contract for application development and operations and maintenance support services was supported by substantial evidence including that bidder's proposal was assigned high-risk ratings under solicitation's management approach factor for failing to align teams to core functional areas that statement of work (SOW) stated were within scope of contract, attachment to solicitation emphasized importance of core functional areas to system that was bedrock of procurement, and CBP cited examples to support conclusion that bidder did not fully understand contract requirements.

[32] **Public Contracts** Acceptance or Rejection

United States Acceptance or Rejection

Customs and Border Protection's (CBP) exclusion of bidder, as small business contractor, from best value tradeoff and resulting award of contract for application development and operations and maintenance support services was supported by substantial evidence including that bidder's proposal was assigned high-risk rating under solicitation's quality assurance factor for failing to include major core functionalities in its proposal that CBP determined would lead to bidder's unsuccessful performance, and bidder simply mentioned those applications to identify and document key contracts which CBP concluded was insufficient to show that bidder understood it was required to transition to those applications.

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Pre-Award Bid Protest; Post-Award Bid Protest; Tucker Act; Administrative Procedure Act; Federal Supply Schedule; Schedule 70; Solicitation Amendment; Task Order; Best Value; Standing; *Blue & Gold Fleet, L.P. v. United States*; Waiver; Agency-Level Protest; Best Value; Technical Evaluation.

OPINION AND ORDER

SMITH, Senior Judge

This pre- and post-award bid protest comes before the Court on the parties' Cross-Motions for Judgment on the Administrative Record. Plaintiff, Harmonia Holdings Group, LLC ("Harmonia"), challenges the evaluation of offerors and the award decision made by the United States Customs and Border Protection ("CBP" or "Agency") for application development and operations and maintenance

support services under Solicitation No. HSBP1018CSPD, Request for Quote 1317188 (hereinafter "Solicitation" or "RFQ"). Specifically, plaintiff challenges the Agency's decision to prohibit offerors from modifying certain portions of their proposals in response to Amendments 9 and 10 to the Solicitation. *See generally* Plaintiff's Harmonia Holding Group, LLC's Motion for Judgment on the Administrative Record and Brief in Support Thereof (hereinafter "Pl.'s MJAR"). Plaintiff also challenges the task order award to defendant-intervenor, Dev Technology Group, Inc. ("Dev Tech"). *See generally id.* In response, defendant contends plaintiff is not an "interested party" and therefore lacks the requisite standing to bring suit, that the Agency properly exercised its discretion in denying offerors the ability to amend their proposals, and that plaintiff "failed to demonstrate that the [award] decision was irrational or the result of prejudicial violations of law." Defendant's Motion to Dismiss and, in the Alternative, Cross-Motion for Judgment upon the Administrative Record and Response to Plaintiff's Motion for Judgment on the Administrative Record (hereinafter "Def.'s CMJAR") at 1. For the reasons set forth below, the Court denies plaintiff's Motion for Judgment on the Administrative Record and grants defendant and defendant-intervenor's Cross-Motions for Judgment on the Administrative Record. Additionally, the Court denies defendant's Motion to Dismiss.

***804 I. Background**

A. The Solicitation

On July 12, 2018, CBP issued the Solicitation, requesting quotes for development and operations and maintenance support services for its Cargo Systems Program Directorate ("CSPD") to develop and support cargo systems applications under the General Services Administration's ("GSA") Federal Supply Schedule ("FSS"). Administrative Record (hereinafter "AR") 2981. The CSPD "is responsible for managing the Automated Commercial Environment (ACE), which is a commercial trade processing system" that "helps reduce the Nation's vulnerability to changing threats without diminishing economic security, by providing threat awareness, prevention, and protection for the homeland." *Id.*

CBP indicated its intent to issue a single time and materials task order award with a one-year base period, four (4) one-year option periods, and a six-month option to extend services. AR 235, 270, 1576. Offerors were to be evaluated in two phases. AR 235. Only GSA Information Technology ("IT") Schedule 70 SIN 132 51-IT small business contractors were eligible to participate in Phase I, which involved Oral Presentations. *Id.* The Agency would then evaluate Phase I offerors on a best value basis and assign each offeror an overall adjectival quality rating. AR 235, 280. Offerors with a "high likelihood of being selected [for award were] therefore encouraged to participate in the acquisition of Phase II RFQ." *Id.* Though all Phase I respondents were permitted to participate in Phase II, the Agency encouraged offerors that received a rating of "some confidence" or "low confidence" not to participate in Phase II. [2] AR 235, 280, 2985–86.

Offerors that participated in Phase II were subsequently evaluated on a best value basis according to the following five factors: (1) Technical Excellence; (2) Management Approach; (3) Quality Assurance; (4) Past Performance; and (5) Price. AR 281–85. Prior to Amendments 9 and 10, Factors 1, 2, and 3 each included three sub-factors, some of which related to one of the Tasks outlined in the Statement of Work ("SOW"). AR 281–84. Under the prescribed best value tradeoff, Factor 1 is "more significantly important than Factors 2, 3, and 4; Factors 2 and 3 are of equal importance and significantly more important than Factor 4," and the "non-Price Factors, when combined are significantly more important than the Price Factor (Factor 5)." AR 286. The Agency was to award the task order "to the Offeror whose proposal has been determined [to] represent the best value to the Government." AR 235.

Before instituting Amendments 9 and 10, the Solicitation directed the Agency to assess proposals in accordance with the following seven tasks in the SOW during its Phase II evaluations: Task 1 – Contractor Transition In; Task 2 – Contractor Transition Out; Task 3 – Cargo Systems Application Development; Task 4 – Dev/Ops Configuration and Release Management; Task 5 – ACE Business Intelligence Capabilities; Task 6 – IT System Security Analysis; and Task 7 – Operations and Maintenance. AR 297. Each of those tasks corresponded to a specific evaluation factor as follows:

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Factor	Sub-Factor(s)
Technical Excellence (Factor 1)	Sub-Factor I, Section 4 SOW Tasks (3, 4, 5, and 7) Sub-Factor II, Section 4 SOW Tasks 6 Sub-Factor III, Risk Mitigation Plan
Management Approach (Factor 2)	Sub-Factor I, Staffing Plan/Key Personnel Resumes Sub-Factor II, Program Management Approach Sub-Factor III, Subcontractor Management Plan/Teaming Arrangements
Quality Assurance (Factor 3)	Sub-Factor I, Transition In Plan, SOW Section 4, Task 1 Sub-Factor II, Performance Metrics, SOW Section 9 Sub-Factor III, Software Engineer Lifecycle, SOW Section 6.13
Past Performance (Factor 4)	
Price (Factor 5)	

AR 281–85. The Solicitation further stipulated how each of those tasks tied into the Time and Materials ("T & M") contract line items ("CLINs") for purposes of Phase II, Factor 5 evaluations. As of Amendment 8, those CLINs were as follows: (1) Base Development CLIN 001 (Tasks 1, 2, 3, and 4); (2) On-Demand Services Development CLIN 002 (Tasks 3 and 4); (3) Base Operation and Management ("O & M") CLIN 003 (Tasks 1, 2, 5, and 6); and (4) On-Demand Services O & M CLIN 004 (Tasks 5 and 6). AR 1533–34. Offerors were to submit pricing in accordance with their technical proposal for each CLIN based on the Sample Price Format spreadsheet included as Attachment C to the RFQ. AR 348, 388.

Prior to Amendment 9, the Sample Price Format included over ninety labor categories across all four CLINs and employed a color code to delineate between labor categories needed at the time of award and those the Agency may need after performance commences. AR 334–42, 548, 1533–34. The Solicitation specified that offerors must use fully-burdened labor rates inclusive of all direct and indirect costs and profit, and, if awarded the contract, be able to "provide the necessary management, labor, facilities, materials and supplies to perform tasks as stated in the task order contract for T&M within the scope of Section IV [SOW]." AR 237.

The Solicitation also indicated the possibility of "additional services that the Government may purchase," or Surge Requirements, which are defined as "any additional work that can be performed under the scope of this SOW resulting from additional functionality that may be required by ACE to perform." AR 270, 307. Section 5.0 of the SOW explained that, if the Agency later determines Surge Requirements are needed, "the Government may exercise the surge CLINS as identified in the task order which will be separately priced and inserted on the Optional Surge CLINs via modification to the Task Order." AR 307; *see also* AR 270. Prior to Amendments 9 and 10, offerors were required to submit proposed prices for Surge Requirements in the Sample Price Format under the designated Surge CLINs, or CLINs 002 and 004. *Compare* AR 270, *with* AR 1696.

B. Amendments 9 and 10

Prior to making an award decision, but after receiving proposals from Phase II offerors, the Agency issued two key amendments to the Solicitation, both of which are at issue in this protest. *See generally* AR 1537–1637 ***806** (Amendment 9), 1638–96 (Amendment 10); *see also* Pl.'s MJAR at 4. The first is Amendment 9, which CBP issued on October 26, 2018. AR 1537. Amendment 9 altered the period of performance ("PoP"), clarified ordering procedures for "On-Demand/Surge" CLINs, required revised Factor 2, Sub-Factor I and Factor 5 proposals from offerors, and revised the Sample Price Format. AR 1576, 1577, 1584, 1593–94, 1637. Amendment 9 also eliminated Task 5 and renumbered Tasks 6 and 7 as Tasks 5 and 6, respectively. AR 1604. The resulting tasks include: Task 1 – Contractor Transition In; Task 2 – Contractor Transition Out; Task 3 – Cargo Systems Application Development; Task 4 – Dev/Ops Configuration and Release Management; Task 5 – IT System Security Analysis; and Task 6 – Operations and Maintenance. *Id.* To further clarify relationships between tasks and evaluation factors, Amendment 9 added Task 2 to Factor 3 and eliminated "Sub-Factor III, Software Engineer Lifecycle, SOW Section 6.13" from Factor 3. AR 1587–91. The result of these modifications is reproduced as follows:

Factor	Sub-Factor(s)
Technical Excellence (Factor 1)	Sub-Factor I, Section 4 SOW Tasks (3, 4, **and 6**) Sub-Factor II, Section 4 SOW **Task 5** Sub-Factor III, Risk Mitigation Plan
Management Approach (Factor 2)	Sub-Factor I, Staffing Plan/Key Personnel Resumes Sub-Factor II, Program Management Approach Sub-Factor III, Subcontractor Management Plan/Teaming Arrangements
Quality Assurance (Factor 3)	Sub-Factor I, Transition In Plan, SOW Section 4, Task 1 Sub-Factor II, Performance Metrics, SOW Section 9, **Task 2**
Past Performance (Factor 4)	
Price (Factor 5)	

See id. (emphases added).

With respect to the Sample Price Format, Amendment 9 reduced the number of labor categories from ninety to ten based on the Agency's pre-existing color code designations. *Compare* AR 1475, *with* AR 1637. This change corresponded with the Agency's decision to identify CLINs as either "Required Services" or "On-Demand/Surge Services." AR

1593. Required Services "are services that the Government [has] identified as work needed now to support the SOW." *Id.* For those services, offerors were required to "propose rates based on their proposed labor category name," but were prohibited from changing the number of Full Time Employees ("FTEs") to support those labor categories. *Id.* On-Demand/ Surge Services, on the other hand, are "services that the Government may identify [for] work in the future to support the SOW." *Id.* Pursuant to an addition under Section 7.0 of the SOW, [3] and based on additional information the Agency would provide, offerors had to "provide a detailed Staffing Plan when the On-Demand/Surge CLINS are needed (each time), [which] will be issued via modification to the [Task Order]." AR 1589.

To implement these changes, the Agency added the phrase "Required" before "Base Development" and "Base O&M" in the titles of CLINs 001 and 003, respectively, and ***807** changed the phrase "On-Demand Services" to "On-Demand/ Surge Services" before "Development" and "O&M" in the titles of CLINs 002 and 004, respectively. *Compare* AR 1533–34, *with* AR 1637. The Agency also established an estimated ceiling/Not-To-Exceed ("NTE") amount to support On-Demand/Surge CLINs. AR 1593. The Agency further indicated that any unused capacity from those amounts would "carry forward," and future On-Demand/Surge ceiling/NTE amounts could be used to meet the needs of any "current requirement" "during any given PoP." *Id.* Last, offerors were restricted to inputting FTE amounts to support their technical solutions for the Required Base CLINs consistent with their revised Staffing Plans, but they were directed not to revise NTE amounts listed in the Sample Price Format for the On-Demand/Surge CLINs, or CLINs 002 and 004. AR 1593–94.

On November 1, 2018, CBP issued Amendment 10, which added Federal Acquisition Regulation ("FAR") 52.219-14, Limitations on Subcontracting (JAN 2017), to the Solicitation, altered the PoP, and added Task 4 to CLIN 003 in the Sample Price Format. AR 1638, 1677, 1692, 1696. Amendment 10 also reiterated that offerors must submit price proposals based on the Sample Price Format and in accordance with their technical proposals. AR 1684. With respect to Factor 2, Sub-Factor I, Amendment 10 explained the following:

> The Offeror shall provide a Staffing Plan, [sic] for CLIN 003 that outlines how they plan to recruit, hire, retain, and replace personnel to ensure a full range of services in support of all requirements and ensure mission success. The Offeror shall ensure the Staffing Plan Table and Price Proposal is consistent. If there is an inconsistency between the Staffing Plan Table and Price Proposal, the proposal may be found non-compliant and be removed from award consideration.
>
> Staffing Plans for CLINS 001, 002, and 004 are not expected from the Offeror at this time. In addition, the Offeror shall provide a detailed Staffing Plan when the On-Demand/Surge CLINS (CLINS 002 and 004) are needed (each time), and this will be issued via modification to the [task order]. Additional information, such as specifications of the additional within scope requirement will be provided to assist the Offeror in the determination of the [FTEs] and the Staffing Plan.

AR 1689–90. Amendment 10 repeated the applicability of those changes to Factor 5, and further specified that "[NTE] values will be utilized for CLINS 001, 002 and 004." AR 1692. In connection with the changes under Amendments 9 and 10, the Agency limited offerors' modifications to Factor 2, Sub-Factor I (Staffing Plan/Key Personnel Resumes) and Factor 5 (Price), with limited proposal revisions due on or before November 13, 2018. AR 1537, 1638, 1685. Harmonia timely submitted its revised proposal. Pl.'s MJAR at 5.

C. Evaluation of Proposals and Task Order Award

The Solicitation notified offerors that, "if an Offeror receives a high[-]risk rating, regardless of technical ratings or price, that Offeror may not be considered for award." AR 286. Evaluation Board Members and Advisors were also explicitly notified of this limitation in their Evaluation Team Training presentation for this procurement. AR 30. Though the Solicitation did not define high-risk, each of the Consensus Technical Evaluation Panel reports defined it as a risk "[l]ikely to cause significant serious disruption of schedule; increase in cost, or degradation of performance even with special Contractor emphasis." *See, e.g.*, AR 2936. A "medium risk" is a risk that "[c]an potentially cause some disruption of schedule, increase in cost, or degradation of performance. However, special Contractor emphasis will probably be able to overcome difficulties." *Id.* The Consensus Technical Evaluation Panel reports also defined five adjectival ratings applicable to Factors 1, 2, and 3. *See* AR 2935–36. Of relevance, an offeror would receive a "Marginal" rating if their proposal "demonstrates a shallow understanding of the requirements and an approach that only marginally meets performance or capability standards necessary for minimal but acceptable contract performance." AR 2936.

In its March 25, 2019 Comparative Analysis and Best Value Determination Report ***808** (hereinafter "BVD Report"), the Agency provided a comprehensive explanation for how it assigned overall adjectival and risk ratings to offerors' proposals. *See generally* AR 2980–3059. Consistent with those explanations and the terms of the Solicitation, the Agency assigned Harmonia an overall "High Risk/Marginal" rating for Factor 2, an overall "Medium Risk/Marginal" rating for Factor 3, and "High Risk/Marginal" ratings for Factor 2, Sub-Factors I and II, and Factor 3, Sub-Factor I. AR 3049.

With respect to Factor 2, Sub-Factor I, the Agency assigned Harmonia's proposal Marginal and high-risk ratings, as Harmonia's "proposal relating to Amendment 0010, Figure 8, pg. 36, shows the O&M teams aligned to the CBP capability owners for four areas ... [and] [w]hile aligning teams to functional areas is documented as a benefit to the Government, Harmonia did not include functional areas for Cargo Release, [Foreign Trade Zone ('FTZ')], [International Trade Data System ('ITDS')], or [Automated Export System ('AES'),] which are major areas of functionality in O & M," and are listed in Attachment E to the SOW. AR 3027; Def.'s CMJAR at 31. Due to these omissions, the Agency concluded Harmonia's proposal posed a high-risk, "as the proposed staffing plan (related to CLIN 0003) will be insufficient, and cost will increase due to the delay in transitioning the applications." AR 3027.

For Factor 2, Sub-Factor II, the Agency concluded that "[n]o strengths were identified" and assigned Harmonia Marginal and high-risk ratings. AR 3027–28. The Agency similarly based these ratings on Harmonia's "omission of certain critical applications," as "the omission of Cargo Release, ITDS, FTZ, and AES applications, [sic] demonstrates that Harmonia does not fully understand the SOW requirements." *Id.* The Agency further found that, based on certain statements in Harmonia's proposal, "Harmonia believes ITDS and Cargo Release are not covered by the contract, when indeed they are, as well as AES as stated in the SOW." AR 3027.

Finally, though the Agency attributed certain benefits to Harmonia's proposal under Factor 3, Sub-Factor I, it ultimately assigned Harmonia Marginal and high-risk ratings because Section 3.1.5 of the proposal listed "groupings of functionality covered by the requirement upon transitioning in," but failed to include Cargo Release, ITDS, and AES, which are "tasks that are required in transitioning in." AR 3028. The Agency explained that a "high risk has been identified as these applications are major [ACE] functionalities and the omission of these critical [ACE] functionalities would lead to unsuccessful performance." *Id.*

Based on these ratings, the Agency provided the following explanation for its decision to "remove[ ] [Harmonia] from the tradeoff analysis":

> Dev Tech is more highly ranked than Harmonia, ***which is considered the lowest ranked technical solution***. A lower technical solution at a higher price of an additional $10,134,901.02 or 3.11% higher is not in the best interest of the Government. In addition, ***Harmonia is not among the Quoters considered for award due to their*** Marginal and ***High[-]Risk rating*** received for their proposed Factor 2 Management Approach solution and Marginal and Medium Risk rating received for their proposed Factor 3 Quality Assurance solution.

AR 3052 (emphases added). Offerors such as Harmonia were also excluded from the tradeoff analysis because "[k]eeping these Quoters in the Trade-off process would pose a significant risk to cost, schedule and performance for the overall CSPD program and CBP mission." *Id.* Accordingly, on April 23, 2019, the Agency notified Harmonia of its decision to award the task order to Dev Tech. AR 3060–61.

II. Procedural History

A. Pre-Award Agency-Level Protest

In response to the changes imposed by and implemented through Amendments 9 and 10, on November 12, 2018, Harmonia filed a pre-award protest with the Agency before the deadline for submission of bids. *See generally* AR 2490–94. In that agency-level protest, Harmonia claimed that offerors should be allowed to modify their proposals with respect to Factor 1, Factor 2, and Factor 3, Sub-Factors I and II, and not be limited to modifying their proposals with respect to Factor 2, Sub-Factor I and Factor 5. AR ***809** 2492–94. Harmonia made this request in part based on its assertion that, prior to Amendment 10, offerors "had to provide proposed

labor categories, rates, and FTEs for *all* CLINs," and the inclusion of Amendment 10 "made a change to ask Offerors to propose labor categories and FTE counts for only CLIN 001, labeled as 'Required – Base Development' (but including only 2 FTEs for management labor categories) and CLIN 003, labeled as 'Required – Base O & M' in Attachment C." AR 2492 (emphasis added). Harmonia also alleged that Amendment 10 "contained a material change to the solicitation by changing the fundamental definition of which tasks are performed under each CLIN," as Amendment 10 added Task 4 to CLIN 003. *Id.* Harmonia claimed that, by identifying CLINS 002 and 004 as optional services that the Agency would request via modification(s) to the Task Order on an as-needed basis, Amendment 10 effectively "recast[ed] [ ] pricing." AR 2492–93. According to Harmonia, this mattered because "Offerors were asked [ ] a question about operating both development and O&M as a whole" during the Phase I Oral Presentations, such that "Offerors would have developed a technical solution that took into account an integrated team consisting of both development and O&M resources, as well as a single support team." *Id.*

In addition to pricing concerns, Harmonia protested the addition of FAR 52.219-14, Limitations on Subcontracting (JAN 2017), pursuant to Amendment 10, as the addition had "a material impact on [Harmonia's] overall technical, management, transition, and staffing solution." AR 2493. Harmonia also contended that "the law permits changes to the entire solicitation," as FAR 52.215-1 "permits Offerors to make the necessary adjustments to all parts of a proposal in response to an amendment." *Id.* Thus, the collective "changes potentially affect all evaluation factors," and restricting offerors to modifying only Factor 2, Sub-Factor I and Factor 5 "creates multiple problems." AR 2490, 2492.

On December 6, 2018, the Agency issued a decision denying Harmonia's pre-award protest on all grounds. *See generally* AR 2898–901. In response to Harmonia's assertion that offerors should have been allowed to update their entire proposal, the Agency stated that Amendments 9 and 10 were issued to provide all Phase II offerors "additional flexibility towards pricing." AR 2899. Amendment 10 "did not change the overall technical solution to be performed under the contract, [and, as] a result, the Government does not believe this constitutes a material change to the solicitation." AR 2899. Regarding the addition of FAR 52.219-14, the Agency explained that it had "inadvertently omitted" the clause in the original solicitation, and that, "[i]n recognition that Offerors may need to modify their teaming strategies, the Government will proceed with evaluations treating all Offerors with neutrality regarding compliance with this clause." *Id.* Finally, to address Harmonia's FAR 52.215-1 argument, the Agency explained that FAR 52.215-1 "does not apply to this procurement," as the procurement was "conducted in accordance with FAR Part 8." AR 2900.

B. Protests Before this Court

On May 7, 2019, Harmonia filed its bid protest with this Court; two additional disappointed offerors filed separate protests with this Court shortly thereafter. *See generally* Plaintiff's Complaint; *see also Excella, Inc. v. United States*, No. 19-763; *Niksoft Sys. Corp. v. United States*, No. 19-779. As a result of these three directly-related protests, the Agency voluntarily stayed performance pending resolution of the merits of the protests. On May 28, 2019, plaintiff filed an amended complaint and, on June 4, 2019, its Motion for Judgment on the Administrative Record. *See generally* Plaintiff's Amended Complaint; *see generally* Pl.'s MJAR. On June 18, 2019, defendant filed its Motion to Dismiss, Cross-Motion for Judgment on the Administrative Record, and Response. *See generally* Def.'s CMJAR. Defendant-intervenor filed its Cross-Motion for Judgment on the Administrative Record and Response that same day. *See generally* Defendant-Intervenor's Cross-Motion for Judgment on the Administrative Record and Response to Plaintiff's Motion for Judgment on the Administrative Record (hereinafter "Def.-Int.'s CMJAR"). Plaintiff filed its Response and Reply on June 27, 2019. *See* Plaintiff's Reply and Response to Defendant's Motion to Dismiss and Cross ***810** Motions for Judgment on the Administrative Record (hereinafter "Pl.'s Resp.").

On July 5, 2019, defendant filed an unopposed motion to stay proceedings pursuant to Rule 52.2 of the Rules of the Court of Federal Claims ("RCFC"), requesting that the Court "stay the proceedings in this case and remand this case to the Customs and Border Patrol." Defendant's Motion to Stay Proceedings and Defendant's Motion for Voluntary Remand, ECF No. 31, at 1. A remand would permit the Agency to "thoroughly consider" allegations regarding the Agency's price evaluation made on behalf of a protestor in a directly-related case. *Id.*; *see generally Niksoft Systems Corp. v. United States* (No. 19-779). The Court granted defendant's Unopposed Motion on July 9, 2019. *See generally* Order Granting Motions to Stay and Remand, ECF No. 32. The stay and remand concluded on September 9, 2019.

Pursuant to the Court's Revised Scheduling Order, on September 20, 2019, defendant and defendant-intervenor filed their respective Responses and Replies. *See generally* Defendant's Reply in Support of Its Motion to Dismiss and, in the Alternative, Cross-Motion for Judgment upon the Administrative Record; *see generally* Defendant-Intervenor's Reply in Support of Its Cross-Motion for Judgment on the Administrative Record. The Court held oral argument on October 3, 2019. The parties' Motions are fully briefed and ripe for review.

III. Jurisdiction

[1] **[2]** This Court's jurisdictional grant is found primarily in the Tucker Act, which gives the Court the following power:

> to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 U.S.C. § 1491(b) (2018). This authority exists "without regard to whether suit is instituted before or after the contract is awarded." *Id.* Though this Court ordinarily does not have jurisdiction over task order awards by virtue of the statutory framework set forth under the Federal Acquisition Streamlining Act of 1994, 10 U.S.C. § 2304c(e)(1) (2018), that statutory constraint does not apply to the Court's jurisdiction over task order protests under GSA FSS contracts. *See, e.g.*, *Distrib. Sols., Inc. v. United States*, 106 Fed. Cl. 1, 11 (2012), *aff'd*, 500 Fed. App'x 955 (Fed. Cir. 2013).

IV. Discussion

In its Motion for Judgment on the Administrative Record, plaintiff claims the Agency "arbitrarily and irrationally refused to allow proposal amendments following Amendments 9 and 10" to the Solicitation, an argument plaintiff previously raised in an agency-level, pre-award protest. *See* Pl.'s MJAR at 9–10. With respect to its post-award protest grounds, plaintiff alleges the Agency acted in an arbitrary and capricious manner by doing the following: (1) irrationally evaluating Harmonia's proposal by employing unstated evaluated evaluation criteria and consequently evaluating offerors unequally; (2) improperly assigning Harmonia's proposal negative and "high risk" ratings under Factors 2 and 3; and (3) performing an irrational tradeoff decision. *See generally* Pl.'s MJAR at 12–24. In its Motion to Dismiss and Response, defendant contends that plaintiff is not an "interested party" and therefore lacks the requisite standing to bring suit. Def.'s CMJAR at 1. In the alternative, defendant claims that the Agency properly exercised its discretion in making an award decision, and that plaintiff "failed to demonstrate that the decision was irrational or the result of prejudicial violations of law." *Id.*

[3] **[4]** **[5]** Whether a plaintiff has standing to pursue its claim in this Court is a "threshold jurisdictional issue." *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Standing in bid protests is framed by 28 U.S.C. § 1491(b)(1), which requires that the bid protest be brought by an "interested party." A protestor is an "interested party" if it is an actual or prospective bidder "whose direct economic interest would be affected by the award of the contract." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (citing ***811** *Am. Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).

[6] **[7]** **[8]** "A protester's burden of establishing standing differs depending upon the nature of the protest." *Joint Venture of COMINT Sys. Corp. and EyeIT.com, Inc., and NetServices & Assocs., LLC v. United States*, 102 Fed. Cl. 235, 251 (2011), *aff'd*, 700 F.3d 1377 (Fed. Cir. 2012). In the context of a pre-award protest, the plaintiff must establish "a non-trivial competitive injury which can be addressed by judicial relief." *Weeks Marine*, 575 F.3d at 1362; *Worldwide Language Res., LLC v. United States*, 127 Fed. Cl. 125, 131 (2016). In a post-award protest, the plaintiff "must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process." *Weeks Marine*, 575 F.3d at 1359; *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003). Given that Harmonia makes both pre-award and post-award arguments, which involve different

remedies and are subject to different legal standards, the Court addresses them separately. *See* *COMINT*, 102 Fed. Cl. at 251.

A. Motion to Dismiss under RCFC 12(b)(1)

Defendant moves to dismiss plaintiff's bid protest for lack of subject-matter jurisdiction pursuant to RCFC 12(b)(1), asserting Harmonia "has not shown that it had a substantial chance of winning the contract" and is therefore not an "interested party." Def.'s CMJAR at 11. Defendant's rationale is two-fold—Harmonia was considered the lowest ranked technical solution, and Harmonia was not considered for award due to its Marginal and high-risk ratings for Factor 2 and Marginal and medium-risk ratings for Factor 3. *Id.* at 11–12. Harmonia responds by stating that "the Court cannot rule on the merits for purposes of determining whether it has subject-matter jurisdiction in the first place." Pl.'s Resp. at 1–2. Plaintiff further argues that, "[b]ut for the errors Harmonia identified, it would have received substantially higher technical ratings, and lower risk assignments." *Id.* at 2. As defendant's Motion to Dismiss concerns Harmonia's post-award protest grounds, the applicable standard is whether Harmonia adequately demonstrated it had a substantial chance of receiving contract award. *See* *Weeks Marine*, 575 F.3d at 1359.

[9] **[10]** **[11]** **[12]** When considering a motion to dismiss for lack of subject-matter jurisdiction, the Court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). The plaintiff bears the burden of establishing this Court has jurisdiction by a preponderance of the evidence. *Diaz v. United States*, 853 F.3d 1355, 1357 (Fed. Cir. 2017); *see IHS Global, Inc. v. United States*, 106 Fed. Cl. 734, 743 (2012). As the Court must analyze prejudice for purposes of standing before deciding the merits, the former "is more properly considered as a question of potential rather than actual prejudice, and assessed based on the cumulative impact of the well-[pleaded] allegations of agency error[,] which are assumed true at this juncture of proceedings." *Tech Sys. v. United States*, 98 Fed. Cl. 228, 244 (2011) (citing *USfalcon, Inc. v. United States*, 92 Fed. Cl. 436, 450 (2010)). Thus, a "prejudice determination for the purpose of evaluating standing is a 'limited review' that seeks 'minimum requisite evidence necessary for plaintiff to demonstrate prejudice and therefore standing.' " *Precision Images, LLC v. United States*, 79 Fed. Cl. 598, 618 (2007) (quoting *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 392, n.23 (2005)).

[13] **[14]** Contrary to defendant's assertions, this Court has routinely explained that "the Government cannot require a plaintiff to prove the merits of its case in order to demonstrate standing." *See, e.g.*, *Magnum Opus Techs., Inc. v. United States*, 94 Fed. Cl. 512, 530 n.12 (2010). If the Court were to do so, it would "lead the court in a round-robin through the arguments on the merits in order to resolve a jurisdictional issue. Such is not a desirable or appropriate procedure." *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 284–85 (2006). Thus, in assessing whether a plaintiff has standing, "the Court should look to Plaintiff's allegations, not prejudge the merits of a bid protest." ***812** *Caddell Constr. Co. v. United States*, 125 Fed. Cl. 30, 44 (2016) ("This Court should not deny a plaintiff access to the courthouse or bar a plaintiff from presenting a claim based upon the speculative construct that the plaintiff cannot ultimately win.").

[15] Defendant does not dispute that Harmonia was an actual bidder in this case. Thus, the inquiry turns on whether Harmonia has a direct economic interest in the resolution of the protest. *See* *Allied Tech. Grp., Inc. v. United States*, 94 Fed. Cl. 16, 37 (2010). The Solicitation explicitly states that, "if an Offeror receives a high[-]risk rating, regardless of technical ratings or price, that Offeror may not be considered for award." AR 286. Based on the high-risk ratings Harmonia received under Factors 2 and 3, the Agency did not consider Harmonia in its best value tradeoff decision. *See* Def.'s CMJAR at 11–12; *see also* AR 3052. Taking "the cumulative impact of the well-[pleaded] allegations of agency error" as true, the Court finds that, but for Harmonia receiving those high-risk ratings, Harmonia would have been considered in the Agency's best value tradeoff decision and in turn would have had a substantial chance of receiving the task order award. *See Tech Sys.*, 98 Fed. Cl. at 244. Accordingly, the Court finds plaintiff successfully established standing to pursue this action.

B. Pre-Award Protest

[16] Prior to filing its Complaint with this Court, Harmonia filed a pre-award protest with the Agency, claiming that the Agency improperly denied offerors the opportunity to revise their proposals in response to Amendments 9 and 10. Pl.'s

MJAR at 9–10 n.2, 10. In *Blue & Gold Fleet, L.P. v. United States*, the Federal Circuit held the following:

> a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

492 F.3d 1308, 1313 (Fed. Cir. 2007). Whether Harmonia is challenging the terms of the Solicitation is undisputed. Thus, the dispositive issue before the Court is whether Harmonia sufficiently objected to Amendments 9 and 10 prior to the close of the bidding process such that Harmonia did not waive its pre-award arguments.

Defendant argues that Harmonia waived its right to challenge Amendment 9 under *Blue & Gold*, as "Harmonia did not object to the alleged reduction in labor categories made in Amendment 9 prior to the close of the bidding process." Def.'s CMJAR at 13. Harmonia counters, stating that the "waiver rule is not a jurisdictional bar, or even a statute of limitations. Rather, it is rooted in equity and sets up an equitable bar to untimely solicitation changes." Pl.'s Resp. at 2 (citations omitted). Thus, plaintiff argues that "[t]he waiver rule does not apply as the Agency insists," as Harmonia requested the opportunity to submit a fully revised proposal in its agency-level protest, and because "the Agency's decision specifically mentioned the combined effect of Amendments 09 and 10 (which it saw as 'additional flexibility towards pricing') as a basis for the denial." *Id.* at 4 (citing AR 2899). Moreover, plaintiff contends that, as Amendments 9 and 10 imposed the same limitation on proposal revisions and were due at the same time, had "the Agency sustained Harmonia's agency-level protest ... Harmonia's revisions would have addressed any issues resulting from both Amendment[s]." *Id.*

Blue & Gold does not define the degree of specificity with which a plaintiff must raise its objections prior to award. Rather, the standard requires only that a plaintiff "object to ***the terms*** of a government solicitation" to avoid waiver. *Blue & Gold*, 492 F.3d at 1313 (emphasis added). Though plaintiff's agency-level protest did not specifically mention a causal link between Amendment 9 and the protested terms, the record clearly demonstrates that Harmonia raised objections to the newly added terms of Amendment 9 that concerned the reduction in labor categories and allegedly impacted Harmonia's technical and price proposals. *See* AR 2490–94. Additionally, both Amendments 9 and 10 were issued after initial proposals were received, included the same proposal revision limitations, and were due at the same time. *See generally* AR 1537–1637 (Amendment 9), 1638–96 (Amendment 10). Thus, in considering Harmonia's agency-level protest grounds ***813** as a whole, and despite plaintiff conflating its Amendment 9 and 10 arguments in its agency-level, pre-award protest, the Court concludes that Harmonia did not waive any of its objections to Amendments 9 or 10.

Separately, defendant-intervenor alleges that "Harmonia failed to diligently pursue its bid protest after its agency[-]level protest was denied," as Harmonia entirely failed to bring its pre-award protest before the Government Accountability Office ("GAO") and waited six months to file its pre-award protest at this Court. Def.-Int.'s CMJAR at 5. This, defendant-intervenor argues, runs contrary to policy considerations underlying *Blue & Gold*, as well as precedent at this Court. *See id.* at 5–8. In response, plaintiff claims defendant-intervenor "misstates the law," and that waiver cannot apply as "either an agency-level protest or a GAO protest would suffice to avoid the waiver rule's effect." Pl.'s Resp. at 5. Thus, by raising "the subject issue in a timely-filed, formal agency-level protest," Harmonia "satisfied its obligations under *Blue & Gold*." *Id.* at 6.

[17] The Federal Circuit has suggested that "filing a formal, agency-level protest before the award would *likely* preserve a protestor's post-award challenge to a solicitation, as might a pre-award protest filed with the GAO." *Bannum, Inc. v. United States*, 779 F.3d 1376, 1380 (Fed. Cir. 2015) (emphasis added) (citing *COMINT*, 700 F.3d at 1382). Here, Harmonia timely filed its agency-level, pre-award protest on November 12, 2019. *See generally* AR 2490–94. The Agency issued its decision denying Harmonia's protest on December 6, 2018. *See generally* AR 2898–901. On April 23, 2019, nearly five months after the Agency denied Harmonia's protest, the Agency issued its award decision. *See generally* AR 3060–61. Harmonia subsequently filed its Complaint at this Court on May 7, 2019. Though the Court concludes Harmonia timely filed an agency-level protest, the Court finds

plaintiff nevertheless waived its pre-award protest grounds by waiting five months to re-raise its pre-award arguments with its post-award protest grounds.

[18] **[19]** **[20]** **[21]** In *Esterhill Boat Services, Corp. v. United States*, this Court held that a protestor waived its pre-award protest ground where, after the protestor lost its timely filed pre-award, agency-level protest, the protestor "apparently gambled on winning the contract anyway, which was entirely within its rights, but then sued [at this Court] when it lost the gamble." 91 Fed. Cl. 483, 486–88 (2010) (holding that plaintiff waived its pre-award protest when the plaintiff "could have and should have protested immediately after its meeting with [the contracting officer]"). In determining whether a plaintiff timely raised its pre-award arguments, the Court looks to the decision in *COMINT*, in which the Federal Circuit interpreted timeliness and the waiver rule as follows:

> To be sure, where bringing the challenge prior to the award is not practicable, it may be brought thereafter. But, ***assuming that there is adequate time in which to do so***, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity ***prior to the award of the contract.***

700 F.3d at 1383 (emphases added). Recognizing the facts in *COMINT* are different than those in the case at bar, the Court nonetheless finds the Federal Circuit's rationale in *COMINT* instructive. In finding the protester waived its pre-award claims, the Federal Circuit in *COMINT* concluded that the protestor

> had ample time and opportunity to raise its objections to [the Amendment], but chose instead to wait and see whether it would receive an award of the contract. Having done so, [the protestor] cannot now "come forward with [its objections] to restart the bidding process," and get a second bite at the apple.

Id. (quoting *Blue & Gold*, 492 F.3d at 1314); *DGR Assocs. v. United States*, 94 Fed. Cl. 189, 204 (2010). These considerations are expressed in *COMINT*'s progeny, *Blue & Gold*, which makes clear that the waiver rule exists in large part to "prevent[ ] contractors from taking advantage of the government and other bidders, and [to] avoid[ ] costly after-the-fact litigation." 492 F.3d at 1314. Other decisions in this Court have expanded upon that rationale when holding that the waiver rule does not apply to a protestor that "diligently pursued its position in a timely manner" by, ***814** for example, "continuously contesting the agency's [ ] decision in one forum or another." *See, e.g.*, *Advanced Am. Constr., Inc. v. United States*, 111 Fed. Cl. 205, 220 (2013). As such, the "proper inquiry is to assess whether a party has timely pursued an alleged defect in a solicitation as allowed by law, and whether the party has diligently pressed its position without waiver at each step of the way." *DGR Assocs.*, 94 Fed. Cl. at 204; *see also* *Advanced Am. Constr., Inc.*, 111 Fed. Cl. at 219–21 (finding that the protestor diligently and timely pursued its pre-award protest where the protestor, within a week of receiving an adverse decision in its timely agency-level protest, filed an initial and supplemental protest at the GAO, and, several days after the GAO dismissed its protest as untimely, filed a protest with this Court).

Nothing in the record or in plaintiff's briefing meaningfully explains the five-month delay in Harmonia filing its pre-award protest with this Court. The Court believes that allowing Harmonia to re-raise its pre-award claims months after the Agency's adverse protest decision and subsequent award decision would frustrate the holding in *Blue & Gold* and functionally give Harmonia a second bite at the apple. As such, the Court cannot conclude that Harmonia diligently or timely pursued its position, particularly if the protested terms impacted Harmonia's proposal as severely as Harmonia claims. Had Harmonia timely filed a pre-award protest with the GAO or this Court after its agency-level protest was denied, it would have avoided asking the Court to concurrently resolve both pre- and post-award protest grounds months after the Agency's award decision.[4] Allowing the protest now would undermine the very reasons courts have consistently upheld the waiver rule in analogous protests. Moreover, were plaintiff to subsequently prevail on

its pre-award protest grounds, such an allowance would result in procurement delay and a waste of agency resources, as the Agency would be required to accept proposal revisions and then reassess proposals over a year after the Agency issued Amendments 9 and 10.

The Court cannot allow a protestor to shield itself from waiver under the guise of *Blue & Gold* by waiting months after receiving an adverse agency-level protest decision before reviving its pre-award claims in a post-award protest. To permit parties to make this type of delayed filing would clearly frustrate the spirit of the law set forth in *Blue & Gold*. Accordingly, the Court finds that while Harmonia facially met the requirements under *Blue & Gold*, Harmonia nevertheless waived its right to bring those claims before this Court by failing to timely and diligently pursue its objections to Amendments 9 and 10.

C. Post-Award Protest

[22] **[23]** Pursuant to RCFC 52.1, a party may file a motion for judgment on the administrative record for the Court to determine whether an administrative body, given all disputed and undisputed facts in the record, acted in compliance with the legal standards governing the decision under review. *See Supreme Foodservice GmbH v. United States*, 109 Fed. Cl. 369, 382 (2013) (citing *Fort Carson Supp. Servs. v. United States*, 71 Fed. Cl. 571, 585 (2006)). In such a motion, the parties are limited to the Administrative Record, and the Court must make findings of fact as if it were conducting a trial on a paper record. RCFC 52.1; *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005). The Court will then determine whether a party has met its burden of proof based on the evidence in that record. *Bannum*, 404 F.3d at 1355.

[24] This Court reviews bid protests in accordance with the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2018). *Axiom Res. Mgmt. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). Agency procurement actions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 28 U.S.C. § 1491(b)(4). That highly ***815** deferential standard exists in large part because agencies and their "[c]ontracting officers in particular are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process.' " *See Savantage Fin. Servs. v. United States*, 595 F.3d 1282, 1286 (Fed. Cir. 2010) (quoting *Impresa*, 238 F.3d at 1332); *see also Advanced Data Concepts v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000).

[25] **[26]** **[27]** When a protestor claims that an agency's decision violates a statute, regulation, or procedure, the protestor must show that such alleged violation was "clear and prejudicial." *Impresa*, 238 F.3d at 1333. In reviewing a protestor's claims, the Court cannot substitute its judgment for that of an agency, even if reasonable minds could reach differing conclusions. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (Where the Court "finds a reasonable basis for [an] agency's action, the [C]ourt should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations."). Accordingly, the Court will "interfere with the government procurement process 'only in extremely limited circumstances.' " *EP Prods., Inc. v. United States*, 63 Fed. Cl. 220, 223 (2005) (quoting *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1581 (Fed. Cir. 1981)).

Harmonia challenges several of the adjectival and risk ratings attributed to its Factor 1 (Technical Excellence), Factor 2 (Management Approach), and Factor 3 (Quality Assurance) evaluations. *See generally* Pl.'s MJAR. The Court addresses plaintiff's challenges to the Factor 2 and 3 evaluations first, as those Factors received risk ratings that disqualified Harmonia from consideration for award. *See* AR 30, 286, 3052.

1. Factor 2 Evaluation

The Agency attributed a significant weakness to Harmonia's proposal under Factor 2, Sub-Factor I based on its determination that the proposal "did not align teams to Core functional areas; such as Cargo Release, FTZ, ITDS, or AES which had been included in the RFQ release Amend. 004." Pl.'s MJAR at 19 (citing AR 2946). The omission of those functional areas allegedly contributed to Harmonia receiving a high-risk rating, as the Agency concluded that Harmonia's "proposed staffing plan [ ] will be insufficient, and cost will

increase due to the delay in transitioning the applications." AR 2947. Based on analogous reasoning, Harmonia also received a significant weakness and high-risk rating under Sub-Factor II due to its omission of those applications. AR 2947–48. In ascribing a significant weakness and high-risk rating under Sub-Factor II, the Agency concluded that, "Harmonia does not fully demonstrate the knowledge and understanding of the Program and SOW requirements, which will lead to program failure." *Id.* Plaintiff claims this determination is a "quintessential example of an irrational evaluation" because, when judged against the "actual requirements of Attachment E, there can be no doubt that Harmonia submitted a responsive [proposal]." Pl.'s MJAR at 21–22. Regarding Harmonia's proposal description of its responsibility for ITDS and Cargo Release, Harmonia explained that, "[o]nly by unreasonably ignoring context could the Agency have reached [its] conclusion" and assign negative ratings to Harmonia's proposal. Pl.'s Resp. at 22. Last, plaintiff asserts the strength it received for its team's "proven knowledge of the CPSD environment" undercuts the Agency's justification for assigning a significant weakness and, in turn, a high-risk rating. *See* Pl.'s MJAR at 21–22.

Defendant contends the Agency did not employ unstated "Core functional area[ ]" requirements, as Cargo Release and ITDS "are identified in the scope of the SOW (and have been since the original solicitation)," and because AES is listed as a requirement in the overview section of the SOW pursuant to Amendment 4. Def.'s CMJAR at 30–31. Furthermore, Attachment E lists and explains the importance of 55 enumerated New Automated Commercial Environment ("N-ACE") applications, including Cargo Release, FTZ, ITDS, or AES, that are critical to CBP's approach to application and Agile development methods. *Id.* at 31. As such, it was neither arbitrary nor irrational for the Agency to attribute a significant weakness and high-risk rating under Sub-Factors I and II ***816** due to Harmonia's omission of Cargo Release, FTZ, ITDS, or AES from the required transition in tasks, or for failing to provide adequate staffing for those applications. *Id.* at 30–32. Defendant then cited examples to support its assertion that the language Harmonia used to describe the Cargo Release and ITDS applications in its proposal rationally led the Agency to conclude that Harmonia did not fully understand the relevant contract requirements. *Id.* at 18–19. In terms of the sole strength Harmonia received, defendant explained that "[p]roposing a team with proven knowledge of the CPSD environment ... does not make up for the fact that Harmonia omitted functionalities," particularly where "[n]ot fully understanding the SOW requirements could lead to unsuccessful performance." *Id.* at 32–33.

[28] **[29]** **[30]** A disappointed bidder "bears a 'heavy burden' of showing that the award decision 'had no rational basis.' " *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001) (quoting *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 456 (D.C. Cir. 1994)). The Court will defer to an agency's expertise in making procurement decisions unless the agency has

> "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [issued a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Ala. Aircraft Indus., Inc. v. United States, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "The evaluation of proposals for their technical excellence or quality is a process that often requires the special expertise of procurement officials, and thus reviewing courts give the greatest deference possible to these determinations." *Beta Analytics Int'l, Inc. v. United States*, 67 Fed. Cl. 384, 395 (2005) (citing *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996)).

[31] The SOW clearly stated Cargo Release and ITDS are within the scope of support required under the contract. AR 295. Moreover, Attachment E to the RFQ emphasized and explained the importance of AES and ITDS to the functionality of the ACE system—the very bedrock of the procurement—and individually discussed the role and technical aspects of all fifty-five N-ACE applications, including Cargo Release, FTZ, ITDS, and AES, in great detail. AR 1307–16. As such, plaintiff's arguments that the Agency improperly assigned weaknesses and employed unstated "Core functional areas" when evaluating Harmonia's proposal lacks merit, particularly where, as here, an offeror's management approach necessarily tied into its technical proposal. Given the highly technical nature of the services at issue and evident importance of each ACE application, the Court declines to substitute its judgment for that of the Agency, and instead defers to the special expertise of CBP's procurement officials. *See Beta Analytics*, 67 Fed. Cl. at 395.

Additionally, the Court concludes plaintiff's argument that the Agency irrationally determined Harmonia did not fully understand the contract's requirements amounts to a mere disagreement with the Agency's decision, and therefore falls short of meeting the burden of proof required to establish that the Agency's action was arbitrary and capricious. *See generally, e.g.*, *Blackwater Lodge & Training Ctr., Inc. v. United States*, 86 Fed. Cl. 488, 514 (2009). That same logic applies to plaintiff's argument that the Agency's assignment of a strength belied its assignment of a significant weakness. Accordingly, Harmonia was properly excluded from the best value tradeoff and resulting award decision based on the high-risk ratings it received under Factor 2, Sub-Factors I and II.

2. Factor 3 Evaluation

[32] Harmonia also received a high-risk rating under Factor 3, Sub-Factor I based on its failure to include Cargo Release, ITDS, and AES from a list of transition in milestones and general schedule in Section 3.1.5 of its proposal. AR 3028. As these tasks "are required in transitioning in," the Agency concluded a "high risk has been identified as these applications are major ACE functionalities and the omission of these critical ACE functionalities would lead to unsuccessful performance." *Id.* Harmonia claims Factor 3 required offerors "to 'provide a transition plan that outlines the Offeror's approach to ***817** taking full ownership of the requirements,' " but that "there was no requirement to discuss any applications." Pl.'s MJAR at 22 (quoting AR 1691). Regardless, plaintiff states Harmonia's proposal "specifically mentioned each of these applications." *Id.* (citing AR 2618). Thus, plaintiff argues, the Agency once again employed the same flawed analysis under Factor 3, Sub-Factor I as it did for Factor 2, Sub-Factor I, and "repeated its mistake" under Factor 3, Sub-Factor II, in assigning Harmonia a risk for failing to discuss "Core ACE functionalities." *Id.* at 19–20 (citing AR 2592).

In its Response, defendant contends that Harmonia insufficiently addressed the Core ACE functionalities and SOW requirements. Def.'s CMJAR at 33. Specifically, defendant argues that Harmonia's

> only "mention" of these applications ... is to "Identify and Document Key Contracts" related to "Unisys (AES, ITDS, Cargo Release)." (AR 2618.) A 10-day milestone for identifying and documenting key contracts regarding AES, ITDS, and Cargo Release is not the same as a milestone for transitioning these functions to Harmonia.

Id. Defendant contends that simply mentioning those applications for the purpose of identifying and documenting key contracts "is not enough to show that Harmonia understood that it was required to transition to them, like the numerous other applications from the SOW and Attachment E that it did list." *Id.* at 34. As Cargo Release, ITDS, AES, and FTZ are requirements listed in the SOW, defendant contends that it was neither arbitrary nor irrational for the Agency to assign Harmonia a significant weakness and high-risk rating under Factor 3, Sub-Factor I. *See id.*

Consistent with its review of the high-risk ratings under Factor 2, Sub-Factors I and II, the Court likewise finds no evidence in the record demonstrating that the Agency irrationally or arbitrarily assigned a high-risk rating under Factor 3, Sub-Factor I. As such, Harmonia was properly excluded from award consideration based on its Factor 3, Sub-Factor I high-risk rating. Additionally, the Court notes that the Solicitation unambiguously notified offerors they would not be considered for award if they received a high-risk rating, "regardless of technical ratings or price." AR 286. As the Court has found the Agency did not irrationally assign Harmonia high-risk ratings under Factor 2, Sub-Factors I and II, and Factor 3, Sub-Factor I, the Court need not reach the merits of plaintiff's Factor 1 arguments given that Harmonia was ineligible for award based on those ratings in accordance with the terms of the Solicitation. Based on the foregoing reasons, the Court finds no evidence establishing that the Agency acted in an arbitrary or capricious manner when evaluating proposals or in making an award decision.

V. Conclusion

For the reasons set forth above, defendant's MOTION to Dismiss pursuant to RCFC 12(b)(1) and plaintiff's MOTION for Judgment on the Administrative Record are hereby **DENIED**. Defendant and defendant-intervenor's CROSS-MOTIONS for Judgment on the Administrative Record are hereby **GRANTED**. The Clerk is directed to enter judgment in favor of defendant and defendant-intervenor, consistent with this opinion.

IT IS SO ORDERED.

All Citations

146 Fed.Cl. 799

Footnotes

1 An unredacted version of this opinion was issued under seal on January 16, 2020. The parties were given an opportunity to propose redactions, but no such proposals were made.

2 Of the thirty-five offerors that submitted proposals, the Agency advised twenty-two not to participate in Phase II based on the adjectival ratings they received. AR 2985–86.

3 Section 7.0 of the SOW is titled "Roles and Responsibilities Agile Framework Requirements." AR 1589.

4 The Court also notes that, given the GAO's 100-day decision timeline, had Harmonia filed a protest with the GAO after receiving the denial of its agency-level protest, Harmonia would have received its GAO decision prior to the April 23, 2019 award date. *See* 4 C.F.R. § 21.9(a).

In the United States Court of Federal Claims

No. 20-299C

(Filed Under Seal: April 16, 2020)

(Reissued: April 21, 2020)

NIKA TECHNOLOGIES, INC.,	)	
Plaintiff,	)	Protest of refusal to implement an automatic stay of performance after a protest filed with GAO; 31 U.S.C. § 3553; timeliness of the protest to GAO; statutory interpretation; debriefing date; 10 U.S.C. § 2305(b)(5)(B)(vii), 31 U.S.C. § 3553(d)(4)(A)(ii)
v.	)	
UNITED STATES,	)	
Defendant.	)	

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OPINION AND ORDER[1]

LETTOW, Senior Judge.

Plaintiff NIKA Technologies, Inc. ("NIKA") protests the actions of the United States Army Corps of Engineers (the "Corps") in refusing to implement an automatic stay of performance under the Competition in Contracting Act of 1984 ("CICA"), Pub. L. No. 98-369, 98 Stat. 1175 (codified at 31 U.S.C. §§ 3551-56). NIKA alleges that it timely filed a post-award bid protest at the United States Government Accountability Office ("GAO") under 31 U.S.C. § 3553(d)(4)(A) and therefore triggered the automatic stay provision of Subparagraph (d)(3)(A).

[1]Because of the protective order entered in this case, this opinion was filed initially under seal. The parties were requested to review the decision and provide proposed redactions of any confidential or proprietary information. No redactions were requested.

The Corps, however, believing NIKA's GAO protest to be untimely, did not implement a stay of performance. This dispute originates from the Corps' decision not to award NIKA a maintenance engineering contract following the Corps' request for proposals. As relief, NIKA requests that this court declare that the Corps' refusal to implement the CICA stay was arbitrary, capricious, an abuse of discretion, and not in accordance with law. NIKA requests that this court enjoin the Corps from taking further action on the contract at issue and grant any other relief the court deems appropriate. *See* Compl. at 13, ECF No. 1.

FACTS[2]

On June 21, 2019, the Corps, acting through the United States Army Engineering & Support Center in Huntsville, Alabama, issued a solicitation (the "solicitation") seeking services for its Operation and Maintenance Engineering and Enhancement Program ("OMEE"). AR 1-1 to 2.[3] The Corps planned to award multiple "Indefinite Delivery/Indefinite Quantity (ID/IQ) type contracts" to qualifying bidders. AR 1-2. NIKA submitted a proposal on August 1, 2019, *see* Pl.'s Mot. for Judgment on the Admin. Record ("Pl.'s Mot.") at 4, ECF No. 18, but was notified on February 27, 2020 that it was not a successful offeror in this solicitation, *see* AR 2-160. The Corps found that NIKA was an unacceptable bidder under Factor 1 of the solicitation, "Corporate experience," AR 2-162, and it notified NIKA that "[p]ursuant to FAR 15.506(a), [NIKA] may request a debriefing by submitting a written request for debriefing to the contracting officer within three days after receipt of this notice," AR 2-160.

On February 28, 2020, NIKA requested a debriefing from the Corps. *See* AR 3-164. The Corps acknowledged the request, *see* AR 4-166 to 167, and on March 3, 2020, NIKA sent the Corps a list of questions it planned to ask during the debriefing, *see* AR 4-166. The Corps provided NIKA with a written debriefing via letter on March 4, 2020, *see generally* AR 5, and included in the debriefing the option for NIKA to "submit additional questions related to this debriefing within two (2) business days after receiving the debriefing," AR 5-174. The letter stated that "[t]he [g]overnment will consider the debriefing closed if additional questions are not received within (2) business days. If additional questions are received, the [g]overnment will respond in writing within five (5) business days . . . [and] will consider the debriefing closed upon delivery of the written response to any additional questions." AR 5-174.[4]

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[2]The following recitations constitute findings of fact by the court from the administrative record of the procurement filed pursuant to Rule 52.1(a) of the Rules of the Court of Federal Claims ("RCFC"). *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005) (specifying that bid protest proceedings "provide for trial on a paper record, allowing fact-finding by the trial court").

[3]The government filed the administrative record pursuant to RCFC 52.1(a) on March 20, 2020, ECF No. 16. It is divided into 8 tabs and sequentially paginated. Citations to the record are cited by tab and page as "AR ___-___."

[4]Because the debriefing letter was received on March 4, 2020, the deadline to submit additional questions was March 6, 2020.

NIKA sent a letter to the Corps on March 5, 2020 noting that it had received the written debriefing the previous day and that it planned to "follow up with [the Corps] by [March 6, 2020] on any official debrief questions" it might submit. AR 6-178. On March 7, 2020, NIKA informed the Corps that it did not have any official debrief questions to submit. *See* AR 6-176. NIKA then filed a post-award bid protest at GAO on March 10, 2020. *See* AR 7-185 to 210. In this protest, NIKA sought the imposition of "the automatic suspension of contract performance pursuant to 4 C.F.R. § 21.6[,] 31 U.S.C. § 3553(c)(1), and FAR § 33.104(b)(1)." AR 7-187 (capitals removed). The Corps indicated in a filing to GAO that it believed NIKA's protest filing to be untimely for the imposition of an automatic stay under CICA, *see* AR 8-211, contending that the latest date for a timely filing would have been March 9, 2020, *i.e.*, "[f]ive days after a debriefing date offered to the protester under a timely debriefing request and no additional questions related to the debriefing are submitted," AR 8-212.

NIKA filed its complaint in this court on March 16, 2020, challenging the Corps' refusal to implement the automatic stay. *See generally* Compl. Submission of the administrative record and briefing by the parties was accelerated. Following the submission of the administrative record on March 20, 2020, NIKA filed its motion for judgment on the administrative record on March 24, 2020, *see* Pl.'s Mot., and the government filed a cross-motion for judgment on the administrative record on March 31, 2020, *see* Def.'s Cross-Mot. for Judgment on the Admin. Record and Response to Pl.'s Mot. ("Def.'s Cross-Mot."), ECF No. 20. Briefing was completed on April 10, 2020, *see* Pl.'s Reply and Response to Def.'s Cross-Mot. ("Pl.'s Reply"), ECF No. 21; Def.'s Reply, ECF No. 22, and a hearing was held on April 15, 2020. The case is ready for disposition.

STANDARDS FOR DECISION

The Tucker Act vests this court with jurisdiction "to render judgment on an action by an interested party objecting to a . . . proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). This jurisdiction extends to all stages of the procurement process, including an agency's decision regarding the implementation of a CICA stay under 31 U.S.C. § 3553. *See RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999). Standards set forth in the Administrative Procedure Act ("APA"), codified in relevant part at 5 U.S.C. § 706, govern the court's review of an agency's actions in a procurement challenge. *See* 28 U.S.C. 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."). Specifically, under 5 U.S.C. § 706(2)(A), the court may set aside an agency's procurement decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Traditionally, this court's cases concerning disputes over 31 U.S.C. § 3553 involve a situation where the agency has exercised its discretion to override the automatic stay pursuant to 31 U.S.C. § 3553(d)(3)(C). *See, e.g.*, *Intelligent Waves, LLC v. United States*, 137 Fed. Cl. 623, 626 (2018); *Dyncorp Int'l LLC v. United States*, 113 Fed. Cl. 298, 299 (2013). In that scenario, the court reviews the agency's actions with a deferential view, determining only "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion."

Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001) (internal quotation and citation omitted). This protest, however, does not involve the review of an agency's discretionary action but rather presents a pure question of statutory interpretation. That is, a determination of when the debriefing period closed for NIKA in applying 31 U.S.C. § 3553(d)(4)(A)(ii), informing the question of whether the agency's actions were in accordance with law. The court decides a question of statutory interpretation, such as the one posed in this case, *de novo*. *Accord Information Tech. & Applications Corp. v. United States*, 316 F.3d 1312 (Fed. Cir. 2003); *Mississippi Dep't of Rehab. Servs. v. United States*, 61 Fed. Cl. 20, 25 (2004) ("[T]he interpretation of statutes is a legal matter for courts to decide.").

ANALYSIS

This dispute hinges on the timeliness *vel non* of NIKA's GAO protest under 31 U.S.C. § 3553(d)(4)(A). Under this statute, NIKA is entitled to an automatic stay of performance if its GAO protest was filed within the later of two dates: (1) "the date that is 10 days after the date of the contract award," 31 U.S.C. § 3553(d)(4)(A)(i); or (2) "the date that is *5 days after the debriefing date* offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required," § 3553(d)(4)(A)(ii) (emphasis added). There is no dispute that the latter is the applicable deadline in this case, but the parties disagree as to which date is the "debriefing date."

NIKA argues that its "decision not to submit additional debriefing questions by March 6 meant that [its] debriefing was closed as of that date," and therefore, its protest filed on March 10 would be timely under Clause 3553(d)(4)(A)(ii). Pl.'s Mot. at 6. The government contends instead that "[t]he debriefing date was March 4, 2020 [and because NIKA] filed its protest six days later, on March 10, 2020 . . . [NIKA] failed to meet the deadline set forth at 31 U.S.C. § 3553(d)(4)(A)(ii)." Def.'s Cross-Mot. at 21 (footnote omitted).

The court begins the inquiry with the text of the statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). The relevant language is that of 31 U.S.C. § 3553(d)(4)(A)(ii), *viz.*, "the date that is 5 days after the debriefing date." The provisions of 10 U.S.C. § 2305(b)(5)(B), define what is included in the "debriefing" of Section 3553, and are pertinent to this analysis. These provisions were added as part of the 2018 National Defense Authorization Act, Pub. L. 115-91, 131 Stat. 1283 (2017) ("2018 NDAA"). Notably, Section 818 of the NDAA, entitled "enhanced Post-award Debriefing Rights," implemented a series of changes to DOD's post-award debriefing process. Pursuant to the 2018 NDAA, the definition of "debriefing" in CICA, as applicable to DOD, was amended to "include" a two-day period in which unsuccessful offerors could submit additional questions:

> (B) *the debriefing shall include*, at a minimum—
>
> (i) the agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(ii) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(iii) the overall ranking of all offers;

(iv) a summary of the rationale for the award;

(v) in the case of a proposal that includes a commercial product that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract;

(vi) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency; and

(vii) *an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing.*

10 U.S.C. § 2305(b)(5)(B) (emphasis added).[5] Consequently, if questions are not submitted in the two-day period, the debriefing closes and the debriefing process ends. *Id.* If questions are submitted, the procuring agency should respond to those questions within five days and the extended debriefing process closes upon the offeror's receipt of those responses. 10 U.S.C. § 2305(b)(5)(C); 31 U.S.C.§ 3553(d)(4)(B).

NIKA asserts that when Section 3553 is read in conjunction with Section 2305, the debriefing "include[s] the two-day window following receipt of the March 4 [debriefing] letter in which NIKA had an opportunity to submit questions." Pl.'s Mot. at 13. Accepting this interpretation, the debriefing date would be March 6—two days after March 4. The government responds with three main arguments. First, the government suggests that because Section 2305 only requires an "opportunity" for supplemental debriefing, this provision merely permits the government to allow a supplemental debriefing period, triggered by the receipt of additional questions. *See* Def.'s Cross-Mot. at 18-19. Second, the government argues that under the plain meaning of the statute, "the debriefing date" is a singular day and not a "process." *Id.* at 20. Lastly, the government argues that because Congress specifically identifies time periods in Section 3553 but not the two-day question period, NIKA's reading runs counter to the statutory scheme. *See id.* at 19-20.[6]

[5]There do not appear to be any comparable provisions applicable to debriefings conducted by federal procurement agencies other than DOD. *See* 41 U.S.C. § 3704(c).

[6]The court does not opine on whether this two-business-day period is always required to be included in DOD's debriefing process. On the record before the court, this two-day window

The court is persuaded that NIKA's interpretation is correct. First, defendant's reliance on the term "opportunity" is misguided. An opportunity, by definition, is "*a time*, condition, or set of circumstances permitting or favourable to a particular action or purpose." *Opportunity*, *Oxford English Dictionary*, https://www.oed.com/view/Entry/131973?redirectedFrom=opportunity#eid (last visited April 14, 2020) (emphasis added). As defined in Subparagraph 2305(b)(5)(B), the debriefing plainly includes "a time" of two business days in which a disappointed offeror can submit questions for further debriefing. *See* 10 U.S.C § 2305(b)(5)(B)(vii).

The government's focus on the singular nature of "date" is also unconvincing. The government suggests the debriefing date must refer to only one date because the statute uses the singular form, and therefore, "[t]he debriefing date is the date when the debriefing occurs," Def.'s Cross-Mot. at 20, here, that date being March 4, 2020, *id.* at 21. This limited reading, however, is not supported by the precedents cited by the government in its own brief, *i.e.*, cases that specifically dealt with scenarios in which the debriefing lasted more than one day. *See id*. at 20-21 (collecting cases including *WiSC Enters., LLC–Costs*, B-415613.5, Aug. 28, 2018, 2019 CPD ¶ 189; *ERIMAX, Inc.*, B-410682, Jan. 22, 2015, 2015 CPD ¶ 92; *Harris IT Servs. Corp.*, B-406067, Jan. 27, 2012, 2012 CPD ¶ 57). These cases confirm that "the debriefing date" in the statute, while singular, refers to the date at the end of a potentially multi-day debriefing *process*. *See, e.g.*, *WiSC. Enters., LLC-Costs*, B-415613.5, Aug. 28, 2018, 2019 CPD ¶ 189. Therefore, NIKA's assertion that its debriefing process lasted three days (March 4-6, 2020), including the two-business day opportunity to submit questions, neither runs counter to the statutory language nor common debriefing practice. It follows that "the debriefing date" here, under the statute, is March 6, 2020—the last day of NIKA's debriefing process.

The government suggests that if Congress wanted to include the two-business-day window for questions as a triggering date in the timing under 31 U.S.C. § 3553(d)(4), it could have done so when it amended Section 2305 in the 2018 NDAA. *See* Def.'s Cross-Mot. at 19. But Congress did not need to amend the "debriefing date" specified in 31 U.S.C. § 3553(d)(4)(A)(ii) to account for these two extra days, because as explained above, this deadline already included the possibility of a debriefing process that lasts more than one day. Further, Congress, in choosing not to amend the reference to "debriefing date" in Section 3553 when it amended Section 2305 to include an extra two business days for questions, implicitly endorsed the statute's previous interpretation that the debriefing date referred to in Subparagraph 3553(d)(f)(A) is simply the last day of the debriefing process.[7]

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was explicitly included in NIKA's written debriefing letter, *see* AR 5-174 (quoted *supra*, at 2), as Clause 2305(b)(5)(B)(vii) specifies.

[7]To determine whether a protest is timely for purposes of triggering the automatic stay, Section 3553 directs as follows:

> [The time for obtaining the automatic stay] is the period beginning on the date of the contract award and ending on the later of—
>
> (i) The date that is 10 days after the date of the contract award; or

Additionally, the government's own debriefing letter supports this reading of the statute. The written debriefing letter provided to NIKA on March 4, 2020 stated that "[t]he [g]overnment will consider the debriefing closed if additional questions are not received within (2) business days. If additional questions are received, the [g]overnment will respond in writing within five (5) business days . . . [and] will consider the debriefing closed upon delivery of the written response to any additional questions." AR 5-174. A plain reading of this statement provides two potential deadlines for the close of the debriefing: (1) if no additional questions were submitted, the debriefing would close after two days; and (2) if additional questions were submitted, the debriefing would close after the government provided written responses, no later than five days after receiving the questions. The letter gives no indication that the agency would consider the debriefing closed on the date it was received, that is, March 4, 2020. As such, this statement supports NIKA's interpretation that "the debriefing date" in this case was March 6, 2020.

CONCLUSION

For the reasons stated, the court finds that NIKA's GAO protest was timely under 10 U.S.C. § 2305 and 31 U.S.C. § 3553 and that NIKA was entitled to an automatic stay under CICA. Consequently, NIKA's motion for judgment on the administrative record is GRANTED, and the government's cross-motion for judgment on the administrative record is DENIED. The parties stipulated that if NIKA were successful on the merits of the case, an injunction would be proper. *See* Def.'s Cross-Mot. at 28; Pl.'s Reply at 14-15. In light of this agreement, the court ENJOINS the Corps from proceeding with any task order awards during the pendency of NIKA's GAO protest. The clerk is directed to enter judgment accordingly.

No costs.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

(ii) The date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

31 U.S.C. § 3553(d)(4)(A).

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Centerra Integrated Facilities Services, LLC

File: B-418628

Date: April 23, 2020

Daniel J. Strouse, Esq., David S. Cohen, Esq., Laurel A. Hockey, Esq., Joshua D. Schnell, Esq., and John J. O'Brien, Esq., Cordatis LLP, for the protester.
Seamus Curley, Esq., and Chelsea L. Goulet, Esq., Stroock, Stroock & Lavan LLP, for Jones Lang LaSalle Americas, Inc., the intervenor.
Nicholas M. Bidwell, Esq., Stephanie J. Villalta, Esq., Donna A. Oden-Orr, Esq., and Jon Wright, Esq., Department of Energy, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an award made by the Bonneville Power Administration filed more than 10 days after the protester learned of its bases of protest when the agency provided a non-required written debriefing is dismissed as untimely; the agency's offer to address the protester's questions after providing the debriefing did not toll the timeliness requirements for protest allegations based on the initially provided non-required written debriefing.

DECISION

Centerra Integrated Facilities Services, LLC, of Palm Beach Gardens, Florida, protests the award of a contract to Jones Lang LaSalle Americas, Inc., of Washington, D.C., under request for offers (RFO) No. 4600, which was issued by the Department of Energy, Bonneville Power Administration (BPA), for integrated facilities management services. Centerra challenges the agency's evaluation of its proposal under the RFO's non-price factors.

We dismiss the protest as untimely because it was filed more than 10 days after the protester learned of its bases of protest when the agency provided a non-required debriefing.

BACKGROUND

BPA is a federal entity within the Department of Energy, and was created by the Bonneville Project Act of 1937 to market hydroelectric power generated by a series of dams along the Columbia River in Oregon and Washington. 16 U.S.C. §§ 832-832m. Unlike most executive branch agencies, BPA's contracting activities are not governed by the competition requirements of the Federal Property and Administrative Services Act of 1949, as amended by the Competition in Contracting Act of 1984. 40 U.S.C. § 113(e)(18). Rather, the Bonneville Project Act provides that BPA's contracting authority is subject only to the provisions of that statute. 16 U.S.C. § 832a(f); *see also Gonzales Consulting Servs., Inc.*, B-291642.2, July 16, 2003, 2003 CPD ¶ 128 at 2 n.1. BPA is similarly not subject to the Federal Acquisition Regulation (FAR), but, rather, is governed by BPA's own acquisition policy, the Bonneville Purchasing Instructions (BPI), that implement the procurement authority granted by its organic statute.[1] *Gonzales Consulting Sevs.*, *supra*.

BPA owns and operates an estimated 2.7 million square feet of facilities valued at over $1.15 billion across Oregon, Washington, Idaho, Montana, and California. These facilities include over 1,000 buildings at more than 400 sites, including critical infrastructure (such as control centers and substation control houses), maintenance shops, administrative offices, and warehouses. Additionally, BPA is responsible for its GSA-owned headquarters building, corporate commercially leased spaces, and various non-building assets (such as sewer systems, fences, and roads). Historically, BPA has met its facility-related obligations through the administration of over a hundred contracts. Req. for Dismissal, exh. A.1, RFO at 3.[2]

Through this procurement, however, BPA sought to establish a strategic alliance with a single qualified facilities management contractor. *Id.* Specifically, the RFO, which was issued on June 28, 2019, and subsequently amended three times, contemplated the award of a single indefinite-delivery, indefinite-quantity contract with a fixed-price base

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[1] The BPI is not the product of notice and comment rulemaking in the Federal Register under the Administrative Procedures Act, 5 U.S.C. § 553; rather, it is promulgated by the Head of BPA's Contracting Activity. *See* BPI, ¶ 1.2(a) (explaining that the BPI is issued by the Head of the BPA's Contracting Activity), and ¶ 1.4 (explaining that the BPI is not published in the Federal Register, but providing for a notice that the BPI may be obtained from BPA); *Availability of the Bonneville Purchasing Instructions (BPI) and Bonneville Financial Assistance Instructions (BFAI)*, 83 Fed. Reg. 50354 (Oct. 5, 2018) (explaining that the BPI "is promulgated as a statement of purchasing policy and as a body of interpretative regulations governing the conduct of BPA purchasing activities, and reflects BPA's private sector approach to purchasing the goods and services that it requires").

[2] References to page numbers for exhibits to the agency's request for dismissal are to the Bates numbering provided by the agency.

operations and maintenance component, and time-and-materials above-base services and construction components. *Id.* at 4. The RFO anticipated the award of a contract with a 3-year base period, two priced 1-year options, and five unpriced 1-year options, which will be the subject of further price negotiations between BPA and the awardee if the options are exercised. *Id*. at 256.

Award was to be made to the offer that represented the "best buy" based on a tradeoff analysis between price and three non-price evaluation factors: technical approach; management approach; and past performance relevance and confidence. *Id.* at 10. The non-price factors, when combined, were to be approximately equal to price. *Id*. BPA received two offers, from Centerra and Jones Lang, in response to the RFO.[3] Req. for Dismissal at 4. Ultimately, BPA decided that Jones Lang's offer was the best buy, and awarded the contract to Jones Lang on March 5. *Id.* at 4. On March 6, BPA notified Centerra that its offer was not selected for award, and that it could request a debriefing. *Id.*; *see also* Request for Dismissal, exh. A.1, RFO at 12 (incorporating BPI, ¶ 12.8.3.2, Debriefing Request). Centerra requested a debriefing the next day.

On March 19, BPA provided Centerra with a written debriefing. The debriefing provided: the offerors' respective evaluated prices[4]; Centerra's evaluated strengths, weaknesses, and deficiencies under the three non-price factors; and a brief rationale for BPA's award decision. Req. for Dismissal, exh. B.1, Debriefing at 2-7. The written debriefing also provided Centerra an opportunity to submit any questions to BPA, and provided that Bonneville would respond to Centerra's questions in accordance with BPI ¶ 12.8.3, and that "Bonneville's response to Centerra's questions marks the conclusion of this debrief." *Id.* at 7; *see also id.*, Debriefing Transmittal Letter at 1 ("The debriefing is concluded once Bonneville has provided answers to your questions.").

On March 24, Centerra submitted five questions in response to BPA's invitation. First, Centerra asked how many offers were submitted. The protester also asked how its proposal was ranked, and how its ratings compared to the awardee's ratings. Finally, Centerra sought clarification with respect to two of the weaknesses assigned to its offer. *Id.*, Email from Centerra to BPA at 8. On March 27, BPA responded to Centerra's questions. Specifically, it declined to provide answers to the first three questions citing BPI policy, and provided additional information with respect to the two weaknesses concerning Centerra's offer. *Id.*, Response to Centerra Debriefing Questions at 11.

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[3] Centerra previously filed a pre-award protest with respect to this RFO; our Office denied that protest. *See Centerra Integrated Facilities Servs., LLC*, B-417963, Dec. 17, 2019, 2019 CPD ¶ 424.

[4] The RFO asked offerors to provide pricing for four different scenarios. For the purposes of the agency's tradeoff analysis, the agency used the offerors' respective pricing for the same scenario. Jones Lang's evaluated price was $53,752,551; Centerra's evaluated price was $57,785,403. Request for Dismissal, exh. B.1, Debriefing at 2-3.

The agency also advised the protester that "[t]his response concludes your debriefing." *Id.* at 10. On April 1, Centerra filed this protest with our Office.

DISCUSSION

BPA and Jones Lang seek dismissal of the protest as untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, a protest such as Centerra's, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." *Id.* In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed no later than 10 days after the date on which the debriefing is held. *Id.*

The agency and intervenor argue that the protest is untimely because it was filed more than 10 days after the protester received the agency's March 19 letter. They contend that the protester knew or reasonably should have known of its bases of protest when it received its March 19 letter and, therefore, any protest had to be filed by no later than March 30.[5] Although the agency styled the March 19 letter as a "debriefing," the agency and intervenor argue that the debriefing exception set forth in our Bid Protest Regulations tolling the filing deadline for a protest until the conclusion of a required debriefing does not apply here for two reasons. First, they argue that this procurement was not conducted on the basis of competitive proposals and second, the debriefing provided to Centerra was not required. Further, the agency and intervenor assert that the agency's offer to respond to Centerra's questions did not--and could not--extend the filing deadline for protest grounds based on information that the protester learned on March 19.[6]

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[5] The tenth day following the debriefing was Sunday, March 29. Pursuant to our Bid Protest Regulations, when the last day of an applicable filing period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. 4 C.F.R. § 21.0(d). Thus, the filing due date was Monday, March 30.

[6] BPA also argues that we should dismiss the protest because (1) Centerra is not an interested party for failing to exhaust its administrative remedies by first filing an agency-level protest, and (2) the protest fails to state legally and factually sufficient bases of protest. In addition to joining the agency's asserted grounds for dismissal, the intervenor also filed an alternative request for partial dismissal seeking to dismiss discrete elements of the protest as failing to state legally and factually sufficient grounds

Centerra opposes dismissal of its protest, arguing that the debriefing exception applies in this case and that its protest was timely filed within 10 days of when the agency concluded the debriefing on March 27. Contrary to the positions taken by the agency and the intervenor, the protester argues that the procurement here was conducted on the basis of competitive proposals and that the debriefing it received was required by the BPI. As a result, the protester contends that it reasonably waited until the conclusion of its debriefing in order to file its protest in accordance with our Bid Protest Regulations.

For the reasons that follow, we find that the debriefing provided to Centerra was not "required" within the meaning of the debriefing exception in our Bid Protest Regulations, and, therefore, it had 10 days from receipt of its March 19 written debriefing to submit any protest grounds based on information that it learned through the debriefing. Because the protester filed its protest on April 1, the protest is untimely.

Although the parties spend considerable effort analyzing whether the procurement at issue was conducted on the basis of "competitive proposals,"[7] a predicate under our regulations to the application of the debriefing exception, we need not address this issue because we find that the debriefing here cannot be classified as a "required" debriefing, another predicate to the application of the debriefing exception. The requirement for a post-award debriefing is established by 41 U.S.C. § 3704, which provides as follows:

> When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall

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of protest. Because we dismiss the protest as untimely, we need not address these alternative arguments.

[7] When evaluating whether a procurement was conducted on the basis of "competitive proposals" for the purpose of the debriefing exception to our timeliness rules, we have noted that the use of negotiated procedures in accordance with FAR part 15--as evidenced by the issuance of a request for proposals--is the hallmark. *See Millennium Space Sys., Inc.*, B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 4. We have also found that task and delivery order procurements conducted pursuant to FAR subpart 16.5, and commercial item procurements utilizing FAR part 12 procedures in conjunction with FAR part 15 procedures similarly are conducted on the basis of "competitive proposals," and associated debriefings in such procurements can be "required" (subject to meeting timeliness and dollar threshold requirements). *See, e.g.*, *General Revenue Corp., et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106; *Professional Analysis, Inc.*, B-410202, Aug. 25, 2014, 2014 CPD ¶ 247.

> be debriefed and furnished the basis for the selection decision and contract award.

41 U.S.C. § 3704(a).

This provision, however, does not apply here because BPA is exempt from the applicable section of Title 41 of the U.S. Code. *See* 41 U.S.C. § 3101(c)(1)(B) (providing that the requirements of Section C, which includes 41 U.S.C. § 3704, do not apply when they are made inapplicable pursuant to law). As addressed above, BPA's organic statute expressly exempts application of federal procurement laws to BPA's contracting. Specifically, BPA's statute provides that:

> *Subject only to the provisions of this chapter*, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancelation therefore . . . upon such terms and conditions and in such manner as he may deem necessary.

16 U.S.C. § 832a(f) (emphasis added).

Thus, the statutory requirement for a post-award debriefing established by 41 U.S.C. § 3704 is inapplicable.[8]

Centerra does not identify any other statutes applicable to BPA that require BPA to provide post-award debriefings. *Cf. Professional Analysis, Inc.*, *supra*, at 2-3 (addressing that our Office interprets the applicability of our timeliness regulations with respect to the scope of statutorily required debriefings). Rather, the sole basis for the protester's argument that the debriefing should be considered a "required" debriefing rests on the debriefing provisions set forth in the BPI.[9] These provisions, however,

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[8] Although not at issue in this protest, our decision would apply equally as to the statutory requirements for pre-award debriefings established by 41 U.S.C. § 3705.

[9] In relevant part, the BPI provides that:

> Debriefings are an important method of helping offerors to understand the basis for Bonneville's decisions. Developing good long-term relationships with contractors includes treating offerors who are not selected for award with respect, and with the knowledge that they may become an important supplier at some future date. In this sense, debriefings should be considered to be more a [contracting officer's] "obligation" than an offeror's "right." Debriefings shall be considered to be negotiations which will, in part, determine Bonneville's future supplier base. For this reason they shall receive commensurate preparation.
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> * * * *

reflect BPI's policy versus a procurement statute or regulation, and are therefore insufficient to establish the debriefing at issue as a "required" debriefing within the meaning of our Bid Protest Regulations. Absent any applicable statutory or regulatory requirement for the post-award debriefing provided to Centerra, the debriefing exception to our timeliness rules does not apply.

Our conclusion that the information provided to Centerra was not provided pursuant to a "required debriefing" within the meaning of the debriefing exception does not end our timeliness inquiry, however. Even if a disappointed offeror does not secure a required debriefing, it may file a protest within 10 calendar days after it learns, or should have learned, the basis for protest, provided it has diligently pursued the matter. Accordingly, a disappointed offeror may file a timely protest based on information obtained during a debriefing that was not required. *See* 4 C.F.R. § 21.2(a)(2); *Raith Eng'g and Mfg. Co., W.L.L.*, B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 3.

Here, the agency concedes that Centerra could not have known its bases for protest until it received the agency's March 19 letter with the agency's evaluation findings. *See* Req. for Dismissal at 6 ("Protester was also made aware of the more specific bases for its protest grounds on March 19, 2020, when it received its initial debriefing letter containing its strengths, weaknesses, and deficiencies."). Thus, any protest based on the information first learned by Centerra when it received its March 19 written debriefing would have been timely had they been filed within 10 days, or by no later than March 30. Centerra did not, however, file its protest until Wednesday, April 1.

The protester asserts that its protest was timely nonetheless because it was filed within 10 days of when BPA responded to the protester's questions following receipt of the written debriefing. While it is true that BPA provided Centerra the opportunity to ask questions following the written debriefing and represented that the debriefing would not be concluded until BPA responded to the protester's questions, we disagree that BPA's voluntary provision of additional information tolled the 10 day filing deadline under 4 C.F.R. § 21.2(a)(2).

When considering the timeliness of a protest in the context of a "required debriefing," in several cases we have found that a debriefing was not concluded, and, therefore, the filing deadline under the debriefing exception was tolled, because the procuring agency had a legal obligation to address a party's questions, voluntarily agreed to continue a required debriefing to address an offeror's questions, or introduced ambiguity with respect to whether a debriefing had concluded. *See, e.g., State Women Corp.*, B-416510, July 12, 2018, 2018 CPD ¶ 240 (addressing the Army's obligations pursuant

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> To the maximum extent practicable, the [contracting officer] shall debrief unsuccessful offerors within ten calendar days of receipt of offeror's debriefing request. Unsuccessful offerors must request a debriefing within three calendar days of receipt of award notice.

BPI, ¶¶ 12.8.3, 12.8.3.1(a).

to Department of Defense Class Deviation 2018-O0011 – Enhanced Post Award Debrief Rights); *Harris IT Servs. Corp.*, B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 (finding that debriefing was extended where the agency addressed additional questions without indicating that it believed the debriefing to be concluded).

These cases, however, all concern timeliness of a protest with respect to a statutorily required debriefing. The statutory and regulatory framework establishing the requirement for a debriefing expressly contemplates that an agency will answer an offeror's relevant questions. *See* 41 U.S.C. § 3704(c)(6) (requiring post-award debriefings to include "reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency"); FAR 15.506(d)(6) (same, with respect to "[r]easonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed"). These requirements are consistent with the overall congressional intent that offerors receive statutorily required debriefings before deciding whether or not to file a protest, to address concerns regarding strategic or defensive protests, and to encourage early and meaningful debriefings. *Professional Analysis, Inc.*, *supra*, at 2.

Here, however, for the reasons set forth above, the agency did not provide a statutorily required debriefing, and the debriefing exception rules set forth in our Regulations do not apply when considering the timeliness of Centerra's protest. Absent a statutorily required debriefing, with its statutorily contemplated question and answer procedures, the agency's provision of further information in response to questions raised by Centerra could not toll the filing deadline established by 4 C.F.R. § 21.2(a)(2). Thus, Centerra had to file its protest when it first learned of the basis for its challenges from the March 19 written debriefing.

We have recognized that a firm may not delay filing a protest until it is certain that it is in a position to detail all of the possible separate grounds of protest. *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; *Litton Sys., Inc., Data Sys. Div.*, B-262099, Nov. 17, 1995, 95-2 CPD ¶ 215 at 5 n.5. At best, any new information learned as a result of BPA's responses to Centerra's additional questions would have started a new 10 day filing deadline for any protest grounds based on the newly learned information; it could not, however, extend the filing deadline for information first disclosed or learned as a result of the initial written debriefing.[10] Therefore, because

[10] BPA's responses provided additional clarification with respect to two of the several weaknesses and deficiencies identified during the initial written debriefing and that were subsequently challenged by Centerra. *See* Request for Dismissal, exh. B.1, Response to Centerra Debriefing Questions at 11. To the extent BPA's supplemental clarifications may have provided further support for these bases of protest, Centerra nevertheless knew or reasonably should have known of its bases for protest based on the written March 19 debriefing, which disclosed the assessed weaknesses. Thus, Centerra's April 1 challenges to these assessed weaknesses were untimely.

Centerra filed its protest more than 10 days after it first learned of its bases of protest from its non-required written debriefing, the protest is untimely.

The protest is dismissed.

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General Counsel