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Decision

Matter of: Academy Leadership, LLC

File: B-419705.2

Date: September 30, 2021

Joseph R. Berger, Esq., and Thomas O. Mason, Esq., Thompson Hine LLP, for the protester.

Alan Grayson, Esq., for Gettysburg Addresses, Inc. d/b/a The Lincoln Leadership Institute, the intervenor.

Gabriel E. Kennon, Esq., Department of Homeland Security, for the agency.

Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the agency's conduct of discussions in a simplified acquisition was not fair or equitable is sustained where the record shows that the agency's discussions with the protester were not meaningful.

DECISION

Academy Leadership, LLC, of Juno Beach, Florida, protests the award of a contract to Gettysburg Addresses, Inc. d/b/a The Lincoln Leadership Institute (Lincoln), under request for proposals (RFP) No. 70CMSD21R00000001, issued by the Department of Homeland Security, United States Immigration and Customs Enforcement (ICE), for leadership-focused training. The protester challenges the agency's evaluation of its proposal and the agency's conduct of discussions.

We sustain the protest

BACKGROUND

The solicitation was issued on October 29, 2020 as a total small business set-aside, under Federal Acquisition Regulation (FAR) subpart 13.5, and contemplated the award of a single fixed-price indefinite-delivery, indefinite-quantity contract with a 5-year ordering period, for leadership-focused Gettysburg staff rides designed for ICE

employees.¹ AR, Tab 3, RFP at 1. Award was to be made on a best-value tradeoff basis considering the following evaluation factors, in descending order of importance: technical capability, sample training presentation, past performance, and price. *Id.* The non-price factors, when combined, were significantly more important than price. *Id.* at 4. The RFP, on the one hand, advised that the procedures of FAR subpart 15.3 would not apply and that the agency did not intend to establish a competitive range, conduct discussions, or request proposal revisions. *Id.* at 1. On the other hand, the RFP also stated that the agency reserved the right to hold discussions if the contracting officer deemed it necessary. *Id.* at 7. Finally, the solicitation notified offerors that the agency reserved the right to contact any offeror “at any point to request additional information regarding [its proposal].” *Id.* at 1.

The evaluation was to be conducted in two phases using an “advisory down-select” process. *Id.* In the first phase, offerors were evaluated under the technical capability, past performance, and price factors, to be followed by the agency’s issuance of an “advisory notification.” *Id.* at 3. The advisory notification process was intended to minimize proposal development costs for offerors with little chance of receiving an award by informing those offerors, whose proposals were not among the most highly rated or whose prices were unreasonable, that they could elect to participate in phase two, but were unlikely to be viable competitors. *Id.* The most highly rated offerors would be advised to proceed to the second phase during which offerors would provide their sample training presentations. *Id.*

ICE received proposals from six offerors by the solicitation closing date. AR, Tab 11, Downselect Memo.; Tab 47, Contracting Officer’s Statement (COS) at 5. On December 22, 2020, the agency notified three offerors, including Academy and Lincoln that they were among the most highly rated offerors and were selected to participate in phase two. *Id.*; AR, Tab 19, Academy Advisory Notice; Tab 51, Lincoln Advisory Notice. Both Academy and Lincoln provided their sample training presentations on January 26, 2021. COS at 5; AR, Tab 54, ICE Dec. 30, 2020, Email (Lincoln).

A technical evaluation team evaluated the proposals, and on March 16, 2021, ICE made an initial award to Lincoln. COS at 5. On March 26, Academy filed a protest with our Office challenging the award to Lincoln. Subsequent to the filing of the protest, the agency notified our Office of its intent to take corrective action. Based on the agency’s

¹ The requirement is to provide a formal historic battlefield (Gettysburg) staff ride program focused on leadership development, strategic thinking, change management, and ethics leadership training. Agency Report (AR), Tab 5, Statement of Work (SOW) at 1. The training requires the expertise of licensed battlefield guides capable of blending the history surrounding the Gettysburg National Park with relevant leadership-based competencies to further the development of ICE supervisors, managers, and executive staff. RFP at 1. The contractor is required to provide multiple course formats (e.g., a 1-day course, a 3-day course, and a virtual course), as well as provide for lodging, training facilities, and transportation to and from Gettysburg. SOW at 1.

intent to reevaluate proposals and make a new selection decision, we dismissed the protest as academic. *Academy Leadership, LLC*, B-419705, Apr. 12, 2021 (unpublished decision).

Following the agency's reevaluation, the proposals of the two offerors were subsequently evaluated as follows:²

	Academy	Lincoln
Technical Capability ³	Some Confidence	High Confidence
Sample Training Presentation	Some Confidence	High Confidence
Past Performance	Some Confidence	Some Confidence
Total Evaluated Price	\$2,923,800	\$4,969,450

AR, Tab 36, Award Decision at 3.

The contracting officer, who was the source selection authority (SSA) for the procurement, compared the proposals and found that while Lincoln's price was higher than Academy's price, Lincoln's proposal was evaluated to be significantly superior under the two heaviest-weighted factors: technical capability and sample training presentation. *Id.* at 10. The SSA ultimately concluded that the benefits offered by Lincoln's higher-rated proposal warranted the 53% price premium over Academy's proposal. *Id.* at 11. After concluding that Academy's approach offered "significantly less benefit to the [g]overnment and far greater risk," the SSA again selected Lincoln for award. *Id.* On June 16, Academy was notified that it was not selected and was provided a written explanation for its non-selection on June 17. COS at 6. This protest followed.

DISCUSSION

Academy challenges the evaluation of the proposals and argues that the agency's conduct of discussions was not fair or equitable. While we do not address every issue raised, we have considered all of the protester's arguments but sustain the protest only

² Confidence ratings were determined by assessing whether areas in an offeror's proposal raised or lowered expectations of success. AR, Tab 36, Award Decision at 2. The available confidence ratings for the non-price factors were: high confidence, some confidence, and low confidence. RFP at 2.

³ The technical capability factor was comprised of two elements: (1) technical approach/logistical capabilities and (2) staffing. RFP at 5. The first element had three functional areas: planning; execution; and logistics and project management. *Id.* Neither the sub-elements nor the functional areas would receive individual ratings; only one overall confidence rating would be assessed to proposals under the technical capability evaluation factor.

with respect to the agency's conduct of discussions; which we conclude were not meaningful.⁴

These Communications Constituted Discussions

Academy first argues that the agency's communication with offerors requesting a price reduction constituted discussions. Protest at 20-22; Comments at 6-11; Supp. Comments at 4-11. ICE asserts that the agency's request for price reductions from offerors did not constitute discussions. MOL at 21-23; Supp. MOL at 3-5.

As noted, this procurement was conducted under the simplified procedures for evaluation of commercial items. Simplified acquisition procedures are designed, among other things, to reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR 13.002; 41 U.S.C. § 3305. Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. *Wellspring Worldwide, Inc.*, B-417282.2 *et al.*, Dec. 20, 2019, 2020 CPD ¶ 10 at 4; *International Waste Indus.*, B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5.

The FAR describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated procurements. FAR 13.106-2(b); 15.306. Clarifications are "limited exchanges" between an agency and an offeror for the

⁴ For example, Academy challenges the agency's evaluation of the firm's proposal under the technical capability and sample training presentation factors. Protest at 12-20. The agency responded to those challenges in its agency report. Memorandum of Law (MOL) at 8-21. In its comments on the agency's report, however, the protester did not substantively address nor rebut the agency's response. Rather, Academy's comments repeat its initial protest argument verbatim, then simply substitutes the assertion from the protest that the agency's evaluation was disparate and unequal, with the protester's conclusion that had the agency conducted meaningful discussions, it could have addressed the shortcomings. *Compare* Protest at 11-24 with Comments at 14-24. Accordingly, we consider these arguments to have been abandoned and will not address them further. *DigiFlight Inc.*, B-419590, B-419590.2, May 24, 2021, 2021 CPD ¶ 206 at 4-5; *Quantech Servs., Inc.*, B-417347, B-417347.2, May 29, 2019, 2019 CPD ¶ 203 at 6 (finding argument to be abandoned because protester failed to rebut or otherwise address agency's substantive responses to protest allegations).

Additionally, during the development of the protest, the agency requested that our Office dismiss several protest grounds. See *generally* Agency Req. for Partial Dismissal. On two of the grounds, GAO agreed and dismissed Academy's disparate treatment challenges to the agency's evaluation of the awardee's proposal and the agency's best-value tradeoff decision as speculative and failing to state a legally sufficient basis of protest. Notice of Partial Dismissal at 4-5.

purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR 15.306(a); *International Waste Indus., supra*. Clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. *ERIE Strayer Co., supra*. Discussions, on the other hand, 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 in some material respect. *Tipton Textile Rental, Inc.*, B-406372, May 9, 2012, 2012 CPD ¶ 156 at 12; *Alliant Enter. JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5; see FAR 15.306(d). It is the actions of the parties that determines whether discussions have been held and not merely the characterization of the communications by the agency. *Tipton Textile Rental, Inc., supra*. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Ranger American of the V.I., Inc.*, B-418539, B-418539.2, June 11, 2020, 2020 CPD ¶ 194 at 9.

Here, the record shows that on February 4--after offerors had provided their sample training presentation and the agency completed its evaluations--the agency contacted Lincoln regarding its price proposal. AR, Tab 83, Feb. 4, 2021 Email (Lincoln). The agency's email specifically informed Lincoln of the following: "*While evaluating your proposal, your pricing was significantly higher than the other proposals. Is this the best offer that you can provide?*" *Id.* (emphasis added). Lincoln was asked to provide a response by February 10, 2021. *Id.*

Similarly, on February 5, the agency also contacted Academy regarding its price proposal. AR, Tab 20, Feb. 5, 2021 Req. for Price Reduction. ICE's email to Academy asked, "Is the pricing that you submitted for the Gettysburg program the best offer that you can provide?" and requested that Academy provide a response by February 11, 2021. *Id.*

In response, both offerors reduced their prices. Lincoln reduced its price by 20.3% and Academy by 18.5%. Lincoln's reduced price (\$4,469,450), however, remained higher than Academy's initial proposed price (\$3,589,673) and reduced price (\$2,923,800). Supp. MOL at 6; AR, Tab 21, Feb. 9, 2021 Email re: Price Reduction; Tab 22, Feb. 9, 2021 Academy Revised Price Proposal; Tab 76, Jan. 6, 2021 Lincoln Price; Tab 87, Lincoln Feb. 9, 2021 Revised Price.

As discussed above, although an agency is not *required* to conduct discussions under simplified acquisition procedures, it does not preclude the agency from engaging--intentionally or inadvertently--in exchanges with offerors that would be considered discussions. See, e.g., *Colonna's Shipyard, Inc.*, B-418896, Sept. 29, 2020, 2020 CPD ¶ 320 at 8; *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 5. The characterization of an agency's communication as a request for a price reduction does not change the nature of ICE's communications. Unlike certain FAR

subpart 8.4 procurements where agencies are *required* to seek additional price discounts from vendors, there is no analogous requirement under FAR part 13. See FAR 8.405-4; see also *Safal Partners, Inc.*, B-416937, B-416937.2, Jan. 15, 2019, 2019 CPD ¶ 20 at 8; *Sapient Gov't Servs. Inc.*, B-410636, Jan. 20, 2015, 2015 CPD ¶ 47 at 6 n.5; *OPTIMUS Corp.*, B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 9.

The record shows that ICE's email to Lincoln clearly informed it that its price proposal was the highest among the offerors. We find that the communications to Lincoln here included what would be considered as "ordinary indicia" of discussions by conveying information that was tailored to Lincoln's proposal, bargaining, and providing the firm with an opportunity to revise its proposal. See *Equa Sols., Inc.*, B-409848.2, B-409848.3, Nov. 20, 2014, 2014 CPD ¶ 354 at 9-10 (finding that indicia of discussions included, among other things, communications conveying information tailored to offerors' proposals or involved bargaining, negotiations, or attempts of persuasion). Lincoln's proposal was assigned the highest available adjectival ratings for the technical capability and sample training plan factors and did not receive any comments from the agency that lowered expectations of success (*i.e.*, had no weaknesses or deficiencies. AR, Tab 36, Award Decision at 4-10. Lincoln's proposed price, however, was the highest of the offerors that participated in phase two of the procurement. *Id.* at 3-4. By informing Lincoln that its proposed price was "significantly higher" than the other offerors and asking if its price was "the best offer you can provide," ICE's email conveyed information tailored to Lincoln's proposal and involved what could be viewed as bargaining, negotiations, or an attempt at persuasion. AR, Tab 83, Feb. 4, 2021 Email (Lincoln).

We note that the agency defends its actions as a means to ensure the government was "getting the best prices and best value," and that "[r]equesting price reductions is one mechanism the agency can use to bridge any gap and ensure contract obligations are in line with spending expectations." AR, Tab 98, Supp. COS at 3; Supp. MOL at 4 n.2. We recognize that there may be certain circumstances in a procurement conducted under simplified acquisition procedures where the agency could request price reductions from offerors that would not trigger discussions. We find, however, under the facts here, the agency's communications with Lincoln amounted to discussions. Moreover, the agency's communications to the offerors ultimately provided offerors an opportunity to revise their price proposals, thus meeting the "acid test" for discussions. See *Raytheon Co.*, B-404998, July 25, 2011, 2011 CPD ¶ 232 at 15 ("Where an agency provides the opportunity to offerors to revise their price proposals, this constitutes discussions.").⁵

Discussions Were Not Meaningful

⁵ In January 2021, after the advisory down-select, but prior to the sample training presentations, the agency discovered an error in the price matrix included in the RFP and provided offerors an opportunity to revise their price proposals. COS at 5; Supp. COS at 1; see also AR, Tab 6, RFP, attach. 3 – Price Matrix. Because we find that the agency engaged in discussion in February 2021, we need not address whether the agency's January 2021 communications constituted discussions.

The protester next argues that these discussions were neither meaningful, nor fair and equitable, because Lincoln was informed that its evaluated price was the highest--which was the crux of the agency's concerns with Lincoln's proposal--but Academy was not informed that the agency had concerns about aspects of Academy's technical proposal. Protest at 20-21; Comments at 10-13; Supp. Comments at 6-13. The agency responds that even if its request for a price reduction could be considered discussions, those discussions were fair and equitable because the agency requested that all offerors provide price reductions and ICE did not allow offerors to submit revisions to their technical proposals. Supp. MOL at 5-7.

Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should treat offerors fairly and reasonably in the conduct of those procedures. *ERIE Strayer Co.*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4; *International Waste Indus.*, *supra*. As a general matter, when an agency conducts discussions with one offeror, it must afford all offerors remaining in the competition an opportunity to engage in meaningful discussions. *International Waste Indus.*, *supra*; *ERIE Strayer Co.*, *supra*. In analogous decisions under FAR part 15, we have stated that it is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. See, e.g., *Shearwater Mission Support, LLC*, B-416717, Nov. 20, 2018, 2018 CPD ¶ 402 at 7. Agencies may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns. *Total Home Health*, B-417283, B-417283.2, Apr. 26, 2019, 2019 CPD ¶ 166 at 4.

The record shows that the agency requested price reductions from all offerors. AR, Tab 20, Feb. 5, 2021 Req. for Price Reduction (Academy); Tab 83, Feb. 4, 2021 Email (Lincoln); Tab 90, Feb. 5, 2021 Email (Third Offeror). Contrary to the agency's assertions, the fact that all offerors were asked if their offer was "the best offer you can provide," does not render the communications "fair and equitable." In its correspondence with Lincoln--whose proposal received no comments that lowered expectations of success (*i.e.*, had no significant weaknesses or deficiencies)--ICE advised that Lincoln's price was "significantly higher" than the prices of the other offerors before asking Lincoln if that price was its best offer. AR, Tab 83, Feb. 4, 2021 Email (Lincoln). This communication directly led Lincoln into the area of its proposal requiring amplification or revision and allowed Lincoln to materially enhance its potential for receiving the award.

By contrast, Academy's initial proposed price was significantly lower than Lincoln's price and the agency's price estimate.⁶ AR, Tab 36, Award Decision at 3-4. Academy's

⁶ Because the original independent government cost estimate (IGCE) was significantly lower than the average of prices submitted by offerors, the agency did not find the IGCE

proposal had also been evaluated as receiving a number of comments that lowered expectations of success under the technical capability factor and the sample training presentation factor. *Id.* at 6, 9. While these comments were not specifically identified as significant weaknesses or deficiencies, our review of the record shows that a number of these comments reflected ICE's concern regarding Academy's ability to successfully perform the requirements.

For example, the SOW required that all curriculum be based on the Office of Personnel Management (OPM) Senior Executive Core Qualifications (ECQs).⁷ SOW at 5. Some of the required tasks to be performed included: (1) relating "key competencies in political savvy, influencing, negotiating, and strategic thinking lessons learned from those events to the challenges ICE first-line supervisors may deal with in today's environment and society view of the ICE mission"; (2) presenting, while on the battlefield, "historical outcomes and individual leadership traits which resulted in the success or failure of the strategic plan" so that participants would be "able to identify and compare the competencies in political savvy, influencing, negotiating, and strategic thinking in the historical figures and explain the success or failure of each by defining the outcomes"; and (3) providing "a formal presentation focused on various historic figures and military leaders, and how they contributed to success or failure as a leader." *Id.* at 3-4 (sections 4.2, 4.10, and 4.11).

Under the most important factor (technical capability), the agency found, among other things, that: (1) Academy did not address ECQs as required by the SOW; (2) Academy did not explain how it would integrate historical events and figures described in the SOW with the SOW's core competencies; and (3) Academy's course syllabi did not address the SOW's core competencies or ECQs. AR, Tab 35, Final Technical Evaluation - Academy at 1-2. The agency found these issues to be items that lowered expectations of success because Academy did not clearly and fully demonstrate its ability to develop or execute a curriculum that aligned with the requirements of the solicitation. *Id.* ICE also identified other issues in Academy's proposal that lowered ICE's confidence in Academy's ability to perform the requirements of the solicitation

to be a "balanced point of comparison." AR, Tab 36, Award Decision at 4. In finding Lincoln's price to be fair and reasonable, the agency used other price analysis techniques, including comparing prices to the "trimmed mean" which was calculated by removing the highest and lowest proposed prices and averaging prices from the remaining four proposals. *Id.*

⁷ ECQs are required for entry to the federal government's Senior Executive Service and are used by many department and agencies in selection, performance management, and leadership development for management and executive positions. ECQs, *available at* <https://www.opm.gov/policy-data-oversight/senior-executive-service/executive-core-qualifications/> (last visited Sept. 8, 2021) (*referenced in* SOW at 5). ECQs define the competencies needed to build a federal corporate culture that drives for results, serves customers, and builds successful teams and coalitions within and outside the organization. *Id.* OPM has identified five ECQs. *Id.*

where the firm failed to provide sufficient detail to demonstrate the ability to manage group transportation, lodging, and meals, as outlined in the solicitation. *Id.* at 1-2.

In his comparative assessment, the SSA noted that, under this evaluation factor, Lincoln's proposal had 12 comments that raised expectations of success and no comments that lowered expectations of success, while Academy's proposal had four comments that raised expectations of success, and four that lowered expectations of success. AR, Tab 36, Award Decision at 4-5. The SSA's assessment did not find any of Academy's comments that raised expectations of success to be discriminators or ones that outweighed the benefits of Lincoln's approach. *Id.* at 5. As an example of a benefit of Lincoln's approach, the SSA observed that Lincoln's [DELETED], which demonstrated a strong understanding of the requirement. *Id.* In contrast, the SSA noted that, in this area, Academy had several comments that lowered expectation of success, including Academy's failure to address ECQs or how the firm would integrate historical events with core competencies. *Id.* at 6. As a result, the SSA concluded that Lincoln's technical approach provided greater benefit with far fewer risks than Academy's technical approach. *Id.* at 6-7.

Similarly, under the next most important evaluation factor (sample training presentation), Lincoln received nine comments that raised expectations of success and no comments that lowered expectations of success. *Id.* at 7-8. Academy had seven comments that raised expectations of success and one comment that lowered expectations.⁸ *Id.* at 8-9. The SSA concluded that Lincoln had provided a more beneficial sample training presentation because Lincoln excelled at [DELETED] into its presentation as outlined in the SOW without lowering the government's expectation of success in any way whereas Academy did not address all the core competencies. *Id.* at 9. Accordingly, the SSA concluded that Lincoln's sample training presentation provided greater benefit with far fewer risks than Academy's. *Id.*

We recognize that the solicitation does not contain a definition for weaknesses, significant weaknesses, or deficiencies. The FAR, however, describes a significant weakness in a proposal as a flaw that appreciably increases the risk of unsuccessful contract performance. FAR 15.001. A deficiency is defined in the FAR as a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increase the risk of unsuccessful contract performance to an unacceptable level. *Id.*

Here, the record reveals that agency's pre-corrective action evaluation assessed several flaws to Academy's proposal. Notably, in the pre-corrective action explanation of award provided to Academy, ICE identified and called these flaws "significant weaknesses" or "deficiencies." AR, Tab 30, Mar. 23, 2021 Award Explanation at 1. The agency then identified the following "significant weaknesses or deficiencies" ICE found in Academy's proposal: (1) failure to base its curriculum development on OPM's ECQs

⁸ As lowering the expectation of success, the agency found that Academy did not address core competencies that were outlined in the RFP and SOW. AR, Tab 36, Award Decision at 9; see also Tab 35, Final Tech. Evaluation – Academy at 3-4.

as required by the SOW; (2) failure to address all competencies outlined in the SOW; (3) lack of detail in its approach to curriculum development; and (4) failure to clearly and fully demonstrate its ability to schedule and manage group transportation, lodging, and meals as described in the RFP. *Id.*

The agency's post-corrective action evaluation included the assessment of similar flaws in Academy's proposal. In the reevaluation documentation and the new explanation of award provided to offerors, the agency, however, did not label these flaws as "significant weaknesses" or "deficiencies" as it had in the earlier explanation, but instead identified them now as aspects "that lowered the expectations of success." *Compare* AR, Tab 35, Final Tech. Evaluation – Academy *with* Tab 43, June 17, 2021 Award Explanation at 3. These aspects that lowered the expectations of success included: (1) failure to address ECQs as required by the SOW; (2) failure to explain how it would develop its curriculum or explain how it would modify an existing one; (3) syllabi that fail to address the core competencies or ECQs in the SOW and RFP; (4) lack of detail in demonstrating its ability to manage group transportation, lodging, and meals as outlined in the RFP; and (5) failure to address in the sample training presentation all of the core competencies outlined in the RFP and SOW. AR, Tab 35, Final Tech. Evaluation – Academy at 1-4.

In sum, the record shows that many of the agency's reevaluation comments that lowered expectations of success are identical or similar to the agency's earlier assessments of significant weaknesses or deficiencies. *Compare* AR, Tab 30, Mar. 23, 2021 Award Explanation at 1 *with* Tab 35, Final Tech. Evaluation – Academy at 1-4; Tab 43, June 17, 2021 Award Explanation at 2-3. Further, there is nothing in the record that indicates that the agency did not consider these same flaws in Academy's proposal to be anything other than significant weaknesses or deficiencies--as they were identified in the prior explanation. While it is implicit that a reevaluation could result in different findings and conclusions, without any other explanation in the record, we have no basis to find that the agency's reevaluation did not consider the same issues to no longer be significant weaknesses or deficiencies--despite the new labels the agency chose to use for the identified flaws. *See Crowley Logistics, Inc.*, B-412628.2 *et al.*, Apr. 19, 2016, 2016 CPD ¶ 120 at 8; *Raytheon Co.*, *supra* at 7.

Moreover, the record shows that the comments identified by the agency as lowering expectations of success were significant with regard to the source selection. In finding Lincoln's proposal to be superior under the technical capability and sample training presentation factors, the SSA concluded that Lincoln's proposal--which had no comments that lowered expectations of success--presented far fewer risks than Academy's proposal. AR, Tab 36, Award Decision at 6-7, 9. The SSA also found that Academy's approach offered "significantly less benefit to the [g]overnment and far greater risk," and selected Lincoln again, despite the 53% price premium over Academy's proposal. *Id.* at 11.

As discussed above, when conducting discussions with offerors, those discussions must be meaningful; that is, an agency must point out significant weaknesses or

deficiencies in a proposal that require correction or amplification in order for the offeror to have a reasonable chance for award. Here, the agency did not point out, during discussions, the significant weaknesses or deficiencies (or equivalent concerns) in Academy's proposal that required correction or amplification in order for Academy to have a reasonable chance for award. Instead, the agency simply asked the protester for a price reduction, which did not suggest the agency's true concerns, reflected in the technical flaws identified in Academy's proposal. On this record, we conclude that ICE did not conduct meaningful discussions. *Tipton Textile Rental, Inc.*, *supra* at 12 ("While we will not lightly impose the requirement for meaningful discussions on a simplified acquisition, here, in our view, the [agency] initiated discussions with [the protester] . . . and, as a result, those discussions were required to be meaningful."); *see also AECOM Mgmt. Servs., Inc.*, B-418828.4 *et al.*, Mar. 17, 2021, 2021 CPD ¶ 152 at 6. As a result, we cannot find the agency's actions here to be fair and equitable and sustain the protest on that basis.⁹ *International Waste Indus.*, *supra*.

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest; we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis to sustain a protest. *Patriot Sols., LLC*, B-413779, Dec. 22, 2016, 2016 CPD ¶ 376 at 5. With regard to competitive prejudice, we will not speculate as to the agency's ultimate source selection decision following its provision of the required, meaningful discussions. When an agency fails to conduct meaningful discussions, we will resolve any doubts concerning prejudice in favor of the protester. *See, e.g., Sungrim Eng'g & Constr. Co., Ltd.*, B-419067.3, Aug. 6, 2021, 2021 CPD ¶ 278 at 6 n.13; *HomeSafe All., LLC*, B-418266.5 *et al.*, Oct. 21, 2020, 2020 CPD ¶ 350 at 19.

RECOMMENDATION

We recommend that the agency reopen the procurement and conduct appropriate discussions with all offerors that participated in phase two of the procurement, request revised proposals, and make a new source selection decision. If an offeror other than Lincoln is selected, the agency should terminate Lincoln's contract for the convenience of the government and award a contract to that offeror, if otherwise proper. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). Academy should submit its claim for costs, detailing and certifying the time expended and costs incurred, to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

⁹ Academy challenges other aspects of ICE's communications. Because we find ICE's conduct of discussions was not fair and reasonable, and this decision includes a recommendation to reopen discussions, we do not address those allegations, such as that the agency also engaged in discussions that were misleading. *See Will Tech., Inc.; Paragon TEC, Inc.*, B-413139.4 *et al.*, June 11, 2018, 2018 CPD ¶ 209 at 13 n.16; *MSI, a Div. of the Bionetics Corp.*, B-243974 *et al.*, Sept. 17, 1991, 91-2 CPD ¶ 254 at 6 n.19.

The protest is sustained.

Edda Emmanuelli Perez
General Counsel