2022 Annual Review
Mergers & Acquisitions Panel

Supplementary Materials

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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-419731; B-419731.2; B-419731.3

Date: July 15, 2021

David S. Cohen, Esq., Laurel A. Hockey, Esq., Daniel Strouse, Esq., John J. O'Brien, Esq., and Rhina Cardena, Esq., Cordatis Law LLP, for the protester.
Damien C. Specht, Esq., R. Locke Bell, Esq., Alissandra D. Young, Esq., and Lyle F. Hedgecock, Esq., Morrison & Foerster LLP, for Millennium Engineering and Integration LLC, the intervenor.
Charles McCarthy, Esq., and Torrie Harris, Esq., General Services Administration, for the agency.
Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where the Small Business Administration and a protester both proffer reasonable, but different, interpretations of SBA's regulations, our Office gives deference to the SBA's reasonable interpretation of its own regulation, and finds no basis to sustain a challenge to the awardee's eligibility for award of a task order set aside for small businesses where the agency's award determination was consistent with the SBA's interpretation.

2. Protest challenging an agency's evaluation of the protester's proposal and award decision is denied where the record reflects that the evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Odyssey Systems Consulting Group, Ltd. (Odyssey), a small business of Wakefield, Massachusetts, protests the issuance of a task order to Millennium Engineering and Integration LLC (Millennium), of Arlington, Virginia, under request for proposals (RFP) No. 47QFPA21R0004, issued by the General Services Administration (GSA) for engineering, program management, and technical support services. Odyssey challenges Millennium's eligibility for award and the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

On December 18, 2020, GSA issued the RFP, through GSA e-Buy,[1] to firms holding contracts under GSA's One Acquisition Solution for Integrated Services (OASIS) Small Business (SB) Pool 5B indefinite-delivery, indefinite-quantity (IDIQ) contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. Contracting Officer's Statement (COS) at 1; Agency Report (AR), Tab 3, RFP at 2. GSA conducted this procurement on behalf of the Space and Missile Systems Center (SMC) at Kirtland Air Force Base (KAFB) in Albuquerque, New Mexico. *Id.*

The solicitation contemplated the issuance of a fixed-price task order for a 12-month base period of performance, four 1-year options, and a 6-month option to extend services under FAR clause 52.217-8, Option to Extend Services. *Id.* at 12. The task order would address SMC/KAFB's need for engineering, program management, and technical support services for the Rocket Systems Launch Program, which serves as the primary provider of launch activities for the space research and development community supporting national security objectives and missile defense programs. *Id.* at 2.

The solicitation provided that award would be made on a best-value tradeoff basis, considering technical capability and cost/price. *Id.* at 87. The technical capability factor consisted of three, equally-weighted elements: corporate experience, staffing plan, and scenario response.[2] *Id.* The RFP advised that the rating for the technical capability factor would be based on the overall evaluation of all elements; *i.e.*, there would not be separate ratings for each element.[3] *Id.* The technical capability factor would be significantly more important than cost/price. *Id.*

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[1] The GSA e-Buy system is an online tool designed to facilitate the submission of proposals for a wide variety of commercial goods and services under GSA schedules and technology contracts. *See* https://www.gsa.gov/tools/supply-procurement-etools/ebuy (last visited July 8, 2021).

[2] The RFP prescribed a 20-page maximum page limit for an offeror's response to the technical capability factor, including 6 pages for responding to the scenario response element. RFP at 81. Proposed resumes and signed letters of intent were excluded from the page limit count. *Id.* at 80-81.

[3] Adjectival ratings from highest to lowest would be exceptional, very good, satisfactory, and unsatisfactory. RFP at 90. As relevant under the solicitation here, a rating of very good was reserved for a proposal that demonstrated a very good understanding of requirements and proposed an approach that exceeded the government's requirements. *Id.* at 91. The solicitation anticipated that such a proposal would contain at least one strength and no deficiencies, and have a low to moderate risk of unsuccessful performance. *Id.* A rating of exceptional was reserved for a proposal that demonstrated an exceptional understanding of requirements and a superior understanding of the

By the solicitation's January 19, 2021 closing date, GSA received five proposals. AR, Tab 7, Award Decision at 3. Thirty-eight days after submitting its proposal, Millennium informed the agency that it had been acquired by QuantiTech LLC, its business structure was being converted to a limited liability company, and its name had changed to Millennium Engineering and Integration LLC.[4] AR, Tab 4, Letter from Millennium to Agency at 1. In its letter, Millennium stated that although it no longer qualified as a small business as a result of the change in control, it was still eligible for task orders set aside for small businesses, absent an order-specific recertification requirement. *Id.* at 1-2 (citing 13 C.F.R. § 121.404(a)(1)(i)(B)). Millennium also averred that although the Small Business Administration (SBA) has established a restriction on the award of a new contract in some cases where a recertification is made while a proposal is pending, it has not extended such a restriction to task order awards. *Id.* at 2 (citing 13 C.F.R. § 121.404(g)(2)(iii)). Additionally, the letter pointed out that Millennium viewed the terms of the OASIS SB Pool 5B IDIQ contract as confirming that the restrictions under section 121.404(g)(2)(iii) do not apply to task orders. *Id.* In this regard, Millennium averred that the OASIS IDIQ only limited eligibility to participate in task order solicitations issued after the change in size status and requires continued performance on all other task orders. *Id.*

Upon receiving Millennium's letter, the contracting officer for this task order sought guidance from within GSA, specifically from the contracting officer of the OASIS IDIQ contract. AR, Tab 11.2, OASIS Name Change Guidance at 2. The task order contracting officer inquired as to whether Millennium would still be eligible for award of the task order. *Id.* at 3. The OASIS IDIQ contracting officer explained that a contractor has 30 days to notify the agency of a change in business size. *Id.* He further explained that once this notice is received, the agency modifies the contract to reflect the size change, at which point, a contractor is unable to participate in subsequent small business requirements. *Id.* In this regard, the OASIS IDIQ contracting officer advised "[b]eing that we have not received an official letter from [Millennium], I would say that if you were to award a contract to [Millennium, it] would be considered a small business." *Id.* Neither the task order contracting officer, nor others within GSA, sought guidance from the SBA prior to making award.

After evaluating proposals, the final ratings were as follows:

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performance work statement (PWS). *Id.* The rating scheme anticipated that such a proposal would include an approach that significantly exceeds the government's requirements; possesses multiple strengths that significantly benefit the government without any weaknesses or deficiencies; and has a low risk of unsuccessful performance. *Id.*

[4] Millennium's prior name was Millennium Engineering and Integration Company. AR, Tab 4, Letter from Millennium to Agency at 1.

	Odyssey	Millennium
Technical Capability	Very Good	Exceptional
Price	$20,630,025	$20,495,804

AR, Tab 7, Award Decision at 30.

The technical evaluation board (TEB) evaluated proposals for significant strengths, strengths, weaknesses, significant weaknesses, and deficiencies. AR, Tab 10.2, TEB Consensus Evaluation at 5-8. Additionally, the TEB provided a narrative justification when assigning each offeror a rating for the technical factor. *Id.* at 6, 8. The TEB did not assess any weaknesses, significant weaknesses, or deficiencies to either Millennium's or Odyssey's proposals. *Id.*

The TEB rated Millennium's proposal under the technical capability factor as exceptional and assessed Millennium's proposal a significant strength under the staffing plan element and a strength under the scenario response element. *Id.* at 6-7. The TEB justified the rating by stating that Millennium's proposal identified an approach that significantly exceeded the government's requirements, demonstrated an exceptional understanding of the requirements, and showed a low risk of unsuccessful performance. *Id.* at 7.

The TEB rated Odyssey's proposal under the technical capability factor as very good and assigned a significant strength to Odyssey's proposal under the staffing plan element. *Id.* at 9. In justifying the rating, the TEB concluded that Odyssey's proposal identified an approach that exceeded the government's requirements, demonstrated a very good understanding of the requirements, and showed a low to moderate risk of unsuccessful performance. *Id.*

The contracting officer, acting as the source selection authority (SSA) conducted a comparative assessment of proposals, including consideration of price and "technical merit," and a review of the TEB's findings. AR, Tab 7, Award Decision at 30, 36. In comparing Odyssey's and Millennium's proposals, the SSA found that Millennium's technical solution was superior to Odyssey's. *Id.* at 34. In this regard, the SSA found the additional strength assessed under the scenario response element distinguished Millennium's proposal from Odyssey's. *Id.* Additionally, the SSA concluded that Millennium's proposal offered a more robust technical approach with more unique benefits, such as recommendations for appropriate actions based on the launch mission requirements--an area anticipated to be a large and critical part of the effort here. *Id.* The SSA also found that Odyssey's higher-priced proposal did not demonstrate any unique, unmatched benefits. *Id.* Accordingly, the SSA concluded that the multiple benefits associated with Millennium's technical proposal, when compared to the single benefit in Odyssey's higher-priced proposal, made Millennium's proposal the best value overall. *Id.* at 35-36.

On April 1, GSA notified Odyssey of its decision to make award to Millennium.[5] After requesting and receiving a debriefing, Odyssey timely protested to our Office.[6]

DISCUSSION

Odyssey contends that Millennium is ineligible for award because it failed to comply with various small business requirements and that multiple aspects of the agency's evaluation of proposals was flawed. While we do not discuss every argument or variation thereof, we have reviewed the protester's arguments and conclude that none provides a basis to sustain the protest. We discuss illustrative examples below.

Small Business Issues

Under the Competition in Contracting Act of 1984 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, as well as solicitations leading to such awards. *See* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. §21.1(a). As to small business matters, the Small Business Act gives SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); *TechAnax, LLC; Rigil Corp.*, B-408685.22, Aug. 16, 2019, 2019 CPD ¶ 294 at 4.

We therefore will not, for example, review challenges to established size standards or a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. 4 C.F.R. § 21.5(b)(1); *Platinum Bus. Servs., LLC*, B-413947, Dec. 23, 2016, 2016 CPD ¶ 377 at 6. Our Office also gives deference to SBA in the interpretation of the regulations it promulgates pursuant to its statutory authority under the Small Business Act. *See, e.g.*, *TechAnax, LLC; Rigil* Corp., *supra*; *SKC, LLC*, B-415151, Nov. 20, 2017, 2017 CPD ¶ 366 at 4. Notwithstanding this deference, we will sustain a protest where SBA's interpretation of its regulation is unreasonable. *See ASRC Fed. Data Network Techs., LLC*, B-418028, Dec. 26, 2019, 2019 CPD ¶ 432 at 10.

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[5] On May 5, the SBA dismissed as untimely the protester's size protest filed in connection with the subject task order. SBA Dismissal of Size Challenge at 1.

[6] This protest is within our jurisdiction to hear protests of task orders valued in excess of $10 million placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B); *Booz Allen Hamilton Eng'g Servs., LLC*, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 6 n.12. While the task order here will be in support of a Department of Defense organization, the authority under which we exercise our task order jurisdiction is determined by the agency that awarded the underlying IDIQ task order contract, which in this instance is GSA. *See Wyle Labs., Inc.*, Dec. 5, 2016, 2016 CPD ¶ 345 at 4.

The SBA regulation applicable here, 13 C.F.R. § 121.404(g), states the basic premise that a concern that represents itself as a small business "at the time it submits its initial offer" is to be considered small for the life of that contract. 13 C.F.R. § 121.404(g). The regulation then goes on to explain that an agency may still count an award made to a concern that grows to be other than small as an award to a small business, except where a recertification of size status is required under in paragraphs (g)(1), (2), and (3) of the section. *Id.* At issue in this protest is the effect of a size recertification under paragraph (g)(2), identified as an exception to the general rule in section 121.404(g), and the relationship between such a recertification and paragraph (g)(4), which contains provisions that apply to instances in which a multiple award contract is set aside for small business. 13 C.F.R. §§ 121.404(g)(2)(iii), (g)(4). We discuss the parties' arguments regarding this regulation below.

In its protest, Odyssey raises various allegations that Millennium should have been found ineligible for award, including an assertion that Millennium should have been found ineligible under SBA regulation 13 C.F.R § 121.404(g)(2)(iii), which provides:

> If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

See 13 C.F.R. § 121.404(g)(2)(iii).

The protester points out that here, Millennium was acquired within 38 days of the date of the offer. Supp. Protest at 12. Thus, according to Odyssey, Millennium should be found ineligible pursuant to section 121.404(g)(2)(iii) because the acquisition occurred within 180 days of the date of the offer, and prior to award; as a result, Odyssey contends Millennium properly could not recertify as small. *Id.*

In response, GSA argues that section 121.404(g)(2)(iii) applies to recertification under the "master contract," *i.e.*, the OASIS IDIQ, not the task order. Memorandum of Law at 8-9. Thus, the agency contends that Millennium remains eligible for award, even though the agency would be unable to count the task order award towards satisfying its small business goals. *Id.* In support of this argument, the agency relies on section 121.404(g)(4), which provides:

> The requirements in paragraphs (g)(1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, . . . then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than small, the agency cannot count any new

> orders issued pursuant to the contract, from that point forward, towards its small business goals.

See 13 C.F.R § 121.404(g)(4).

In light of the issues presented, our Office invited SBA to provide its views on its regulations, pursuant to 4 C.F.R. § 21.3(j). Electronic Protest Docketing System No. 46, June 9, 2021. As stated above, our Office will defer to SBA's reasonable judgments in matters such as this, which fall squarely within its responsibility for administering the Small Business Act. *Research & Dev. Sols., Inc.*, B-410581, B-410581.2, Jan. 14, 2015, 2015 CPD ¶ 38 at 6.

SBA provided its interpretation of the regulation in question, specifically addressing the interplay between sections 121.404(g)(2)(iii) and (g)(4). First, the SBA clarified that it interprets section 121.404(g)(2)(iii) as applicable to pending and subsequent awards, including task orders. SBA Comments at 3. Stated differently, the SBA explains that if a firm recertifies as other than small within 180 days of offer and before award, the firm will generally be ineligible for the award of either a task order or a contract. *Id.* In the SBA's view, reading section 121.404(g)(2)(iii) as applying only to contracts would impart no additional impact beyond the requirements of paragraph (g)(2)(i), which already requires recertification following a merger, sale, or acquisition. *Id.* at 4.

However, although SBA interprets section 121.404(g)(2)(iii) as applying at the task order level, the SBA proffers its interpretation that this section is not controlling for the scenario presented in this protest. In the SBA's view, section 121.404(g)(4) "provides an exception to the general rule" for size recertification between offer and award in circumstances involving a multiple award contract set aside for small businesses. *Id.* The SBA asserts that in accordance with section 121.404(g)(4), the agency can make award to Millennium, but can no longer receive small business credit for pending and future awards against Millennium's OASIS contract for three reasons: (1) because the OASIS contract is a multiple award contract; (2) the OASIS contract is set aside for small businesses; and (3) Millennium recertified as other than small following an acquisition. *Id.* at 5.

Here, section 121.404(g)(2)(iii) establishes three rules regarding recertification and the effect thereof: (1) where an acquisition occurs after an offer, but prior to award, an offeror must recertify; (2) where an acquisition occurs within 180 days of the date of an offer, and the offeror cannot recertify as small, it is ineligible to receive award of the contract; and (3) where the acquisition occurs more than 180 days after an offer, and the offeror cannot recertify as small, award can be made, but it will not count as an award to small business. 13 C.F.R § 121.404(g)(2)(iii). Section 121.404(g)(4) makes clear that the requirements of section (g)(2) apply to multiple award contracts. This section also states that when such contracts are set aside for small businesses, an agency is restricted from counting subsequent task order awards towards its small business prime contracting goals where the resulting contractor is other than small. 13 C.F.R § 121.404(g)(4).

The regulation at issue here is not a model of clarity. On the one hand, the result identified by section 121.404(g)(2)(iii) could apply here just as easily as the result outlined in section 121.404(g)(4). In attempting to reconcile the applicability of these two provisions, we note that the SBA has expressly identified a rule that would result in ineligibility of an entity under section 121.404(g)(2)(iii), but has not expressly revoked that rule under section 121.404(g)(4). On the other hand, while section 121.404(g)(4) is silent on a firm's eligibility for award, its express indication--that new orders issued under a multiple award contract to firms that are other than small cannot count against an agency's small business contracting goals--implies (or seems to assume) that the agency is permitted to issue task orders to firms when the procurement is set aside for small businesses.

In our view, the protester's contention that section 124.404(g)(4) only repeats the rules already set forth in section 121.404(g)(2)(iii) would render much of the language in (g)(4) surplusage. In contrast, we note that section 121.404(g)(2)(iii) shows that the drafters knew how to draw distinctions between a firm's ineligibility and the agency's ability to count contract awards towards small business goals, and yet did not do so in this provision.

In summary, this protest presents a very close question and we are not convinced that SBA's interpretation is the only reasonable interpretation of the regulation at issue. We nevertheless conclude it is appropriate in this case to defer to the SBA's interpretation of its own regulation; an interpretation that permits GSA to make award to Millennium, while prohibiting GSA from counting the award towards its small business goals. In this regard, we accept as reasonable SBA's interpretation that section 121.404(g)(4) overlays additional considerations when the rules under paragraph (g)(2) apply to a multiple award contract set aside for small businesses. Additionally, because the drafters did not draw a distinction between ineligibility and counting in section 121.404(g)(4), ultimately, we have no basis to disagree with SBA's interpretation that this provision, in essence, carves out a different rule for scenarios in which a multiple award contract is set aside for small businesses and an offeror becomes other than small within 180 days of submitting its offer.

In reaching this conclusion, we have fully considered the protester's arguments, and acknowledge that Odyssey's interpretation of the SBA's regulations may also be reasonable. Specifically, the protester points out that the ineligibility rule expressly set forth in section 121.404(g)(2)(iii) is not expressly revoked in section (g)(4), and on this basis, contends that Millennium is ineligible for award despite the language in (g)(4) that suggests that subsequent awards can be made to firms that are no longer small. While the protester's reading of the regulation appears reasonable on its face, we find that the SBA's interpretation is also reasonable. Our Office previously has given deference to SBA's interpretation of its regulations where, as here, both the protester and SBA have offered reasonable interpretations. *SKC, LLC*, *supra* at 5 n.2.

Moreover, we note that the protester failed to properly avail itself of the opportunity to challenge Millennium's size status with SBA. As stated above, after receiving notice of the agency's award decision, the protester filed an untimely size protest with the SBA. *See* SBA Dismissal of Size Challenge at 1. Given SBA's conclusive authority to determine matters of small business size status for federal procurements, and given Odyssey's failure to bring a timely protest to the SBA, we are reluctant to disturb an agency's award decision in this situation.

Thus, under the unique circumstances presented here, we deny the protester's argument that Millennium was ineligible for award.

Evaluation Challenges

The protester contends the agency's evaluation of Odyssey's technical proposal was flawed and unequal. Supp. Protest at 12, 17; Comments and Supp. Protest at 1, 5. In this regard, the protester asserts that it should have received additional strengths and a higher rating for the technical factor. Supp. Protest at 17. The protester also argues that the agency engaged in disparate treatment in its evaluation of Odyssey's and Millennium's proposals under the scenario response element. Comments and Supp. Protest at 5. In addition, the protester alleges that the agency erred in making its best-value tradeoff decision. Supp. Protest at 33.

In a protest challenging an agency's evaluation of task order proposals, our Office will not reevaluate proposals but we will review the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *IPKeys Techs., LLC*, B-416873.2, B-416873.3, 2019 CPD ¶ 138 at 5. The protester's disagreement with the agency's conclusions, without more, is not sufficient to establish that an agency acted unreasonably. *STG, Inc.*, B–405101.3 *et al.*, Jan. 12, 2012, 2012 CPD ¶ 48 at 7. We discuss representative examples below.

Adjectival Ratings

Odyssey first argues that the agency unreasonably assigned the adjectival ratings given to its proposal. The protester contends that its evaluation under each element of the technical factor should have received additional strengths and resulted in a higher adjectival rating for the technical factor than assigned. Supp. Protest at 17, 33.

We find no basis to sustain the protest. As we have consistently noted, the ratings assigned to a proposal, be they numeric or adjectival scores, are merely guides for intelligent decision making. *Advantaged Tech., Inc.*, B-414974, B-414974.2, Oct. 27, 2017, 2017 CPD ¶ 340 at 4. The ratings assigned largely are immaterial, provided that the evaluators and source selection officials have considered the underlying bases for the ratings, including the specific advantages and disadvantages associated with the content of the proposals. *Id.*

Here, the record shows that, in fact, the evaluators and the SSA gave detailed consideration to the substance of Odyssey's proposal and thoroughly documented their findings. *See, e.g.*, AR, Tab 10.2, TEB Consensus Evaluation; Tab 7, Award Decision. For example, the TEB evaluated whether Odyssey's proposal identified any significant strengths, strengths, weaknesses, significant weaknesses, and deficiencies and found that Odyssey's proposal warranted a significant strength only under the staffing plan element. AR, Tab. 10.2, TEB Consensus Evaluation at 7-8. Additionally, the TEB provided a narrative justification for the rating assigned to the technical factor. *Id.* at 8. The SSA then performed a comparative assessment of both proposals and determined Millennium's proposal offered the agency a better value. AR, Tab 7 Award Decision at 34-36. Under these circumstances, the assignment of one adjectival rating versus another largely was immaterial, since the agency's evaluation accurately reflected the merits of the Odyssey's proposal. We therefore have no basis to object to this aspect of the agency's evaluation.[7]

Disparate Treatment

Finally, Odyssey argues that only Millennium's proposal was given a strength under the scenario response element for its in-depth knowledge of available launch options and contract vehicles despite Odyssey's proposal also demonstrating a similar depth of knowledge. Comments and Supp. Protest at 5.

It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Rockwell Elec. Commerce Corp.*, B-286201 *et al.*, Dec. 14, 2000, 2001 CPD ¶ 65 at 5. However, when a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the proposals. *CACI, Inc.-Fed.*, B-419371.3, Feb. 26, 2021, 2021 CPD ¶ 147 at 5. To prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably downgraded its proposal for features that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Battelle Mem'l Inst.*, B-418047.3, B-418047.4, May 18, 2020, 2020 CPD ¶ 176 at 5.

The record shows that in assessing a strength to Millennium's proposal, the agency identified a chart in which Millennium outlined detailed information on launch service options, including cost, schedule, performance benefits, concerns, and risks for each option identified. AR, Tab 13, Millennium Technical Proposal at II-26. In this regard, the agency noted that the comparison between contract options demonstrated critical thinking skills that were advantageous to the government. AR, Tab 7, Award Decision at 13. Odyssey's proposal discussed launch service options, however, it did not include all the information identified in Millennium's chart or provide comparisons about each

[7] Based on our conclusions here, we find no merit to the protester's challenge that the agency's best-value tradeoff determination was flawed because Odyssey's technical capability factor should have been rated as exceptional. *See* Supp. Protest at 33.

option. *See, e.g.*, AR, Tab 9.2, Odyssey Technical Proposal at 27. The agency did not assess a strength to Odyssey's proposal. AR, Tab 7, Award Decision at 14.

We find no basis to conclude that the agency's evaluation was unequal. Although the protester contends that its proposal was nearly identical to the awardee's, this allegation is not borne out by the record. Instead, the record shows that Millennium's response was more detailed than Odyssey's. On these facts, we find the agency's evaluation to be unobjectionable. Accordingly, we deny this basis of protest.[8]

The protest is denied.

Thomas H. Armstrong
General Counsel

[8] Additionally, Odyssey argues that Millennium's technical proposal exceeded the RFP's 20-page limitation for responses to the technical capability factor, including a 6-page limit for responding to the scenario response element. *See* RFP at 80-81. Here, the record shows that Millennium's technical proposal--excluding pages devoted to key personnel resumes and letters of intent, which the RFP indicated would not count against page limits--spanned 20 pages, including 6 pages for the scenario response. AR, Tab 13, Millennium Technical Proposal at II-1 to II-14; II-21 to II-26. Accordingly, Millennium's allegation in this regard is without merit.

GAO@100 U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

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

Comptroller General
of the United States

Decision

Matter of: Morgan Business Consulting, LLC

File: B-418165.6; B-418165.9

Date: April 15, 2021

Todd R. Overman, Esq., Sylvia Yi, Esq., and Roee Talmor, Esq., Bass Berry & Sims, PLC, for the protester.
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Cara R. Little, Esq., and Kelsey Harrer, Esq., Department of the Navy, 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 challenging agency's evaluation of proposals and selection decision is denied where the record shows that the agency's evaluation and selection decision were reasonable and consistent with the terms of the solicitation.

DECISION

Morgan Business Consulting, of Arlington, Virginia, protests the issuance of a task order to Synchron, LLC, of Fairfax Station, Virginia, under request for proposals (RFP) No. N66604-18-R-3012, issued by the Department of the Navy, to procure program, business, and engineering management, as well as integrated logistics support services. The protester challenges various aspects of the agency's evaluation of proposals and selection decision.

We deny the protest.

BACKGROUND

The solicitation, issued on August 22, 2018, as a small business set-aside pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, sought proposals from holders of the agency's SeaPort-e indefinite-delivery, indefinite-quantity (IDIQ) multiple award contract, for comprehensive engineering, program management, and integrated logistics support services for offices within the program executive office

(PEO) referred to PEO Submarines (PEO SUB) and Team Submarine (TEAM SUB).[1] Agency Report (AR), Encl. 2, Conformed Solicitation at 1, 7, 94.[2] The solicitation contemplated the issuance of a cost-plus-fixed-fee, fixed-price, and cost-reimbursable task order, with a 1-year base period and four 1-year option periods.[3] *Id.* at 19, 94, 95. Award would be made on a best-value tradeoff basis considering the following evaluation factors: technical capability, past performance, and cost/price. *Id.* at 113-114. The technical capability factor was comprised of three subfactors: technical capabilities/corporate experience; personnel; and management plan.[4] *Id.* at 113. The first two subfactors were of equal importance and each more important than the third subfactor. *Id.* at 114. The solicitation advised that the technical capability factor was more important than the past performance factor, and the two factors, when combined, were significantly more important than the cost/price factor. *Id.*

The Navy received four timely proposals, including those from Morgan and Synchron. Contracting Officer's Statement (COS) at 8. On September 23, 2019, the agency made award to Morgan. *Id.* at 10. The disappointed offerors filed protests with our Office challenging the award to Morgan. *Id.* Subsequent to the filing of the protests, the agency notified our Office of its intent to take corrective action. *Id.* Based on the agency's proposed corrective action to reevaluate the proposals and make a new selection decision, we dismissed the protest as academic. *Id.*at 9.

The offerors' proposals were subsequently reevaluated by a source selection evaluation board (SSEB) and cost evaluation team (CET) as follows:

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[1] PEO SUB focuses on the design, construction, delivery, and conversion of submarines and advance undersea and anti-submarine systems. https://www.navsea.navy.mil/Who-We-Are/Program-Executive-Offices (last visited Apr. 9, 2021). Team Submarine is a combination of the PEO SUB, the Deputy Commander for the Undersea Warfare, and the Undersea Technology Officer, and unifies once diverse submarine-related activities into a single submarine-centric organization. https://www.secnav.navy.mil/rda/ Pages/PEO_Submarines.aspx (last visited Apr. 9, 2021).

[2] The solicitation was amended once. All citations to the record are to the consecutive numbering in the pages in the Adobe PDF format of the documents provided by the agency.

[3] Although this is a task order competition under a multiple-award IDIQ contract, the agency issued the solicitation as an RFP rather than a request for quotations and refers to the submissions of proposals (and offers) from offerors instead of quotations from vendors. For consistency and ease of reference to the record, we do the same.

[4] The technical capability factor also included seven pass/fail requirements: transition plan; clearance plan; Navy nuclear propulsion information plan local office; local liaison office(s); quality control plan; organizational conflict of interest statement/mitigation plan; and software development plan. RFP at 101-103.

	Morgan	Synchron
Technical Capability[5]	Good/Low Risk	Good/Low Risk
Technical Capabilities/ Corporate Experience	Good	Good
Personnel	Good	Good
Management Plan	Acceptable	Acceptable
Pass/Fail Requirements	Pass	Pass
Past Performance[6]	Substantial Confidence	Substantial Confidence
Total Evaluated Cost	$119,083,198	$106,998,695

AR, Encl. 9, Source Selection Advisory Council (SSAC) Report at 10, 36. An SSAC was convened to review the proposals and the evaluation reports from the SSEB and CET. The SSAC concurred with, and adopted, the findings of the evaluation teams. The SSAC then performed a comparative analysis of the proposals, conducted a tradeoff analysis, and made a recommendation for award to Synchon. The source selection authority (SSA) concurred with the SSAC, and determined that Synchron's proposal provided the best value to the government. AR, Encl. 10, Source Selection Authority Decision Document (SSDD) at 1, 5.

On December 21, 2020, the agency informed Morgan that award had been made to Synchron. AR, Encl. 6, Notice to Unsuccessful Offeror at 2. Subsequently, Morgan requested and received a debriefing, which concluded on December 30. *See generally* AR, Encl. 8, Enhanced Debriefing. This protest followed.[7]

DISCUSSION

Morgan challenges numerous aspects of the evaluation of the firm's and Synchron's proposals. In filing and pursuing this protest, Morgan has made arguments that are in addition to, or variations of, those discussed below, as well as arguments that were

[5] The RFP stated in addition to assigning adjectival ratings under the technical capability factor (outstanding, good, acceptable, marginal, and unacceptable), the agency would also assess technical risk ratings (low, moderate, high, and unacceptable). RFP at 115-116.

[6] The available confidence ratings for the past performance factor are: substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. RFP at 117-118.

[7] The value of the task order here exceeds $25 million. Accordingly, this protest is within our Office's jurisdiction to resolve protests involving task orders issued under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

withdrawn or abandoned during the development of the protest.[8] While we do not address every issue raised, we have considered all of the protester's arguments, to the extent they have not been withdrawn or abandoned, and conclude that none furnishes a basis on which to sustain the protest.[9] We discuss a few representative examples below.

Challenges to the Evaluation of Morgan's Proposal

As the task order competition here was conducted pursuant to FAR subpart 16.5, our review of protests of an agency's evaluation of proposals does not reevaluate proposals or substitute our judgement for that of the agency. Instead, our review examines the record to determine whether the agency's judgement was reasonable, consistent with the solicitation's evaluation scheme, and compliant with applicable procurement law. *SSI*, B-413486, B-413486.2, Nov. 3, 2016, 2016 CPD ¶ 322 at 5. A protester's disagreement with the agency's judgement, without more, is not sufficient to establish unreasonable agency action. *CSRA LLC*, B-417635 *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 9.

[8] For example, Morgan initially challenged the evaluation of its and Synchron's past performance, but did not reply to the agency's arguments in response. Protest at 23-25. Where, as here, an agency responds to allegations in its report but the protester does not rebut the agency's positions in its comments, we dismiss the allegations as abandoned because the protester has not provided us with a basis to find the agency's positions unreasonable. *Johnson Controls Sec. Sols.*, B-418489.3, B-418489.4, Sept. 15, 2020, 2020 CPD ¶ 316 at 4 n.3; *Medical Staffing Sols. USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3. Since Morgan did not reply to the agency's response, we dismiss these arguments as abandoned.

[9] During the development of the protest, the agency requested that our Office dismiss several protest grounds. On one of the issues, GAO agreed and advised the parties that we would dismiss the challenge to the agency's evaluation of Synchron's proposal under the management plan subfactor. Electronic Protest Docketing System No. 21. Morgan argued that Synchron's reliance on its subcontractors for corporate experience, personnel, and overall performance, should have resulted in the firm being assessed a weakness under the management plan subfactor because Synchron's "reliance on its subcontractors suggests Synchron itself lacks corporate capabilities to successfully perform the contract." Protest at 17. For this subfactor, the RFP required offerors to submit a management plan. RFP at 106. Other than speculation, the protester provides no explanation as to why Synchron could not have provided an adequate management plan capable of meeting the requirements of the solicitation. Accordingly, we found the allegation failed to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Potential Impact of the [DELETED] Corporate Transaction

Morgan challenges the agency's assessment of several weaknesses to its proposal under the technical approach factor based on the agency's consideration of the potential impact of a subcontractor's corporate transaction.[10] Protest at 20-23; Comments and Supp. Protest at 19-24. Specifically, the protester argues that the agency's conclusions lack a rational basis, asserting that although the transaction resulted in a change of ownership, the only practical effect was a name change to the subcontractor, with no impact on performance. Protest at 21; Comments and Supp. Protest at 20-22.

The Navy explains that during the evaluation it became aware that one of Morgan's subcontractors, [DELETED], sold its [DELETED]--the entity that would be performing under this task order--to [DELETED], Inc., a separate corporate entity. Memorandum of Law (MOL) at 18-30. The agency contends that, at the time of the evaluation, the Navy could not conclude that the sale would result only in a name change to the performing entity with no impact on the contractor's performance. *Id.* at 23, 27-30.

As a general matter, our decisions regarding corporate restructuring after the submission of proposals have involved the question of whether an offeror's proposal relies on resources that may no longer be available after the corporate restructuring. *See EA Eng'g, Sci. and Tech., Inc.*, B-417361, B-417361.2, June 13, 2019, 2019 CPD ¶ 218 at 10; *Honeywell Tech. Solutions, Inc.*, B-413317, B-413317.2, Oct. 5, 2016, 2017 CPD ¶ 2 at 11. Our analysis in these cases is fact-specific, hinging on whether reliance on any such resources are material to the performance of the contract. *EA Eng'g Sci. and Tech., Inc.*, *supra*.

When an agency becomes aware of an impending corporate transaction prior to award--either through information in an offeror's proposal or through other information resources--and such transaction is imminent and essentially certain (or already consummated), an agency should analyze the effect on proposals of the corporate restructuring at issue. *Lockheed Martin Integrated Sys., Inc.--Recon.*, B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258 at 7 (*citing National Aeronautics & Space Admin.--Recon.*, B-408112.3, May 14, 2014, 2014 CPD ¶ 155 at 3). Key in our analysis on these matters is both whether an agency is aware of a particular transaction, as well as its imminence and certainty. *Id.* 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.*, *VSE Corp.*, B-417908, B-417908.2, Nov. 27, 2019, 2019 CPD ¶ 413 at 8; *Target Media Mid Atlantic, Inc.*, B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 7; *Veterans Eval. Sys., Inc., et al.*,

[10] The agency assessed four weakness to Morgan's proposal under the technical capability factor. Specifically, the agency assessed one weakness under the technical capabilities/corporate experience subfactor; two under the personnel subfactor; and one under the management approach subfactor. AR, Encl. 13, SSEB Report at 41, 46-48, 49-50.

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.

Here, the record shows after submission of the proposal and during the evaluation, the source selection team learned via a press release that [DELETED] completed the sale of its [DELETED] to [DELETED] on August 1, 2019. AR, Encl. 13, SSEB Report at 35 (*citing* [DELETED]). The record also shows that between the date when proposals were due (October 15, 2018) and the date when award was made (December 18, 2020), Morgan offered no information about the corporate transaction, or any explanation of the potential impact that the transaction might have on its proposal. *Id.* at 35; COS at 9. The agency explains that initially it evaluated Morgan's proposal and assessed strengths based on the information provided in the proposal, inclusive of [DELETED] efforts as proposed. MOL at 20; AR, Encl. 13, SSEB Report at 36-49.

The agency, however, ultimately concluded that it could not ignore the possibility that if Morgan were to receive award, the effort would not be executed as proposed in light of the fact that [DELETED] was no longer part of [DELETED]. MOL at 20; AR, Encl. 13, SSEB Report at 35-36. Accordingly, the agency assigned weaknesses to Morgan's proposal based on the potential impact to Morgan's performance in light of the corporate restructuring of [DELETED] and the sale of [DELETED]'s [DELETED].

The agency further explains that without information from Morgan, the SSEB was left to consider, among other things, "whether the [DELETED] resources proposed [would] be impacted by this sale and how," and whether [DELETED], [DELETED], or a different team member, would be performing the work at issue. AR, Encl. 13, SSEB Report at 35. These concerns resulted in the assessment of five weaknesses to Morgan's proposal under the technical capability factor. *Id.* at 41-42, 45-49. Despite these weaknesses, the SSEB concluded that (1) the risks associated with the weaknesses were low and could be overcome; and (2) those weaknesses neither impact the strengths identified, nor the adjectival ratings assigned. *Id.* at 36-37.

In its protest, Morgan points to another press release and a notification provided by [DELETED] to the Navy for an unrelated procurement, in support of its argument that the agency was "well aware [that] the transaction did not impact either the key management or staff." Protest at 22. In its comments, Morgan argues that because of these documents the agency was aware that the corporate transaction would create a new business unit within [DELETED]. Morgan also argues that the documents advised the Navy that the [DELETED] subsidiary company ([DELETED]) that held the assets required to perform under the task order would become a wholly-owned subsidiary of [DELETED].. Comments and Supp. Protest at 20-21 (*citing* AR, Encl. 14, CET Report at 49). We disagree.

Our review of the press release, issued by [DELETED] in May 2019, shows only that [DELETED] announced that it had entered into an agreement with [DELETED] to acquire [DELETED]'s [DELETED]. In addition, the release stated in general terms that [DELETED] would retain its management team and staff. Protest at 20 n.13 (*citing*

[DELETED]). Moreover, the notification to which Morgan refers was a July 2019 letter from [DELETED] to an unrelated contracting officer--concerning a different procurement altogether. *Id.*, attach. 17, [DELETED] July 2019 Letter. Although the letter from [DELETED] made assurances (to that contracting officer) that the corporate transaction would have no impact on [DELETED]'S proposed technical, management, staffing, or pricing approach for that procurement (Sol. No. N00164-18-R-3004), neither Morgan nor [DELETED] provided similar assurances to the contracting officer for the procurement at issue here. To the extent Morgan contends that the contracting officer here should have imputed knowledge from [DELETED]'s notification to a different contracting officer on a different procurement, we have often observed, each procurement stands alone. *See, e.g.*, *OmniMax,* B-419445, Mar. 4, 2021, 2021 CPD ¶ 114 at 4. On this record, we do not find the agency's consideration of the potential impacts to Morgan's performance, or the assessment of weaknesses, to be unreasonable. Accordingly, this protest ground is denied.

Evaluation of Morgan's Escalation and Indirect Rates

Morgan also argues that the agency arbitrarily and improperly upwardly adjusted its proposed escalation and indirect rates despite the data submitted by the firm supporting its approach. Protest at 12-15; Comments and Supp. Protest at 24-33. The agency explains that it did not find the data convincing and thus reasonably adjusted Morgan's proposed escalation and indirect rates. MOL at 45-57; *see generally* AR, Encl. 15, CET Chair Decl.

When an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, the offeror's or vendor's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.404-1(d), 16.505(b)(3); *AECOM Mgmt. Servs., Inc.*, B-418467 *et al.*, May 15, 2020, 2020 CPD ¶ 172 at 4. Consequently, the agency must perform a cost realism analysis to determine the extent to which the offeror's or vendor's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1); *see Noridian Admin. Servs., LLC*, B-401068.13, Jan. 16, 2013, 2013 CPD ¶ 52 at 5. An agency is not required to conduct an in-depth cost analysis, or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. *See Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8; *see* FAR 15.404-1(c). Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonable and not arbitrary. *See AM Pierce & Assocs., Inc.*, B-413128, B-413128.2, Aug. 22, 2016, 2016 CPD ¶ 270 at 6. A protester's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest. *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 15-16.

The solicitation advised that for all cost-type contract line item numbers (CLINs), the agency would perform a cost realism analysis of each offeror's proposed costs and that "the burden of cost credibility" rested with the offer. RFP at 107. As such, the solicitation instructed offerors to submit substantiating cost data for each element of its

cost (*e.g.*, direct labor, fringe rate, overhead rate, general and administrative rate, subcontract costs). *Id.* Offerors were warned that providing insufficient information to substantiate the realism of any proposed cost could result in a cost adjustment. *Id.*

With regard to proposed escalation rates, where the CET found that the rate was not adequately substantiated, the agency compared the rate to the current IHS Global Insight Rate (GIR) for professional, scientific, and technical services, which the agency used as a comparative baseline. AR, Encl. 14, CET Report at 7-8. Where a proposed rate was higher than the GIR, the agency used the higher rate. *Id.* at 8. Where the rate was lower than the GIR, the CET reviewed the rate to assess whether it was sufficiently supported; if so, the rate was accepted. *Id.* If the CET concluded the rate was not sufficiently supported, the higher GIR rate was used. *Id.* The CET considered the following sources, in order of precedence, to provide sufficient support for a proposed rate: a Defense Contract Management Agency (DCMA) forward pricing rate agreement (FPRA); a DCMA forward pricing rate recommendation (FPRR); a Defense Contract Audit Agency (DCAA) audit; or historical actual rate information. *Id.*

With regard to indirect rates, the solicitation instructed offerors to identify the basis for the proposed rates (*e.g.*, FPRA and date of agreement, bidding rates and the date of submission; or, actual rates used and the effective date, billing rates, and the date of approval, etc.). RFP at 109. For these rates, the CET again made upward adjustments to rates the CET concluded were not sufficiently supported. AR, Encl. 14, CET Report at 6.

The CET considered the following sources, in order of precedence, to provide sufficient support for a proposed indirect rate: DCMA FPRA; DCMA FPRR; DCAA audit; or actual historical rate information provided by the offeror. *Id.* The CET did not consider provisional billing rates (PBRs) alone to provide sufficient support for indirect rates because, according to the DCAA, PBRs were for billing purposes only. *Id.* As relevant here, where no FPRA, FPRR, or DCAA audit data was available, the CET analyzed the rate using a three year historical average for the rate, and compared the average to the proposed rate. *Id.* at 7. Where the proposed indirect rate was below the three-year average, and where the offeror did not provide sufficient support for the lower proposed rate, the CET adjusted the rate to the three-year average. *Id.*

Based on our review of the agency's analyses, we find first that the agency reasonably concluded that Morgan did not sufficiently support its proposed escalation rate of [DELETED]%. *Id.* at 57. While the protester's proposal cited to the [DELETED]% escalation rate calculated by the Bureau of Labor Statistics's Employment Cost Index for Private Industry Workers, Morgan proposed an escalation rate of [DELETED]%. AR, Encl. 11g, Morgan's Cost Proposal at 8. Morgan attempted to justify its lower proposed rate by predicting that more senior personnel will leave the program, and be replaced by more junior resources, thus leading to a lower rate. *Id.* Morgan further stated that its proposed escalation rate was justified because of the firm's "real-world experience" in [DELETED] high-cost of living markets ([DELETED]). *Id*. However, nothing in Morgan's proposal provided any support or explanation about how turnover, the firm's efforts to

reduce its indirect rates, or its "real world experience" with lower escalation rates in other offices, supported the lower rate proposed here. *Id.* at 8-9. Although Morgan may disagree with the agency's conclusions, the record shows that the agency reasonably concluded that the information provided by Morgan in its proposal did not sufficiently support its escalation rate.

Similarly, the record shows that the CET reviewed the information provided by Morgan to substantiate the firm's indirect rates and found that those rates as well were not sufficiently supported. AR, Encl. 14, CET Report at 58-60. Morgan's proposal stated that it did not have a FPRA, FPRR, or DCAA audit of its indirect rates. AR, Encl. 11g, Morgan's Cost Proposal at 9. Instead, Morgan provided three years (2015-2017) of historical indirect data, its provisional indirect rates for 2018, and its proposed indirect rates for 2019. *Id.* Morgan stated that, for 2018 and 2019, it had recalculated its expected indirect rates and had identified nine factors that it concluded supported the change in indirect rates. *Id.* at 9-12. The proposal also included a spreadsheet that purported to support its indirect rates. *Id.* at 9 (*citing* AR, Encl. 11l, Morgan Indirect Burden Supporting Documentation).

The CET did not, however, find Morgan's proposed rates--which were lower than its historical rates--to be sufficiently supported, and concluded that the proposed indirect costs were unrealistic. AR, Encl. 14, CET Report at 58-59. The agency provided a declaration from the chair of the CET, explaining that the CET found the supporting information to be "vague, inconsistent, and not traceable for the purposes of cost realism." AR, Encl. 15, CET Chair Decl. at 5. Specifically, the agency explains that Morgan's supporting cost documentation only showed "higher level summary calculations and did not provide any level of granularity to show the calculations or factors that led to the changes in the cost elements and associated increases or decreases in pools and/or base amounts." *Id.*

Morgan urges our Office to reject the explanations provided by the chair of the CET in answer to the protest as *post hoc* rationalization not supported by the contemporaneous evaluation record. Comments and Supp. Protest at 28. Our Office generally accords lesser weight to *post-hoc* arguments or analyses made in response to protest allegations because we are concerned that new judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In contrast, we will consider agencies' explanations that 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. *Native Energy & Tech., Inc.*, B-416783 *et al.*, Dec. 13, 2018, 2019 CPD ¶ 89 at 4. Here, we find the agency's explanation to be both credible, and consistent with the contemporaneous record. As a result, we find unobjectionable the CET's decision not to accept Morgan's lower proposed indirect rates, and to upwardly adjust the protester's

proposed rates based on a comparison of the proposed rates to average historical rates.[11] Accordingly, this protest ground is denied.

Synchron's Compliance with the Limitation on Subcontracting Clause

Morgan argues that Synchron's proposal should have been found ineligible for award for proposing to perform less than 50% of the proposed effort and that Synchron's proposal, on its face, violated FAR clause 52.219-14, Limitation on Subcontracting. Comments and Supp. Protest at 2-3; Comments at 2-8. The Navy contends that Morgan's allegation regarding Synchron's compliance with the limitation on subcontracting clause is an issue of responsibility and contract administration not generally reviewed by GAO. Supp. MOL at 3-9. The agency also argues that Synchron's proposal, on its face, led it to the conclusion that the firm would comply with the subcontracting limitations set forth in FAR clause 52.219-14. *Id.*

As a general matter, the Navy is correct in its assertion that an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. *Hughes Coleman, JV*, B-417787.5, July 29, 2020, 2020 CPD ¶ 257 at 4-5 n.4; *Spectrum Sec. Servs., Inc.*, B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. A proposal need not affirmatively demonstrate compliance with the limitation on subcontracting clause. *See Dorado Servs., Inc.*, B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. Rather, such compliance is presumed unless specifically negated by other language in the proposal. *See Express Med. Transporters, Inc.*, B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability, which GAO will review. *TYBRIN Corp.*, B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Here, the solicitation incorporated FAR clause 52.219-14, RFP at 80, and Synchron's proposal affirmatively stated that "Synchron will execute over 50% of the labor cost." AR, Encl. 12b, Synchron Tech. Capability Proposal at 115. Morgan contends that Synchron did not intend to comply with the limitation on subcontracting, based on Morgan's alternative computation of the percentage of costs allocated to the prime and the subcontractors, which, by its own admission "requires some arithmetic." Comments and Supp. Protest at 3-4. Specifically, Morgan provides a computation that combines figures from Synchron's cost proposal to calculate the total proposed subcontractor cost and fee, and compares the resulting sum with the price for a fixed-priced CLIN, proposed to be performed by a subcontractor. *Id.*

The agency explains that Morgan's computational methodology does not demonstrate that it was "clear on the face" of the proposal that Synchron did not intend on complying with the subcontracting limitations. Specifically, the agency notes that Morgan cannot

[11] The historical rates were derived by averaging Morgan's actual indirect rates--obtained from DCAA--for 2016 through 2018. AR, Encl. 14, CET Report at 59-60.

show that the fixed-price CLIN only included personnel costs, or that the sum of subcontractor prices calculated by Morgan did not include any other labor costs that might be incurred by Synchron for that CLIN. Supp. MOL at 5-6. We agree. Because Morgan has not shown that Synchron's proposal takes exception to the subcontracting limitation, or clearly demonstrated that Synchron would not comply with the subcontracting limitation, the protest ground is denied. *D&G Support Servs.*, LLC, B-419245, B-419245.3, Jan. 6, 2021, 2021 CPD ¶ 15 at 11-12.

Disparate Treatment

Morgan also alleges that the agency's evaluation of the technical and cost proposals here were unequal in numerous respects. Comments and Supp. Protest at 4-17; Comments at 8-18.

In conducting procurements, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing offerors. *22nd Century Techs., Inc.*, B-416669.5, B-416669.6, Aug. 5, 2019, 2019 CPD ¶ 285 at 7; *Arc Aspicio, LLC et al.*, B-412612 *et al.*, Apr. 11, 2016, 2016 CPD ¶ 117 at 13. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their offers evenhandedly against the solicitation's requirements and evaluation criteria. *See Sumaria Sys., Inc.; COLSA Corp.*, B-412961, B-412961.2, July 21, 2016, 2016 CPD ¶ 188 at 10. Where 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. *Camber Corp.*, B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 8.

Again, we have fully considered all of the protester's arguments and concluded that none provide a basis to sustain the protest. We discuss a few representative examples below.

Strength for Inclusion of Lean Six Sigma and PMP Certified Personnel

Morgan argues that it was unreasonable and unequal for the agency to assess a strength to Synchron, under the technical capabilities/corporate experience subfactor, for including Lean Six Sigma processes and program management professionals (PMP), but not to assess a similar strength to Morgan's proposal because the protester proposed essentially identical features in its proposal.[12] Comments and Supp. Protest at 4-6; Comments at 8-10. The Navy explains that Synchron thoroughly addressed the solicitation's requirement to describe the offeror's approach to maintaining schedule and quality of deliverables while Morgan did not. Supp. MOL at 10-14. The agency states that because Synchron's approach placed an emphasis on the roles and qualifications of its management personnel in meeting the solicitation's requirements, the agency

[12] The agency explains that Lean Six Sigma is a management approach used for quality control and continuous process improvement through a series of steps. Supp. AR, attach. A, SSEB Member Decl. at 1.

concluded it was appropriate to mention those qualifications in assessing a strength to the proposal. *Id.* at 12-13. According to the Navy, the offerors proposed different approaches under this subfactor, and to the extent that Morgan's proposal offered to use an approach that included any use of Lean Six Sigma tools or PMP-certified personnel, it was in connection with Morgan's quality control plan (QCP), which was submitted and evaluated under the pass/fail requirements of the technical capability factor. *Id.* at 13-14.

The technical capability factor was comprised of seven pass/fail requirements and three subfactors. RFP at 101-106. Relevant here, one of the pass/fail requirements was the QCP, which was evaluated to assess the adequacy of the offeror's ability to perform the requirements of the statement of work. *Id.* at 119. Under this requirement, offerors were instructed to submit a QCP that described their approaches for: periodically monitoring technical quality, cost performance, contract management effectiveness, promoting customer feedback and responsiveness, and raising and resolving issues to the appropriate management level. *Id.* at 102.

Also relevant here, the agency explained that under the technical capabilities/corporate experience subfactor within the technical capability factor, it planned to "evaluate the [c]ontractor's experience [with] maintaining schedules and providing quality deliverables with minimal [g]overnment oversight or rework of deliverables with continuous integration and interaction with internal and external organizations and activities." *Id.* at 119. To address this area, offerors were instructed to "describe their approach and demonstrated experience [with] maintaining schedule and quality of deliverables with minimal Government oversight or rework of deliverables." *Id.* at 103.

Both offerors submitted QCPs that received a rating of "pass." AR, Encl. 13, SSEB Report at 3. Under the technical capabilities/corporate experience subfactor, the SSEB assessed a strength to Synchron's proposal, finding that "Synchron's proposal demonstrates a dedicated approach to process improvement through a thorough [QCP] executed by personnel with Lean Six Sigma and [PMP] certifications. (Proposal Section 3.6, pg. 67-68; Section 4.3, pg. 72-100)." *Id.* at 93. The SSEB also found that "Synchron's approach includes utilization of certified PMPs [and Lean Six Sigma] Green Belts and Black Belts, leveraging Lean Six Sigma tools to streamline processes and achieve increased workforce productivity [which] will reduce cycle time for the introduction of new and improved procedures, and enhance product quality." *Id.*

The record shows that Synchron's proposal offered a detailed approach to maintaining schedule and quality of deliverables, providing details about its QCP and the roles of the key personnel such as the program manager (PM), deputy PM, and task leads. AR, Encl. 12b, Synchron Tech. Capability Proposal at 74-75 (section 3.6). With regard to the PM and deputy PM, Synchron's proposal specifically stated that both were PMP certified. *Id.* The proposal also stated that Synchron has "invested in highly qualified personnel in management positions across the Team," however, the proposal did not provide any additional information about task leads in this section or specifically state that the company would use "Lean Six Sigma" processes in its approach. *Id.* at 74.

Rather, the resumes submitted under the personnel subfactor reflected that three of the identified task leads had Lean Six Sigma certifications. *Id.* at 87, 93, 103 (section 4.5).

In contrast, Morgan's proposal did not offer a detailed approach to maintaining schedule and quality of deliverables in the section of the proposal addressing the technical capabilities/corporate experience subfactor. Morgan's proposal, however, stated in its QCP that "Team [Morgan] utilizes certified PMP's, Green Belts, and Black Belts using Lean Six Sigma tools to achieve increased workforce productivity and enhance product quality." AR, Encl. 11b, Morgan Tech. Capability Proposal at 18. The record shows that the agency considered this representation as support for the agency's conclusion that Morgan's QCP should be rated as "pass" under the pass/fail requirement. AR, Encl. 13, SSEB Report at 60 (noting that "Tables 2-9 & 2-10 detail the interaction of Team [Morgan] with the Government personnel. Team [Morgan] utilizes certified PMP's, Green Belts, and Black Belts using Lean Six Sigma tools to achieve increased workforce productivity and enhance product quality.").

Based on our review of the record, we do not find the agency's evaluation here to be unequal or unreasonable. We see no support for the agency's conclusion that Synchron offered to use Lean Six Sigma tools to perform this contract. We nonetheless do not find unreasonable the conclusion that Synchron "demonstrates a dedicated approach to process improvement through a thorough [QCP] executed by personnel with Lean Six Sigma and [PMP] certifications." AR, Encl. 13, SSEB Report at 93-94.

We also do not find the agency's evaluation here unequal. In this regard, the agency was not required to search for information about Morgan's approach to maintaining schedule and quality of deliverables that the solicitation instructed offerors to address under the technical capabilities/corporate experience subfactor in other areas of its proposal; *i.e.*, the section of the protester's proposal addressing its QCP. *See Dewberry Crawford Grp.; Partner 4 Recovery*, B-415940.10 *et al.*, July 2, 2018, 2018 CPD ¶ 297 at 13. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. *Mike Kesler Enters.*, B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3. An offeror runs the risk that a procuring agency will evaluate its proposal unfavorably where it fails to do so. *International Med. Corps*, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. Accordingly, this protest ground is denied.

Waiver of Certain Key Personnel Requirements

Morgan also argues that the Navy waived the qualification requirements for key personnel positions solely to cure unacceptable deficiencies in Synchron's proposal. Comments and Supp. Protest at 7-9; Comments at 20-21. Morgan further contends that the agency's contemporaneous analysis of the impact of the waiver was flawed because it was limited to the potential cost impacts and did not consider the technical impact and prejudice to other offerors. *Id.*

The Navy explains that during evaluations the evaluators concluded that certain qualification requirements associated with four key personnel positions were not necessary to satisfy the agency's actual needs. The agency also states that it considered the utility of the increased requirements and specifically considered the possibility of prejudice to any offeror by application of the waiver. The agency asserts that its decision was not tailored to benefit any one offeror, and that Morgan cannot demonstrate how it was prejudiced. Supp. MOL at 16-21 (*citing* AR, Encl. 10, ref (d), Key Personnel Waiver Sensitivity Analysis at 3).

Our Office has explained that an agency may waive or relax a material solicitation requirement when the award will meet the agency's actual needs without prejudice to the other offerors. *Booz Allen Hamilton, Inc.*, B-417418 *et al.*, July 3, 2019, 2019 CPD ¶ 246 at 6. Unfair competitive prejudice from a waiver or relaxation of the terms and conditions of a solicitation for one offeror exists where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. *22nd Century Techs., Inc.--Recon*., B-417478.5, Apr. 28, 2020, 2020 CPD ¶ 153 at 4.

The RFP identified 15 key personnel positions and specified required and desired qualifications for each position. *See generally* RFP, attach 3, Key Personnel List. During the evaluation, the SSEB identified four key personnel positions with associated qualification requirements that exceeded what the evaluators believed were necessary to meet the agency's needs.[13] AR, Encl. 10, ref (d), Key Personnel Waiver Sensitivity Analysis at 3. The SSAC and contracting officer concurred with the waiver. *Id.* at 4. The SSA, however, requested that the contracting officer perform a sensitivity analysis to ensure that the source selection decision took into account the potential impacts of the waiver of these requirements on the offerors. AR, Encl. 10, SSDD at 4.

The contracting officer completed the sensitivity analysis, which included the SSEB's and SSAC's assessment of the potential impacts of waiver on the Navy's technical requirements. The SSA considered this analysis and found that the waived key personnel requirements were not necessary to meet the agency's needs. *Id.* The SSA also found that the technical evaluation ratings for offerors were not negatively impacted by the waiver (*i.e.*, no offeror would have received a higher rating if the waiver was not executed). *Id.* As a result, the SSA found that the waiver did not meaningfully affect his tradeoff decision. *Id.*

Relevant here, the sensitivity analysis also included an analysis of any potential evaluated cost/price impact on the offerors. AR, Encl. 10, ref (d), Key Personnel Waiver Sensitivity Analysis at 8-9. The cost/price sensitivity analysis showed that Synchron's total evaluated cost/price would remain lower than Morgan's even if Morgan were

[13] The waivers were for the degree field (technical or business) requirement for three analyst positions; and the degree field and length of experience (10 years or more) requirement for another analyst position. AR, Encl. 10, ref (d), Key Personnel Waiver Sensitivity Analysis at 6-7.

credited for lower labor rates to account for the waiver. *Id.* Based upon his independent review, the SSA concluded that Synchron's proposal still offered a better overall value than Morgan's because Synchron remained technically superior with a lower total evaluated cost/price. AR, Encl. 10, SSDD at 4-5.

There is nothing in the record showing that the agency's waiver of the requirements was disparate or it was "solely to cure the unacceptable deficiencies in Synchron's proposal." Comments and Supp. Protest at 7. Rather, the record shows that, during the evaluation, the Navy found that several requirements for four key personnel positions were overstated and unnecessary to meet the agency's needs. The fact that the agency did not waive requirements for other key personnel positions does not demonstrate that the agency's actions here are unreasonable. As we have stated, the decision to waive a solicitation requirement, even when permissible, is a discretionary action; an agency is not required to waive a solicitation requirement and offerors have no entitlement to a waiver. *Inalab Consulting, Inc.*, B-418950, Oct. 9, 2020, 2020 CPD ¶ 327 at 6.

Similarly, Morgan's assertion that the agency's waiver analysis was flawed because it was limited to the potential cost impacts and did not consider the technical impact and prejudice to other offerors is not supported by the record. The record shows that the SSA specifically considered whether any offeror was negatively impacted by the waiver--to include whether any offeror would have received a higher (or lower) technical rating as a result of the waiver.[14] AR, Encl. 10, SSDD at 4 (SSA concluding that the technical ratings for the offerors were not negatively impacted by the waiver because no offeror would have received a higher rating without the waiver).

The agency's analysis also took into consideration two different cost scenarios as a result of the waiver. The first scenario was based on the changes to the total evaluated cost that hypothetically reduced the cost/price of the four key personnel positions that were affected by the waiver to $0 for all offerors other than Synchron. AR, Encl. 10, ref (d), Key Personnel Waiver Sensitivity Analysis at 2-3, 8. The second scenario was based on the potentially lower total evaluated cost if the cost of the proposed personnel for the four positions was reduced to a lower labor category. *Id.* at 3, 9. This showed that under both scenarios, Synchron's total evaluated cost/price was still lower than that

[14] Morgan also argues that it was prejudiced by the agency's waiver of these key personnel requirements because if provided an opportunity to submit a revised proposal, Morgan would have: (1) offered alternate key personnel that exceeded the requirements; and (2) confirmed the availability of key personnel as proposed and would not have been negatively impacted by its subcontractor's corporate transaction. Comments and Supp. Protest at 13-14; Comments at 8-9. We find these arguments to be untimely, because Morgan was made aware that the agency waived these requirements at the time of the debriefing, but did not raise these arguments until it filed its comments on the agency report, approximately 40 days after its initial protest was filed. 4 C.F.R. § 21.2(a)(2); *InterImage, Inc.,* B-415716.29, Aug. 9, 2019, 2019 CPD ¶ 399 at 8.

of Morgan's. *Id.* at 8, 9. On this record, we do not find the agency's actions reflect disparate treatment or are unreasonable. Accordingly, this protest ground is denied.

Evaluation of Escalation Rates

Morgan also argues that the agency unequally evaluated the offerors' labor escalation rates by applying two years' of escalation to Morgan's proposed direct labor rates but only one year of escalation to Synchron's rates. Comments and Supp. Protest at 11-17; Comments at 16-18. The Navy explains that because both offerors provided different information in their proposals, the agency fairly evaluated the proposed escalation rates, consistent with the solicitation and established cost methodologies, taking into consideration information provided by each offeror. Supp. MOL at 25-30.

The RFP instructed offerors to provide detailed information to allow the contracting officer to assess the cost realism and reasonableness of the proposed costs. RFP at 108. Relevant here, offerors were to provide details about the basis of labor rates proposed, labor escalation factors applied, and burden factors. *Id.*

The CET found that Morgan's proposed escalation rate of [DELETED]% was not adequately supported, and thus upwardly adjusted it to the GIR rate of 3.60%. AR, Encl. 14, CET Report at 7-8, 57. Additionally, because Morgan's fiscal year runs from [DELETED] to [DELETED] and Morgan annualized its salary in [DELETED] of each year, the CET had to make an adjustment to account for the period from May 30, 2019 (the original planned award date) to July 1, 2020 (the revised planned award date). As a result, the CET escalated Morgan's labor rate by two years, to account for wage increases from 2018 to 2019, and from 2019 to 2020.[15] *Id.* at 56-57.

Similarly, Synchron proposed an escalation rate of [DELETED]%, which the CET also found was not sufficiently supported. *Id.* at 188. Accordingly, the CET upwardly adjusted Synchron's labor rate to the GIR rate of 3.60%. *Id.* The CET prorated the base year labor rates to account for the period from May 30, 2019 to July 1, 2020, by multiplying 3.60% by 1.09 years to arrive at 3.93%. *Id.*

Here, the record shows that Morgan's proposal clearly stated that "[Morgan's] fiscal year runs from [DELETED] through [DELETED]." AR, Encl. 11g, Morgan Cost Proposal at 4. As such, we find the CET reasonably concluded that Morgan's proposed direct labor rates would have increased twice from when they were proposed in October 2018, once on January 1, 2019, and once on January 1, 2020. AR, Encl. 14, CET Report at 55-57.

Synchron's proposal, however, did not make any representations about its fiscal year or provide specific information about when labor rate increases would be applicable. Supp. MOL at 28. As such, we do not find objectionable the CET's assumption that

[15] The proposals were submitted in 2018 and Morgan provided direct labor rates from [DELETED] 2018. AR, Encl. 14, CET Report at 55; *see generally* AR, Encl. 11m, Morgan Cost Proposal Payroll Journals.

Synchron's labor rates would increase within a year from proposal submission to reflect the rates the employees would most likely be paid when the contract period began. *Id.*; AR, Encl. 14, CET Report at 188. Our review of the record reflects that the differences in the agency's evaluation were the result of differences in the offerors' proposals, not the result of disparate treatment. Accordingly, Morgan's protest ground is denied. *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 10.

Selection Decision

Finally, Morgan argues that the agency's selection decision was flawed because of the underlying evaluation errors. Protest at 25-26; Comments and Supp. Protest at 40-41. Given our conclusion that the evaluation was reasonable, equal, and supported by the record, there is no basis to object to the agency's award decision on the grounds asserted by Morgan. As discussed above, the record does not support the protester's challenges to the agency's evaluation. Accordingly, given that the agency's selection decision had a reasonable basis and was properly documented, and given that Morgan has not prevailed on any of its substantive challenges, we see no basis to disturb the selection decision here.

The protest is denied.

Thomas H. Armstrong
General Counsel

GAO@100 U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

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

Comptroller General
of the United States

Decision

Matter of: Vertex Aerospace, LLC

File: B-420073; B-420073.2

Date: November 23, 2021

J. Alex Ward, Esq., W. Jay DeVecchio, Esq., James A. Tucker, Esq., and Lyle F. Hedgecock, Esq., Morrison & Foerster LLP, for the protester.
Scott M. McCaleb, Esq., Jon W. Burd, Esq., Sarah Hansen, Esq., Nicholas L. Perry, Esq., and Teresita Regelbrugge, Esq., Wiley Rein LLP, for DynCorp International LLC, the intervenor.
Colonel Frank Yoon, Captain Jheremy K. Perkins, Michael J. Farr, Esq., Lieutenant Colonel Brian D. Teter, Lieutenant Colonel Shawn C. Tabor, and Ryan C. Springer, Esq., Department of the Air Force, for the agency.
Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the awardee's proposal is sustained where the record is insufficiently documented to demonstrate that the agency meaningfully and reasonably considered whether a corporate restructuring of the awardee's business resulting from a stock purchase would have an effect on the awardee's ability to perform the task order.

DECISION

Vertex Aerospace, LLC, of Madison, Mississippi, protests the award of a task order to DynCorp International LLC, of Fort Worth, Texas, by the Department of the Air Force under solicitation No. FA3002-21-R-0001 for comprehensive flight operations support (FOS) at Vance Air Force Base (AFB), Oklahoma. The protester contends that the agency's evaluation of proposals was unreasonable and that the agency failed to adequately consider the effect of a recent corporate transaction involving DynCorp.

We sustain the protest.

BACKGROUND

The Air Force established the Aircraft Maintenance Enterprise Solutions (ACES) multiple award (MAC), indefinite-delivery, indefinite-quantity (IDIQ) contract for aircraft

maintenance services across the United States Air Force on September 1, 2020. Contracting Officer Statement (COS) at 2. The ACES MAC IDIQ contract was awarded to eight contractors, including DynCorp, Vertex, and Amentum Services, Inc. *Id.* Only these eight contractors are eligible to receive task orders under the ACES MAC IDIQ. *Id*.

On November 20, 2020, Amentum Government Services Holdings, LLC, acquired all of the outstanding shares of DynCorp's former parent holding company, DefCO Holdings, Inc. Agency Report (AR), Tab 29, Emails on Novation at 10. The intervenor, DynCorp, explains that as a result of the transaction, DefCo and all of its corporate subsidiaries, including DynCorp, became wholly owned subsidiaries of Amentum. Intervenor's Comments at 13. The intervenor also states that "[f]ollowing a series of internal reorganizations, Amentum became the immediate parent company of DynCorp." *Id.*

On December 18, the agency issued the Vance AFB FOS task order solicitation, referred to as a fair opportunity proposal request (FOPR), in accordance with Federal Acquisition Regulation (FAR) section 16.505(b), to holders of the Department of the Air Force's ACES MAC IDIQ contract. AR, Tab 3, FOPR at 1. The services to be provided under this task order include fleet management, aircraft maintenance, airfield management, aircrew flight equipment, management and human resources and all related services. AR, Tab 5i, FOPR attach. 9, Performance Work Statement (PWS) at 5.

The solicitation, which was amended twice, contemplated the award of a single task order, containing a 2-month mobilization/transition, a 10-month base period, and four 1-year option periods. AR, Tab 5i, FOPR attach. 9, PWS at 7. The FOPR identified program execution, past performance, and price, as the factors that would be evaluated for determining which proposal represented the best value to the government.[1] The solicitation provided that program execution was more important than past performance, and program execution, when combined with past performance, was significantly more important than price. AR, Tab 5, FOPR amend. 2 at 21.

In addition, the solicitation provided that the agency may provide an offeror with an interchange notice (IN). The solicitation contained the following with regard to INs:

> Prior to award, the Government may at any time during the evaluation, have oral or written interchanges with one or more Offerors, in response to any evaluation factor, or any other aspect of the proposal. All Offerors will be treated fairly, but that does not mean that interchanges will be

[1] The program execution factor was divided into the following three subfactors, each included underlying elements: manning approach, program management and workforce strategy, and fleet health management. AR, Tab 5, FOPR amend. 2 at 20-21, 27-29. These subfactors would be evaluated individually, and then the agency anticipated assigning one overall adjectival rating for the program execution factor.

> conducted with all Offerors or all interchanges will be of the same nature or depth.

Id.

The agency received proposals by the February 4, 2021 due date, including proposals from DynCorp and Vertex.[2] AR, Tab 18, Fair Opportunity Decision Document at 2. Although Amentum also holds one of the ACES MAC IDIQ contracts, it advised the agency it would not submit a proposal in response to this task order "due to strategic considerations." AR, Tab 7, Amentum ACES Vance AFB FOPR No Bid Notice at 1.

On March 19, DynCorp submitted documentation to the Defense Contract Management Agency (DCMA), requesting novation of numerous contracts, including the ACES IDIQ contract, to Amentum Services, Inc. AR, Tab 29, Emails on Novation at 6. On May 17, DCMA granted DynCorp's request to novate numerous contracts, including the ACES IDIQ contract, to Amentum Services, Inc. AR, Tab 17, DynCorp Novation Agreement at 2. Also on May 17, DCMA notified individual contracting officers for each contract affected by the novation and directed them to "modify the individual affected contracts identified in the attachment to incorporate the Novation Agreement." *Id*. Relevant to the protest, the record shows that the contracting officer for this solicitation was provided with this notification from DCMA, and a complete copy of the novation agreement.[3] AR, Tab 29, Emails on Novation at 4, 6.

The contracting officer received this information before the agency completed the evaluation of DynCorp's proposal. While the contracting officer previously may have been unaware of Amentum's acquisition of DynCorp, the May 17 notification from DCMA expressly informed the contracting officer of this fact and provided additional information. As relevant here, the documentation from DCMA stated that Amentum acquired all of DynCorp's assets and assumed all of DynCorp's obligations and liabilities associated with the novated contracts. AR, Tab 28, Novation Request, encl. 1 at 13. In addition, the novation request from DCMA mentioned upcoming integration and consolidation of contract performance activities between the companies, and also made reference to the use of intercompany procedures to ensure resources and employees were available. AR, Tab 28, Novation Request at 1, encl. 1 at 57.

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[2] Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors" who submit "quotations," and are "issued" a task order, the record reflects that the agency sought "proposals" from "offerors." For the sake of consistency with the record, we refer to the firms that competed here as offerors who submitted proposals for the award of a task order.

[3] Of note, the email correspondence between DCMA and the Air Force contained in the record is heavily redacted. *Id.* As a result, it is not entirely clear what documents were actually attached to the May 17 email; however, the email indicates, and the agency does not dispute, that a complete copy of the novation agreement was provided.

The record does not contain a pre-award document that provides a description of what actions, if any, the contracting officer for the Vance task order took in response to receiving this information. Instead, the record shows that on June 15, Amentum responded to an inquiry from the same contracting officer concerning DynCorp's novation to Amentum, which included the following:

> It is our [Amentum's] unified request to have the Legacy DI ACES IDIQ Contract, FA3002-20-D-0010, novated as described in the attached DynCorp/Amentum Novation Modification signed by DCMA on 17 May 2021. From our recent discussions, we understand that you would prefer to retain the legacy Amentum IDIQ Contract, FA3002-20-D-0012; however, we believe this will create unnecessary risks.

AR, Tab 23, June 15, 2021, Amentum Emails on Novation.[4]

Of relevance to this protest, DynCorp's proposal for this task order, submitted on February 4, made no mention of its recent acquisition by Amentum. AR, Tab 9, DynCorp Proposal. The agency's evaluation record and source selection documentation also did not reference the recent acquisition or its potential effect on performance, if any. AR, Tab 22, Fair Opportunity Selection Team (FAST) Source Selection Evaluation Report (SSEB) Report; AR, Tab 18, Fair Opportunity Decision Document; Vertex's Comments and Supp. Protest at 26. Based upon its evaluation, the agency concluded that DynCorp's higher-rated but higher-priced proposal represented the best value to the agency, and made award to that firm on July 28.[5] AR, Tab 20, DynCorp Vance FOS TO Successful Notice.

Vertex subsequently requested and received a written debriefing. On August 2, during the debriefing process, Vertex inquired as to whether the agency communicated with the awardee regarding how the acquisition and corporate restructuring would impact the awardee's ability to perform the contract. AR, Tab 19b, Vertex Debriefing Questions at 3.

On August 9, the contracting officer requested that DCMA provide information related to the DynCorp-Amentum novation to include a new organizational chart. AR, Tab 29, Emails on Novation at 3. Then, DCMA sent an email to Amentum requesting the pre and post DynCorp-Amentum organizational charts under the ACES MAC IDIQ to "show the merger changes were just senior management and the program has the same

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[4] The agency did not provide the contracting officer's correspondence with Amentum that precipitated this email.

[5] DynCorp's proposal received a satisfactory for the past performance factor, exceptional for the program execution factor, and its total evaluated price was $283,022,496. AR, Tab 18, Fair Opportunity Decision Document at 10. Vertex's proposal received a satisfactory for the past performance factor, acceptable for the program execution factor, and had a total evaluated price of $213,419,811. *Id*.

people and nothing has changed." *Id.* at 2. Amentum responded that the organization chart and operations did not change because of the acquisition. *Id*. Amentum went on to state that "[m]ost of the impact was related to Corporate, where our indirect costs were challenged by our new owners (PE Firms)." *Id.* Thereafter, DCMA forwarded the information received from Amentum to the contracting officer. *Id.* at 1.

Also on August 9, the agency provided a written response to Vertex, in which it declined to disclose any communications the agency had with the awardee related to the corporate transaction. AR, Tab 19c, Agency Response to Debriefing Questions. Following the conclusion of Vertex's debriefing, this protest was filed with our Office.[6]

DISCUSSION

The protester contends that the agency's evaluation of proposals was unreasonable and disparate in some instances. The protester also argues that the agency failed to adequately consider the potential impact of the awardee recently being acquired by another firm. Our decision focuses on the protester's challenge to the agency's consideration of this corporate transaction, which we view as the gravamen of the protest.

In response to the protest, the agency maintains that its evaluation of proposals and award decision were reasonable and consistent with the solicitation. As to the corporate transaction issues, the agency asserts that it properly considered the fact that DynCorp had been acquired by Amentum, and contends that the recent acquisition presented no performance risk related to the task order. COS at 35.

For its part, the intervenor supports the agency's conclusion, primarily contending that the novation package from DCMA confirmed that all of DynCorp's resources would continue to be available for contract execution. Intervenor's Comments at 16. In this regard, the intervenor explains that DynCorp's resources were either transferred to Amentum as part of the reorganization, or would remain available through intracompany transfer agreements as an affiliated entity. *Id.*

In reviewing protests challenging an agency's evaluation of proposals, including those procurements conducted pursuant to FAR subpart 16.5, our Office does not reevaluate proposals, rather we review the record to determine whether the evaluation was reasonable and consistent with the solicitation's evaluation criteria as well as applicable procurement laws and regulations. *Tribalco, LLC*, B-414120, B-414120.2, Feb. 21, 2017, 2017 CPD ¶ 73 at 7.

For the reasons discussed below, we sustain the protest on the basis that the record contains insufficient documentation and analysis for our Office to conclude that the

[6] The task order at issue is valued in excess of $25 million, and was placed under an IDIQ contract established by the Air Force. Accordingly, our Office has jurisdiction to consider Vertex's protest. 10 U.S.C. § 2304c(e)(1)(B).

agency meaningfully and reasonably considered the effect of this corporate transaction on the awardee's ability to perform the task order.[7]

Corporate Transaction

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 Systems, Inc.--Recon.*, B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258 at 5. Primarily, these decisions generally focus on whether it was reasonable for an agency to reach the conclusions it did regarding the corporate transaction. *Id*. Our Office has warned, however, that where an agency is aware of an impending or already consummated corporate transaction but fails to assess the impact on proposals of the restructuring, the agency runs the risk that its failure to do so will be deemed improper, based of course, on the unique posture of that procurement and the corporate transaction at issue. *Id*.

Key in our analysis in these decisions is both whether the contracting agency was aware of the particular corporate transaction, and of the imminence and certainty of the transaction. *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 where the agency was aware of the transaction and the potential impacts on the protester's proposal), *recon. denied*, *Lockheed Martin Integrated Sys., Inc.--Recon.*, *supra*; *Wyle Labs., Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16 (sustaining protest where, prior to award, the agency was aware of, but declined to consider in its evaluation, the awardee's proposed division into two separate firms and intent to assign the contract to the new corporate entity), *recon. denied*, *National Aeronautics & Space Admin.--Recon.*, B-408112.3, May 14, 2014, 2014 CPD ¶ 155.

As a preliminary matter, we conclude that under the circumstances presented, the agency was required to assess the potential impact of the transaction on DynCorp's proposal. Here, the record suggests that the contracting officer initially may not have been aware of Amentum's November 2020 acquisition of DynCorp. Additionally, DynCorp's proposal did not mention this corporate transaction, and therefore did not make any representations as to what effect, if any, the corporate transaction would have on its ability to perform the task order as proposed. Thus, as of the February 4, 2021, deadline for receipt of proposals, we find the contracting officer had no basis to conclude that a subsequent corporate restructuring might occur.

On May 17, prior to completing its evaluation of proposals (to include that of DynCorp), the procuring agency was notified by DCMA that Amentum had requested to become the successor-in-interest to DynCorp on all of its contracts via a novation request. AR, Tab 17, DynCorp Novation Agreement. According to the agency, DCMA provided the

[7] With the exception of the protest grounds discussed in this decision, we have considered all of Vertex's allegations and find that none provide an independent basis to sustain the protest.

approved novation agreement and the underlying novation request to the agency, and directed the contracting officer to issue a modification to the ACES ID/IQ, executing the novation. AR, Tab 29, Emails on Novation at 4, 6.

DynCorp's novation request, dated March 19, 2021, referenced the November 20, 2020, acquisition of DynCorp by Amentum, and stated that as part of the integration process, it was requesting approval and execution of a novation agreement. AR, Tab 28, Novation Request at 1. Relevant here, the request then stated, as follows:

> As with many other mergers and acquisitions, each legacy business has numerous legal entities. A focal point of the integration is to simplify our legal entity structure to avoid confusion and to reflect that Amentum has combined with [DynCorp] as one enterprise. Accordingly, Amentum will consolidate bidding activities and most contract performance functions under Amentum Services, Inc. via the intercompany asset transfer agreement within Enclosure 1.

Id. Enclosure 1 to the novation request included several documents, to include a novation agreement between DynCorp and Amentum, which was dated March 19. AR, Tab 28, Novation Request, encl. 1. The novation agreement provided details of the November 20, 2020, stock purchase that resulted in Amentum assuming the obligations and liabilities of DynCorp under the ACES MAC IDIQ. *Id.* at 3-7.

The novation request also included a memorandum of agreement (MOA) between DynCorp and Amentum. *Id.* at 56-59. Related to the asset transfer, the MOA stated Amentum would "have ongoing access to any DynCorp resources that may be necessary to fulfill [Amentum's] obligations, through established Amentum intercompany procedures."[8] *Id.* at 57. With respect to employee considerations, this MOA stated that "[i]n order to minimize disruption to employees and assure a seamless transfer of business unit assets, DynCorp will remain the employer of DynCorp employees" and that "[f]ollowing novation approval and contract modifications[,] the employees shall support Amentum and transferred contract via established intercompany procedures." *Id.* at 57.

Providing further background, the intervenor explains that the novation between Amentum and DynCorp is taking place as part of a corporate reorganization within two

[8] As to pending proposals, the MOA contained a similar provision, which states as follows:

> At any time following the effective date of this agreement, DynCorp shall continue to have access to all assets, personnel, and other resources of Amentum and its subsidiaries as necessary to fulfill commitments under its current contract and pending proposals, including as necessary to avoid any material changes to a proposal submitted to the U.S. governments.

Id.

affiliated entities, the parent company and its wholly-owned subsidiary. Intervenor's Resp. to Req. for Briefing (Oct. 20, 2021) at 5. The intervenor further asserts that as a result of the November 2020 stock acquisition, Amentum is "undertaking an internal reorganization and integration of the corporate management and assets of the two affiliated entities." *Id.*

Thus, while previously unaware of Amentum's acquisition of DynCorp, after receiving the novation package from DCMA, the contracting officer had notice that the transaction was creating the possibility of a corporate restructuring to implement the novation. In particular, the novation request referenced the integration and consolidation of contract performance activities, and alluded to the use of intercompany procedures to ensure resources and employees were available. Therefore, upon receipt of DCMA's May 17 notification of the approved novation agreement, the contracting officer possessed information that should have raised questions about what effect, if any, the transaction would have on DynCorp's ability to perform the proposal it submitted on February 4.

As we have stated, consistent with our decisions in this area, when an agency becomes aware of an impending transaction prior to award--either through information in an offeror's proposal or through other information resources--and such transaction is imminent and essentially certain (or already consummated), an agency should analyze the effect on proposals of the corporate transaction at issue. *Lockheed Martin Integrated Sys., Inc.--Recon.*, *supra.* at 6. So too here, we conclude that under the circumstances presented, the agency was required to analyze the effect of this corporate transaction on DynCorp's proposal.

We also note that the parties here provide no basis to find otherwise. On this point, neither the agency nor the intervenor contend that the agency was not required to consider the corporate transaction, and the subsequent restructuring. That is, the parties do not dispute the protester's assertion that the agency should have considered the impact of the corporate transaction on DynCorp's ability to perform the task order. Rather, the parties disagree as to the sufficiency of the agency's analysis, and whether the agency's conclusion was reasonable.

Having established that this transaction should have been considered by the agency after receipt of information about a possible restructuring from DCMA, our Office's inquiry now turns to the reasonableness of the agency's assessment of the impact of the transaction. *See Lockheed Martin Integrated Sys., Inc.--Recon.*, *supra.* at 6. Generally, our concern regarding a corporate restructuring that occurs during a competition has been whether an offeror's proposal relies on resources that may no longer be available after the corporate restructuring. *See Honeywell Technology Solutions Inc.*, B-413317, B-413317.2, Oct. 5, 2016, 2017 CPD ¶ 2 at 9 (protest denied

where another firm acquired the assets of an offeror via a stock purchase agreement, the agency requested information from the offeror regarding the stock transfer and then made award to the firm).

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, undocumented, or not reasonably based. *See Ekagra Software Techs., Ltd.*, B-415978.3, B-415978.4, Oct. 25, 2018, 2018 CPD ¶ 377 at 5. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Id.; see also Navistar Def., LLC, BAE Sys., Tactical Vehicle Sys. LP*, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

As stated above, on May 17, 2021, and prior to making award to DynCorp, the agency learned of Amentum's recent acquisition of DynCorp. As noted above, the agency does not contend that it was not required to consider the corporate restructuring that resulted from the transaction. Rather, the contracting officer states that, after receiving the May correspondence from DCMA, the Air Force considered the impact the stock purchase and novation could have on DynCorp's proposed effort, and determined that there would be no material effect. COS at 35.

The record, however, does not contain any contemporaneous documentation that the agency meaningfully and reasonably considered the effect this corporate transaction could have on DynCorp's ability to perform. First, as noted, DynCorp did not address the corporate transaction in its proposal. Second, the agency acknowledges that its evaluation does not discuss the impact of the corporate transaction on DynCorp's ability to perform as proposed. Next, while the agency states that it noted during its responsibility determination that Amentum was the listed owner of DynCorp, the agency's source selection decision document does not discuss the ramifications of the acquisition. AR, Tab 18, Fair Opportunity Decision Document. Moreover, the record does not contain a *pre-award* document in which the contracting officer substantively considers the corporate transaction or any associated corporate restructuring.

Additionally, the agency urges us to deny the protest because this corporate transaction has been the subject of a separate bid protest. Specifically, the agency cites *PAE Aviation and Technical Servs., LLC*, B-417704.7, B-417704.8, June 8, 2021, 2021 CPD ¶ 293, for the proposition that the government has already considered the fact that Amentum acquired DynCorp, and concluded that the "purchase of DynCorp does not appear likely to have significant impact on cost or any technical impact on contract performance, DynCorp remained intact and retains the same resources reflected in the proposal." Memo. of Law at 39-40 *citing PAE Aviation and Technical Servs., LLC*, *supra* at 14.

However, the facts in that case are distinguishable from the facts presented here. In *PAE*, the agency (United States Customs and Border Protection) documented a pre-award determination that the transaction would not adversely impact that

procurement, which constituted a contemporaneous finding that was given due deference by our Office. *PAE Aviation and Technical Servs.*, *LLC*, *supra* at 13-15. Here, given the lack of contemporaneous documentation, our Office has insufficient information from which to assess the adequacy and reasonableness of the agency's consideration of the effect of the corporate transaction and subsequent restructuring on the instant procurement.

In response to the protest, the agency argues that its analysis was adequate on the basis that it further considered the corporate transaction after award. As stated above, after award, the contracting officer, by way of DCMA, requested documents from Amentum concerning post-acquisition organization charts. *See* AR, Tab 29, Emails on Novation.

While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's selection decision is supportable, under certain circumstances, our Office will accord lesser weight to *post-hoc* arguments or analyses due to concerns that judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details will generally be considered in our review of evaluations and award determinations, so long as those explanations are credible and consistent with the contemporaneous record. *ITT Fed. Servs. Int'l Corp*., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6. Where an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, however, we generally give little weight to the later explanation. *Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc.*, B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 10.

As an initial matter, the fact that the agency did not obtain certain information regarding Amentum's acquisition of DynCorp until after the agency had completed its evaluation of proposals and made award does not absolve the agency of its obligation to meaningfully consider the corporate transaction and document that assessment. On this point, we note that the agency did not document its assessment after receiving this additional information and prior to the filing of Vertex's protest. Thus, our understanding of the agency's consideration of the corporate transaction comes entirely from assertions contained in the agency's filings with our Office that reflect considerations made during the course of this protest.

Based upon our review of the record and the parties' filings, in our judgment, we find the agency's post-award explanations to be insufficient. Contrary to the agency's contentions, the information received by the agency after award, does not appear to unequivocally confirm that the corporate transaction and reorganization had no impact on DynCorp's ability to perform the task order.

First, it is worth noting that the information received by the agency was provided by Amentum, not DynCorp. Next, we note that the information did not specifically address two important matters raised in the Amentum-DynCorp novation request; namely, the impending integration and consolidation of contract performance activities between the companies, and the intended use of intercompany procedures to ensure resources and employees were available. *See* AR, Tab 28, Novation Request at 1, encl. 1 at 57. Indeed, the record is devoid of any specific details explaining how these efforts will be accomplished to ensure DynCorp has the resources available to perform the task order at issue. As a result, the agency's post-protest explanations fail to address these potentially significant matters directly.

Also, the information received from Amentum should have raised some additional questions about DynCorp's ability to perform the task order. For example, Amentum states that "[m]ost of the impact was related to Corporate, where our indirect costs were challenged by our new owners." AR, Tab 29 Emails on Novation at 2. The agency did not request any additional information regarding Amentum's "challenged" indirect costs, an issue which could potentially result in pressure to lower indirect costs, and have an effect on performance. Additionally, we note that while DCMA asked Amentum to confirm that "the program has the same people and nothing has changed," Amentum's response does not plainly and unambiguously provide an affirmative response. *Id.* In the end, we do not view the agency's post-award efforts to be sufficient to remedy the failure to contemporaneously consider the effect of the corporate transaction.

In summary, based upon our review of the record, we cannot conclude that the agency meaningfully considered the effect of the corporate transaction or that the agency's conclusion was reasonable. While it could be the case that DynCorp's ability to perform the task order will not be materially affected by the corporate transaction and any associated corporate restructuring, the record before us is inadequate for us to reach that conclusion. As a result, because we are unable to assess the reasonableness of the agency's evaluation, we sustain the protest.

Competitive Prejudice

As discussed above, the record shows that the agency's evaluation of DynCorp's proposal was flawed. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was 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, we cannot say with certainty what the agency's conclusion would have been had it meaningfully analyzed and documented the effect of the corporate transaction in question. In such circumstances, we resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. *See AT&T Corp.*, B-414886 *et al.*, Oct. 5, 2017, 2017 CPD ¶ 330 at 8.

Accordingly, we conclude that Vertex has established the requisite competitive prejudice to prevail in a bid protest.

RECOMMENDATION

We recommend that the agency conduct and properly document an analysis of the effect of the corporate transaction and restructuring at issue on the awardee's proposed approach to performing the task order here. If, during the course of its analysis, the agency determines that additional information is needed, the agency should request such information. Depending on the nature of the information requested or received, the agency should conduct discussions, as necessary. We further recommend that, upon completion of this analysis, the agency make a new source selection decision. If, after performing the reevaluation, the agency determines that a firm other than DynCorp represents the best value to the government, we further recommend that the agency terminate the task order awarded for the convenience of the government and make award to the firm selected, if otherwise proper. We also recommend that Vertex be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). Vertex should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

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