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Decision

Matter of: ASRC Federal System Solutions, LLC

File: B-420443; B-420443.2

Date: April 12, 2022

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DIGEST

1. Protest alleging that awardee gained an unfair competitive advantage based on employment of a former government official is denied where the agency, after conducting an investigation of the alleged conflict of interest, reasonably concluded that the former official did not have access to non-public, competitively useful information.
 2. Protest alleging that agency conducted misleading discussions is denied where the record shows that while the agency twice raised a concern about past performance, and later indicated that it considered the issue resolved, the responses did not fully resolve the agency’s concern; nonetheless, the record shows no reasonable possibility that the protester was competitively prejudiced by any error that may have occurred.
 3. Protest alleging that agency improperly awarded a competitive 8(a) set-aside contract to an ineligible joint venture is denied where the Small Business Administration’s regulations no longer require that the agency approve joint ventures for competitive 8(a) awards.
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DECISION

ASRC Federal System Solutions, LLC (AFSS), a small business of Beltsville, Maryland, protests the award of a contract to RSi-QuantiTech JV, LLC (RSi-QT), also a small business of Huntsville, Alabama, under request for proposals (RFP) No.

80MSFC20R0036, issued by the National Aeronautics and Space Administration (NASA) for multidisciplinary engineering technician and trade support services at the George C. Marshall Space Flight Center (MSFC) in Huntsville, Alabama. AFSS challenges the agency's evaluation of proposals and resulting award. The protester also contends that RSi-QT gained an unfair competitive advantage by proposing a former NASA official as a key person and improperly engaging that former official to prepare its proposal.

We deny the protest.

BACKGROUND

On February 13, 2020, the agency issued the Marshall Engineering Technicians and Trades Support (METTS) III solicitation as a small business set-aside, pursuant to Federal Acquisition Regulation (FAR) part 15 procedures.¹ Agency Report (AR), Tab 3, RFP at 1281, 1282; COS ¶ 1.01.² The solicitation anticipated award of a single cost-plus-award fee contract for both mission services and indefinite-delivery, indefinite-quantity (IDIQ) components, for a 1-year base period and four 1-year options. RFP at 983, 985.

The RFP advised that award would be made on a best-value tradeoff basis, considering mission suitability, cost, and past performance. *Id.* at 1420. The solicitation instructed that these three evaluation factors were equal in weight but that mission suitability and past performance, when combined, were significantly more important than cost. *Id.*

The mission suitability factor consisted of two subfactors, each to be weighted equally and assigned up to 500 points: (1) management and technical approach, and (2) staffing and total compensation. *Id.* at 1422. The RFP provided that NASA would evaluate proposals and assess significant strengths, weaknesses, significant weaknesses, and deficiencies, as appropriate. *Id.* at 1421-22. Based on these findings, NASA would assign a numerical score--and a corresponding adjectival rating of excellent, very good, good, fair, or poor--for each subfactor. *Id.* (referencing NASA FAR Supp. 1815.305(a)(3)(A)).

¹ The RFP was issued as a competitive small business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).

METTS III is a "follow-on" procurement of the current METTS II contract, with some minor changes. Supp. Contracting Officer's Statement (COS) ¶ 4.25. The METTS II contract was awarded in August 2015 to Aerie JV, a joint venture between Aetos Systems, Inc., and Engineering Research and Consulting, Inc. (ERC). AR, Tab 14, AFSS Past Performance Proposal at 2161. Aetos and ERC are AFSS's two proposed subcontractors for METTS III.

² All citations throughout the decision are to the Bates number provided by NASA in its agency report.

The RFP instructed that proposed costs would be established as

the sum of the mission services cost and fee . . . , and an IDIQ value . . . , using [o]fferor-provided fully-burdened composite labor rates multiplied by a pre-populated number of Work Year Equivalent (WYE) personnel for each labor category multiplied by the [o]fferor’s productive hours, plus the proposed labor award fee . . . and the [o]fferor’s burden rates and/or fee applied to a prepopulated estimate of ODC [other direct costs]. . . .

RFP at 1423. The solicitation advised that cost would be evaluated for reasonableness and realism, in accordance with the FAR and the agency’s supplemental acquisition regulations. *Id.*

With respect to past performance, the RFP instructed offerors to identify up to five past contracts and/or subcontracts. *Id.* at 1304. The solicitation required offerors to submit specific information regarding “the Days Away From Work Injury or Illness (DAFWII) and Total Case Rate (TCR) for the last three calendar years of contract performance for each referenced contract or subcontract.” *Id.* at 1310. The adjectival ratings for past performance, which considered both performance and relevance, were as follows: very high level of confidence, high level of confidence, moderate level of confidence, low level of confidence, very low level of confidence, and neutral. *Id.* at 1424-25.

In addition to three volumes corresponding to the evaluation factors described above, offerors were required to submit a “contract” volume, to include copies of joint venture and mentor-protégé agreements for joint venture offerors. *Id.* at 1311-1313.

Three offerors, including AFSS and RSi-QT, submitted proposals. COS ¶ 2.01. RSi-QT is a joint venture between Radial Solutions, Inc., a service-disabled veteran-owned small business protégé, and QuantiTech, Inc., a women-owned small business mentor under the Small Business Administration’s (SBA) mentor-protégé program.³ AR, Tab 35, RSi-QT Vol. IV Contract Excerpts at 6062, 6067. NASA established a competitive range, conducted discussions, and received timely final proposal revisions from the protester and RSi-QT. *Id.* ¶¶ 2.09-2.14. NASA evaluated the proposals as follows:

AFSS	RSi-QT
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³ On June 1, 2020, QuantiTech, Inc. was acquired by Sagewind Capital, LLC; as a result, the company converted to a limited liability company, QuantiTech, LLC. AR, Tab 17, Notice of Pending Ownership Change at 2491. The company explained that despite the corporate restructuring, “there will be no change to QuantiTech’s current business systems or operations, and all staff and resources in QuantiTech’s proposal, including any [k]ey [p]ersonnel, will remain in place and committed to successful contract performance.” *Id.*

Mission Suitability Score (out of 1,000 points)	685	705
Management and Technical Approach(out of 500 points/adjectival)	345/Good	375/Very Good
Staffing and Total Compensation (out of 500 points/adjectival)	340/Good	330/Good
Past Performance Confidence Rating	Moderate	Moderate
Proposed Cost & Fee	\$239,757,045	\$224,095,570
Probable Cost & Fee	\$239,757,045	\$224,095,570

AR, Tab 48, Final Briefing to the Source Selection Authority (SSA) at 6212.

The SSA noted that between AFSS’s and RSi-QT’s mission suitability proposals, AFSS’s proposal had an advantage under the staffing and total compensation subfactor and RSi-QT’s proposal had an advantage under the management and technical approach subfactor. AR, Tab 49, SSA Statement at 6400. Nevertheless, the SSA viewed RSi-QT’s proposal as superior based on its proposed use of an established network of fabricators. *Id.* In the SSA’s opinion, the use of this network would improve efficiency and reduce schedule delays over the life of the contract. *Id.* at 6401. While the agency assigned ratings of moderate confidence to both proposals under the past performance factor, the SSA viewed RSi-QT’s proposal as superior due to the exceptional performance record of its non-managing joint venture partner and stronger record of safety performance. *Id.* at 6397.

The SSA concluded that RSi-QT’s proposal represented the best value to the government based on the discriminators identified under the mission suitability and past performance factors, and its lower cost. *Id.* at 6393. On November 2, 2021, the agency awarded the METTS III contract to RSi-QT. COS ¶ 2.24.

After requesting and receiving a debriefing, AFSS filed this protest with our Office.

DISCUSSION

AFSS challenges nearly every aspect of the agency’s evaluation of proposals and source selection decision, and contends that NASA conducted misleading and unequal discussions. AFSS also argues that RSi-QT gained an unfair competitive advantage based on its employment of a former NASA official. While we do not address all of the protester’s arguments in this decision, we have considered each argument and find no basis to sustain the protest. We discuss the principal allegations below.

Unfair Competitive Advantage

The protester alleges that the award to RSi-QT was tainted by a disqualifying organizational conflict of interest (OCI) due to the unfair competitive advantage the company received from proposing a former NASA official from the MSFC as a key person. We subsequently refer to this former official as Y. AFSS contends that, while

at NASA, Y provided program management oversight and continuous review of all programs at the MSFC, including the METTS II contract. The protester also asserts that Y was involved in the preliminary selection process of new chairs heading the METTS III procurement development team and the source evaluation board (SEB). Comments & Supp. Protest at 14-17; Supp. Comments at 12-18. According to AFSS, given Y's position as the associate engineering director for technical management at the MSFC from December 2014 until March 2019, Y had "direct insight into extensive non-public information" regarding the METTS procurement. Supp. Comments at 12. The protester alleges that Y oversaw performance of ERC and Aetos on the METTS II contract, serving as a member of the Performance Evaluation Board (PEB). *Id.* at 13.

After retiring from NASA in March 2019, Y joined TriVector, RSi-QT's subcontractor for the METTS III requirement, in April 2019. According to the protester, as an employee of TriVector and a proposed general manager for the METTS III procurement, Y had an opportunity to use the above information to support RSi-QT's proposal development efforts. Comments & Supp. Protest at 17-18.

Contracting agencies are to strictly avoid any conflict of interest or even the appearance of a conflict of interest in conducting government procurements. FAR 3.101-1; *see also* FAR 9.504(a), 9.505; *Verisys Corp.*, B-413204.5 *et al.*, Oct. 2, 2017, 2017 CPD ¶ 338 at 9. Where a firm may have gained an unfair competitive advantage through its hiring of a former government employee, the firm can be disqualified from a competition based on the appearance of impropriety which is created by this situation--even if no actual impropriety can be shown--as long as the determination of an unfair competitive advantage is based on hard facts and not on mere innuendo or suspicion. *See, e.g., VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 7; *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29. Thus, a person's familiarity with the type of work required, resulting from the person's prior position in the government, is not, by itself, evidence of an unfair competitive advantage. *Health Net Fed. Servs., LLC, supra; Dewberry Crawford Grp.; Partner 4 Recovery*, B-415940.11 *et al.*, July 2, 2018, 2018 CPD ¶ 298 at 24-25.

In determining whether an offeror obtained an unfair competitive advantage by hiring a former government employee with knowledge of non-public information, our Office has considered a variety of factors, including whether the non-public information at issue was in fact available to the firm, whether the non-public information was proprietary information, and whether the non-public information was competitively useful. *Sigmatech, Inc.*, B-415028.3, B-415028.4, Sept. 11, 2018, 2018 CPD ¶ 336 at 9. Whether the appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances in each case; ultimately, the responsibility for determining whether an appearance of impropriety exists, and whether an offeror should be allowed to continue to compete, is a matter for the contracting agency. *Unisys Corp.*, B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 5. We will not disturb the contracting agency's determination in this regard unless it is shown to be unreasonable. *Id.*

After AFSS filed its supplemental protest, alleging an unfair competitive advantage, the contracting officer conducted an investigation into whether Y had access to competitively useful, non-public information due to his high-ranking position at NASA. See AR, Tab 53, OCI Investigation Report; Supp. COS ¶ 4.27. During the investigation, the contracting officer reviewed and analyzed: (1) cost reports submitted under the incumbent METTS II contract; (2) records documenting the evaluation of performance under the METTS II contract; (3) records of participation in METTS III acquisition planning; (4) records of involvement in METTS III proposal activities; and (5) the declaration of Y regarding his access to competitively useful, non-public information. AR, Tab 53, OCI Investigation Report at 6452.

The contracting officer then examined the records collected in the investigation using a three-step analysis:

1. Determination of Y's access to non-public information.
2. Determination if non-public information was competitively useful.
3. Determination if competitively useful, non-public information was disclosed to the offeror.

AR, Tab 53, OCI Investigation Report at 6452; see also Supp. Memorandum of Law (MOL) at 13 (explaining that NASA relied upon a process that was recently "endorsed" by our Office in *Science Applications Int'l Corp.*, B-419961.3, B-419961.4, Feb. 10, 2022, 2022 CPD ¶ 59).

Based on this investigation, the contracting officer concluded that Y did not have access to competitively useful, non-public information regarding the incumbent METTS II contract. AR, Tab 53, OCI Investigation Report at 6452-54. In particular, the investigation determined that Y did not oversee the METTS II contract, and did not have access to contractor pricing information. *Id.* Regarding this pricing information, the contracting officer found that the four types of cost reports submitted by the METTS II contractors to the agency were emailed only to a limited number of recipients at MSFC, and that Y was not one of them. *Id.* at 6452; see also AR, Tab 55, Financial Management Reports; AR, Tab 56, Monthly Workforce Reports; AR, Tab 57, Monthly Cost and Status Reports; AR, Tab 58, Quarterly Average Labor Rates. The agency also performed further searches of Y's email records to determine whether any cost reports were forwarded to Y at a later time. AR, Tab 53, OCI Investigation Report at 6454. Upon review of these records, the contracting officer concluded that Y did not receive any such emails, and, hence, did not have access to any information regarding ERC's and Aetos's performance costs. *Id.*

With respect to the evaluation of performance under the METTS II contract, the contracting officer established that Y was not a member of the PEB. *Id.* at 6454. A review of PEB attendance sheets between 2016 and 2019 revealed that Y participated in a single PEB meeting, on May 5, 2016, on behalf of another PEB member. AR,

Tab 60, PEB Attendance 2016-19 at 7025. In his declaration, Y confirmed that he attended one PEB session but indicated that due to the lapse of time, he could not recall any information associated with that evaluation. AR, Tab 65, Decl. of Y at 7174.

The contracting officer also considered whether Y was involved in acquisition planning for the METTS III procurement. Analyzing the major METTS III procurement milestones, the contracting officer noted that most of these milestones occurred after March 2019, *i.e.*, after Y retired.⁴ AR, Tab 53, OCI Investigation Report at 6455. Specifically, the contracting officer established the timeline for the acquisition as follows:

- The sources sought was posted on beta.sam.gov in June 2019;
- The requirements development team was appointed in June 2019;
- The NASA procurement strategy was approved in August 2019;
- The industry day debriefing was conducted on December 19, 2019; and
- The final solicitation was issued on February 13, 2020, with proposals due April 10, 2020.

Id. Accordingly, while Y may have known the anticipated acquisition schedule for the follow-on METTS procurement, the contracting officer found that any competitively useful acquisition planning information was created after Y had left the agency; hence, Y could not have had access to that information. *Id.*

With respect to Y's involvement in METTS III proposal preparation, the contracting officer noted that during the evaluation of proposals, the SEB chair reached out to NASA's ethics counsel and inquired about Y's involvement as a proposed key person for the requirement. AR, Tab 64, METTS III Key Personnel Legal Clearance at 7167-7172. The SEB chair specifically sought advice as to whether Y "has completed his extended period of time away from NASA/MSFC to be eligible for this position. . . ." *Id.* at 7168.

In response, NASA's ethics counsel advised that Y retired in March 2019, so that his "1 year cooling off period expired in March 2020." *Id.* at 7167. Additionally, the counsel stated that Y's post-employment ethics opinion regarding his potential involvement with the METTS III procurement did not advise on "any specific ethics conflicts with METTS III." *Id.*

⁴ The agency also notes that its record searches located three separate email strings with discussions regarding potential candidates to lead the requirements development team and to chair the SEB for the upcoming METTS III. AR, Tab 53, OCI Investigation Report at 6454; AR, Tab 59, Y Investigation Emails at 6738-6751, 6759-6788, 6799-6833. Because none of the identified candidates were eventually selected for these positions, the contracting officer concluded that Y "did not influence the appointment of either the [requirements team] lead or SEB chair as none of the individuals discussed ultimately served in either capacity." AR, Tab 53, OCI Investigation Report at 6454.

As a last step, the contracting officer reviewed Y's declaration, including Y's statement that he did not have access to non-public METTS II cost information, PEB information regarding incumbent contractor performance, or any proprietary information regarding the pending METTS III acquisition. AR, Tab 53, OCI Investigation Report at 6456. In the declaration, Y noted his limited involvement in AFSS's METTS III proposal preparation, and noted that he largely concentrated on the proposed organizational structure and the roles and responsibilities of the management team. *Id.* Y stated that at no time was he asked to provide, or did provide, non-public, procurement-sensitive information. *Id.*

Based on this investigation, the contracting officer concluded that Y did not have access to competitively useful, non-public information regarding either the METTS II contract or the METTS III procurement. *Id.* at 6457. Accordingly, the contracting officer found that RSi-QT did not gain an unfair competitive advantage based on its employment of Y.

AFSS challenges the contracting officer's conclusions, asserting that the agency "asked the wrong questions, reached the wrong conclusions, and failed to fully consider the scope and breadth of the unfair competitive advantages" resulting from Y's employment at NASA. Supp. Comments at 8. For example, AFSS asserts that NASA's investigation focused on a small subset of emails covering less than a single year, spanning from August 2018 through April 2019, and used improperly narrow search terms for the relevant records.⁵ *Id.* at 9-10. The protester also questions the agency's conclusions that Y did not influence the selection of the requirements development team chair or the SEB chair, arguing that even if the candidates mentioned were not selected, "[a]t the very least, [Y] knew who wasn't on the board." Supp. Comments at 17.

We see no merit in the protester's contentions. In our view, AFSS's allegations, and expressed preference that the agency have "conducted a more in-depth analysis," along with its otherwise general disagreement with NASA's findings, do not provide the hard facts needed for our Office to find that an OCI exists, or conclude that the agency's evaluation was unreasonable. See, e.g., *Deloitte Consulting, LLP et al.*, B-411884 *et al.*, Nov. 16, 2015, 2016 CPD ¶ 2.

Moreover, we find that the record reflects that the contracting officer conducted a thorough investigation and reasonably concluded that Y did not have access to competitively useful, non-public information. Accordingly, we conclude that the agency reasonably determined that the RSi-QT team did not obtain an unfair competitive advantage in preparing its METTS III proposal. This protest ground is denied.

Discussions

AFSS contends that NASA engaged in misleading discussions with AFSS regarding its past performance. Protest at 14; Comments & Supp. Protest at 18-20. In this respect, after initially identifying concerns with three of AFSS's past performance references,

⁵ Because of the agency's archiving system, the email search was able to retrieve records going back to August 2018. AR, Tab 53, OCI Investigation Report at 6454.

NASA notified the offeror that it considered those issues resolved. *Id.* Despite this, however, the agency ultimately assigned a weakness to AFSS's past performance based on those same concerns. *Id.*

Specifically, the protester was asked to verify reported adverse safety information on three of its past contracts, because its DAFWII and TCR rates were well above the national average for adverse safety rating performance. COS ¶¶ 3.47; AR, Tab 47, Memorandum on AFSS's Past Performance Adverse Safety Record at 6152. The agency states that while AFSS provided revised DAFWII and TCR data on some contracts performed by ERC and Aetos, that information was not sufficient to resolve NASA's concerns about ERC's safety record. *Id.* Subsequently, the agency opened discussions with AFSS regarding its safety record weakness findings. *Id.*

NASA states that as a result of discussions, some of the Aetos's DAFWII and TCR data was corrected, and ultimately Aetos's safety record rating was revised to very good. *Id.* at 6153. In contrast, additional explanations regarding ERC's safety data did not alleviate NASA's concerns and did not change the safety record rating of unsatisfactory assigned for ERC's performance. *Id.* Nevertheless, NASA notified AFSS that the issue was considered "resolved" as of July 22, 2021, and that the agency would not request updated past performance final proposal revisions. COS ¶¶ 3.49; AR, Tab 47, Memorandum on AFSS's Past Performance Adverse Safety Record at 6154; AR, Tab 27, AFSS Discussions Round 4 at 3552.

It is a fundamental principle of negotiated procurements that an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinforms the offeror concerning a problem with its proposal or about the government's requirements. *Trans Digital Techs., LLC, B-412521 et al.*, Jan 17, 2018, 2018 CPD ¶¶ 58 at 8-9.

On this record, we conclude that when the agency advised AFSS that the concerns were resolved, AFSS may have been misled into concluding that its corrections to the reported safety data resolved NASA's concerns with AFSS's past safety record. In fact, however, NASA was concerned not just with the accuracy of the data but mainly with ERC's poor contract safety performance. Indeed, the agency maintains that AFSS's minor administrative corrections could not have changed the offeror's unsatisfactory safety ratings. MOL at 8. NASA explains that the AFSS team's safety records were "reported to the [Department of Labor] and [Occupational Safety and Health Administration]," and hence, "no additional information could have changed . . . the alarming safety record so as to alleviate the SEB's concerns." AR, Tab 47, Memorandum on AFSS's Past Performance Adverse Safety at 6153; MOL at 8.

Because we find that the agency's discussions with AFSS may have been misleading, we now turn to the issue of prejudice. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of

receiving the award. *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21-22.

Here, we find that AFSS was not prejudiced by the agency's conduct of discussions. In this regard, the protester fails to explain what it would have done had it known that ERC's safety shortcomings remained an issue. While AFSS states that it "could have provided any further information requested or required," Protest at 14, a general contention that the protester might have revised its proposal during further discussions is insufficient to show competitive prejudice. *See, e.g., Unispec Enters., Inc.*, B-407937, B-407937.2, Apr. 16, 2013, 2013 CPD ¶ 104.

In addition, we note that removing a weakness for ERC's past safety record would not have changed AFSS's overall competitive standing, nor provided AFSS with a substantial chance of award. In this regard, even without this weakness, AFSS's past performance rating would have remained lower than RSi-QT's. *Compare* AR, Tab 48, Final Briefing to the SSA at 6200 (AFSS would have been assessed no significant strengths, two strengths, no significant weaknesses, and no weaknesses) *with* AR, Tab 48, Final Briefing to the SSA at 6206-07 (RSi-QT was assessed one significant strength, three strengths, no significant weaknesses, and no weaknesses for its past performance). Accordingly, while we find that NASA may have engaged in misleading discussions, AFSS fails to establish that it was competitively prejudiced as a result of these discussions, and we therefore have no basis to sustain the protest on this ground.

Compliance with Solicitation Requirements

AFSS alleges that RSi-QT's proposal failed to comply with material RFP requirements and is therefore ineligible for award.⁶ Protest at 34-36; Comments & Supp. Protest at 4-9. Specifically, the protester contends that RSi-QT did not provide a valid joint venture (JV) agreement approved by the SBA in advance of award, and that the JV and mentor-protégé agreements submitted by RSi-QT were for the wrong entity. *Id.*

NASA responds that RSi-QT properly submitted the agreements at issue, which were then reviewed and approved by the agency. MOL at 31-32. NASA also explains that the SBA regulations regarding joint venture approvals for competitive 8(a) procurements, like this one, "changed mid-competition" and currently, no approval is needed. Supp. MOL at 7.

⁶ In its protest submissions, AFSS raises arguments that are in addition to, or variations of, those specifically discussed below. While we do not discuss all of AFSS's various arguments alleging noncompliance with the RFP requirements, we have considered them all and find no basis to sustain the protest. For example, AFSS alleges that RSi-QT failed to submit an acceptable OCI plan, which, according to the protester, was another mandatory pre-requisite for award. As the agency correctly points out, however, the RFP required submission of the final OCI plan "no later than 15 calendar days after start of [the p]hase-in period," *i.e.*, after the contract award. RFP at 1118.

In addition, NASA maintains that any corporate restructuring concerning QuantiTech--*i.e.*, after it was purchased by Sagewind--did not affect its legal status as an RSi-QT joint venture entity; QuantiTech remains a party to the joint venture and the mentor-protégé agreements. COS ¶¶ 3.76-3.80. The agency further notes that it was able to verify, using a single Data Universal Numbering System (DUNS) number and a single Commercial and Government Entity (CAGE) code in the System for Award Management (SAM), that QuantiTech, Inc. and QuantiTech, LLC are registered as the same legal entity. Supp. COS ¶ 4.07; AR, Tab 67, SAM.gov Data at 7179-7187.

Relevant here, the solicitation instructed that joint venture offerors:

shall provide a complete copy of the JV agreement signed by all parties. (See 13 CFR § 121.103[h]). To be eligible for this award, the JV agreement must conform to requirements as set forth in 13 CFR § 124.513, and must be approved by the SBA prior to award. The Offeror shall submit written certification of SBA approval of the JV agreement prior to performance of the contract, in accordance with 13 CFR § 124.513 (j).

RFP at 1313.

As noted above, the RFP was issued in February 2020, and included a requirement about the SBA approval of joint venture agreements reflecting the SBA's regulation in place at the time, 13 C.F.R. § 124.513. Section 124.513 was recently amended to effectively eliminate the requirement for SBA approval of joint venture agreements before the award of an 8(a) contract. See 85 Fed. Reg. 66164, 66191 (Oct. 16, 2020) (final rule) (explaining that the rule "eliminated the need for 8(a) [p]articipants to seek and receive approval from SBA of every initial joint venture agreement and each addendum to a joint venture agreement for competitive 8(a) contracts."). Accordingly, effective November 20, 2020, section 124.513 provides that "SBA will not approve joint ventures in connection with competitive 8(a) awards. . . ." 13 C.F.R. § 124.513(e)(1).

In addition, the record here shows that RSi-QT's proposal included an executed JV agreement, dated July 1, 2019. AR, Tab 35, RSi-QT Vol. IV Contract Excerpts at 6062-66. The record also demonstrates that NASA reviewed the JV agreement, and after discovering it was missing an authorization regarding a bank account in the JV's name, requested that RSi-QT supplement it with an addendum to the JV agreement. COS ¶ 3.87; AR, Tab 35, RSi-QT Vol. IV Contract Excerpts at 6079-6084.

The agency further states that it reached out to the SBA in February 2022, after this protest was filed, to inquire about the "current guidance on whether JV agreements for the otherwise successful offeror are reviewed in accordance with 13 CFR 124.513."⁷

⁷ The protester disagrees with NASA's position that due to the change of the SBA regulations during the procurement, the SBA's approval is no longer required. AFSS urges us to consider the SBA's regulations in effect at the time of issuance of

AR, Tab 69, Email Communication with SBA at 7193. In response, the SBA explained that the revised regulations no longer required its approval of joint venture agreements for competitive 8(a) procurements. *Id.* at 7189-90.

Generally, our Office affords great discretion to the SBA's interpretations of its own regulations, as long as they are reasonable. See *Research & Dev. Sols., Inc.*, B-410581, B-410581.2, Jan. 14, 2015, 2015 CPD ¶ 38 at 6. Under the unique circumstances of this case, we find the SBA's interpretation of the amended section 124.513, and its implications on the pending procurements, as the one here, reasonable. If we were to follow the interpretation espoused by AFSS, we would need to recommend that NASA terminate RSi-QT's award because its JV agreement was not approved by the SBA. Requiring such an approval, at a time when the SBA no longer issues them, would lead to an absurd result; accordingly, we reject AFSS's arguments in this regard.⁸

With respect to the mentor-protégé agreement, the solicitation required offerors to include a copy of their agreements with the proposal, and instructed that:

For [o]fferors proposing as a mentor-protégé JV, an SBA approved mentor-protégé agreement must be in place prior to submitting an offer in order for the JV to receive exclusion from affiliation and be eligible for this award. (See 13 C.F.R. § 121.03 and 13 C.F.R. § 124.520).

solicitation, relying on *Yang Enterprises, Inc.*, B-418922.4, B-418922.6, May 20, 2021, 2021 CPD ¶ 209. We find that *Yang* is distinguishable from the circumstances here. In *Yang*, applying the new interpretation would have changed the ground rules of the procurement, *i.e.*, the criteria for evaluation of offerors' past performance, in the midst of the procurement. Here, in contrast, applying the version of the SBA regulation in effect at the time the solicitation was issued would lead to an absurd result: an attempt to enforce a requirement that no longer exists and consequently, one the SBA no longer enforces. In addition, we note that in *Yang*, we sustained the protest following a view expressed by the SBA on the issue; here, we also defer to the SBA's interpretation.

⁸ We find similarly untenable AFSS's argument that RSi-QT should have protested the terms of the solicitation if it believed the firm should not be subject to the requirement for prior SBA approval of JV agreements. Comments & Supp. Protest at 5.

In addition, AFSS's reliance on *Alutiiq-Banner Joint Venture*, B-412952 *et al.*, July 15, 2016, 2016 CPD ¶ 205 is misplaced. In *Alutiiq-Banner*, we recommended that an agency terminate an award because a JV offeror did not have a valid SBA approval of its JV agreement. In addition to the case involving a different version of the SBA regulation in effect now, the facts here are clearly distinguishable. Importantly, in *Alutiiq-Banner*, the SBA recommended termination of an award where the offeror did not have a valid approval of its JV agreement, and we followed that recommendation. *Alutiiq-Banner Joint Venture, supra*. Here, the SBA expressed a different position on the issue, and we follow that recommendation as well.

RFP at 1313.

RSi-QT included its approved mentor-protégé agreement in its proposal. See AR, Tab 35, RSi-QT Vol. IV Contract Excerpts at 6067-76; AR, Tab 66, SBA Mentor-Protégé Approval Database (listing the approved mentor-protégé agreement between Radial Solution and QuantiTech, dated March 14, 2018). The protester alleges, however, that as a result of corporate changes affecting QuantiTech, the identity of RSi-QT's mentor has changed, and that this change should have been approved by the SBA. Protest at 35-36 (citing 13 C.F.R. § 125.9(e)(7), which provides that "SBA must approve all changes to a mentor-protégé agreement. . . .").

We find the protester's argument unreasonable, and agree with the agency. NASA explains that while the ownership of QuantiTech did change, its identity did not; QuantiTech remains a party to the mentor-protégé agreement. COS ¶¶ 3.76-3.80. NASA notes that it received a clarification from the company that despite the corporate restructuring, there was no change to QuantiTech's business systems or operations. AR, Tab 17, Notice of Pending Ownership Change at 2491. The agency further notes that QuantiTech formally notified the SBA about its acquisition by Sagewind; it also certified that it would continue to abide by the terms of the mentor-protégé agreement with Radial Solutions; and noted that there would be no material changes to the agreement itself. AR, Tab 50, Notice of Change of Control at 6403 (acknowledging its name change to QuantiTech, LLC but explaining that since it did not alter the existing mentor-protégé agreement, QuantiTech did not anticipate amending the agreement to reflect the name change).

During discussions, NASA sought an explanation from RSi-QT regarding the merger of QuantiTech with another company, Millennium Engineering and Integration Company. Upon receiving information that Millennium was being integrated into QuantiTech, the agency considered the issue resolved, with no concerns regarding its effects on RSi-QT and its ability to perform the requirement.⁹ AR, Tab 29, RSi-QT Discussions Round 1 at 3700. Accordingly, NASA states that the SEB found that the change in ownership did

⁹ As RSi-QT explained during discussions, on February 10, 2021, Sagewind Capital, LLC purchased Millennium for the purpose of integrating the company with QuantiTech, LLC. COS ¶ 3.79. The transaction occurred before the final submission of revised proposals on September 27, 2021. COS ¶ 2.13. While the protester argues that NASA failed to consider the impact of this corporate transaction on QuantiTech, based on our review of the record, we see no basis to question NASA's explanation in this regard. COS ¶¶ 3.75-79. Specifically, we credit the agency's explanation that it fully considered the acquisition and its effect on RSi-QT's proposal, and found no basis to conclude that RSi-QT would be unable to perform the contract in the manner described in its proposal. *Id.*; see also, e.g., *Honeywell Tech. Sols. Inc.*, B-413317, B-413317.2, Oct. 5, 2016, 2017 CPD ¶ 2.

not impact the existing JV or mentor-protégé agreements, and therefore the agency did not request updated agreements. COS ¶¶ 3.91.

Finally, as noted above, NASA verified, by searching the SAM database, that QuantiTech, Inc., and QuantiTech, LLC, are associated with the same DUNS number and CAGE code.¹⁰ Supp. COS ¶¶ 4.08; AR, Tab 67, SAM.gov Data at 7179-7187; see also, e.g., *Davis Strategic Innovations, Inc.*, B-413305, Sept. 26, 2016, 2016 CPD ¶¶ 267 (concluding that a company, after undergoing corporate restructuring which resulted in a name change, was the same original entity at issue).

Based on the above, we are unable to conclude that RSi-QT lacked valid JV and mentor-protégé agreements, and deny this protest ground.

Cost Evaluation and Discussions

AFSS next protests the total compensation plan and cost realism evaluations, and also argues that the agency engaged in misleading and unequal discussions about cost. Protest at 14-21. With respect to the cost evaluation, AFSS challenges the methodology used by NASA to evaluate cost proposals, asserting that it was mechanical and failed to consider unique approaches. Protest at 14-17; Comments & Supp. Protest at 28-31. For example, the protester states that for the labor categories covered by the Service Contract Labor Standards (SCLS) or a collective bargaining agreement (CBA), *i.e.*, non-exempt employees, NASA's cost realism analysis was limited to the mere verification of SCLS/CBA minimum wage rates, which "is not a proxy for a cost realism evaluation."¹¹ Protest at 17-18; Comments & Supp. Protest at 29. AFSS also challenges the agency's method used for evaluating labor rates for exempt employees, which compared such rates to "the local industry average" rate as the minimum. Protest at 18. AFSS asserts that such an evaluation improperly failed to consider historical or true market compensation, and was therefore not "a meaningful analysis of the awardee's technical approach with regard to its ability to retain an incumbent workforce." *Id.*

¹⁰ We find that the agency acted reasonably in comparing the CAGE codes and DUNS numbers for both entities. Supp. COS ¶¶ 4.08; AR, Tab 67, SAM.gov Data at 7179-7187. CAGE codes are assigned to discrete business entities by the Defense Logistics Agency and are used to dispositively establish the identity of a legal entity for contractual purposes. *Gear Wizzard, Inc.*, B-298993, Jan. 11, 2007, 2007 CPD ¶¶ 11 at 2; *National Found. Co.*, B-253369, Sept. 1, 1993, 93-2 CPD ¶¶ 143 at 2 n.1. Similarly, the DUNS numbering system is established by Dun & Bradstreet Information Services for purposes of establishing the precise identification of an offeror or contractor. *URS Group, Inc.*, B-402820, July 30, 2010, 2010 CPD ¶¶ 175 at 4. CAGE codes and DUNS numbers are used to identify the entity that is the offeror for a given procurement. *Id.*

¹¹ SCLS are the prevailing wage requirements for specific geographic areas, established and administered by the Department of Labor under the McNamara-O'Hara Service Contract Act (SCA) of 1965, applicable to federal contracts for the provision of goods and services.

When an agency evaluates a proposal for the award of a cost-reimbursable contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. See FAR 15.305(a)(1), 15.404-1(d); *Palmetto GBA, LLC*, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1). 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. FAR 15.404-1(c); *Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. *Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

We find the methodology used by NASA unobjectionable, and conclude that the agency's cost realism analysis was a reasonable exercise of its judgment. Although we do not specifically discuss each of the arguments presented by AFSS, our review of the record provides no basis to sustain this aspect of the protest. *Jacobs COGEMA, LLC, supra*. For example, the "local industry average" challenged by AFSS was calculated by averaging the total compensation plan rates proposed by all offerors and their subcontractors, and the independent government cost estimate total compensation plan rates. COS ¶ 3.21. These latter rates consisted of direct labor rates that were obtained from local Economic Research Institute data and incumbent labor rate data with an added estimate of fringe benefits. *Id.* Hence, contrary to the protester's contentions, the method used by NASA did capture the incumbent labor rates as a component of the "local industry average" used for its direct labor cost analysis.

Similarly, we disagree with AFSS's characterization of the method used for the cost realism evaluation of non-exempt employees as a mechanical comparison of labor rates to the minimum statutory SCLS/CBA rates. For example, the record shows that NASA conducted its own market research analysis, which considered incumbent data, and identified five non-exempt labor categories that significantly exceeded the SCLS/CBA minimums. COS ¶¶ 3.13-14. NASA included that information in the RFP, listing those five identified categories, and identifying "the percentage by which the current average labor rate exceeds the SCLS minimum wage rate for each labor category." *Id.* at ¶ 3.13. We find this approach sufficient and see no basis to question NASA's evaluation of pertinent labor rates.

With respect to discussions, AFSS contends that NASA misled it into raising its proposed cost by \$15 million while not providing a similar instruction to RSi-QT. The protester notes that its initial total proposed cost was lower than RSi-QT's final total evaluated cost such that the agency's discussions resulted in competitive prejudice to AFSS. Protest at 14-17 (stating that its initial proposed cost was \$224.8 million and RSi-QT's final proposed cost was \$224 million).

Responding to these allegations, NASA states that the upward adjustment of AFSS's proposed cost was necessary for the proposed cost to be deemed realistic, as the firm's proposed direct labor rates, total compensation rates, fringe benefits, escalation rates, and outyear rate reductions were all below NASA's estimates. MOL at 6. The agency notes that the evaluators used the exact same criteria to evaluate both AFSS's and RSi-QT's costs, and the agency had similar concerns about certain aspects of RSi-QT's proposed cost being too low. COS ¶ 3.04. NASA further explains that certain elements of AFSS's cost proposal, unrelated to compensation, were higher than in RSi-QT's proposal; for example, AFSS had higher overhead costs, program support labor, and a higher mission award fee. MOL at 7. Those costs also contributed to the price difference between the two proposals. *Id.*

Based on our review of the record, we see no merit in AFSS's allegations that the discussions were misleading, unequal or that the protester was "coerced" into rising its cost by \$15 million. As noted above, when discussions are conducted, they must be meaningful, and an agency may not mislead an offeror into responding in a manner that does not address the agency's concerns. *Trans Digital Techs., LLC, supra*. In addition, in the context of cost discussions, an agency may not coerce an offeror into raising its proposed costs or altering any other aspect of its proposal. *World Wide Tech., Inc.*, B-417909.2, B-417909.3, Dec. 14, 2020, 2021 CPD ¶ 6 at 7. We will not, however, find a coercion in discussions where an agency in good faith provides accurate information to an offeror, and leaves the possible response to the offeror's business judgment. *Id.*

Here, the agency did not direct AFSS to change its proposed rates; instead, AFSS made an independent business judgment to increase them in response to the agency's reasonable concerns that some proposed rates were too low. Accordingly, we do not find the cost discussions to be misleading or conducted in an unequal manner; similarly, we see no merit to the protester's contentions that the discussions were coercive where AFSS had discretion about whether, and to what degree, to adjust its proposed cost upward. As such, this protest ground is denied.

Mission Suitability

AFSS further asserts that NASA failed to assign multiple strengths to its mission suitability proposal. Protest at 40-43. The protester contends that its proposal merited strengths for its approach to innovations, improvements, and efficiencies of program/project requirements; seamless phase-in transition; sources of staffing; and maintaining an optimal skill mix. *Id.*

An agency's judgment that the features identified in a proposal did not significantly exceed the requirements of the solicitation, and thus did not warrant the assessment of unique strengths, is a matter within the agency's discretion and one that we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable. *Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2018 CPD ¶ 33 at 8 n.4; *Metropolitan Life Ins. Co.*, B-412717, B-412717.2, May 13, 2016, 2016 CPD ¶ 132 at 13.

Here, we have reviewed AFSS's allegations and find no basis to sustain its protest. For example, the protester contends that its proposed management and technical approach included a highly-detailed list of suggested innovations, improvements, and efficiencies, which NASA largely failed to credit. AFSS protests that it only received one strength for this aspect of its proposal.¹² Protest at 41.

The record, however, demonstrates that NASA evaluated all of AFSS's proposed innovations and improvements and that while two were credited as conferring additional benefits to the agency, others were only considered adequate. COS ¶ 3.110. While the agency fully considered these features, it simply did not conclude that they warranted the assignment of any additional strengths or significant strengths. We find no basis to question the reasonableness of the agency's evaluation in this regard.

To the extent the protester disagrees with NASA's judgment concerning these features, we note that disagreement with the agency's evaluation, without more, does not provide a basis to sustain a protest. See *STG, Inc.*, B-405101.3 *et al.*, Jan. 12, 2012, 2012 CPD ¶ 48 at 7. Accordingly, we find no basis to sustain this protest ground.

Best-Value Determination

Finally, the protester challenges the agency's best-value determination, arguing it was based on a flawed mission suitability, cost, past performance evaluation, as discussed above. Protest at 43-44. Because we find no merit to the protester's challenges to the agency's evaluation of proposals, we see no basis to sustain the protester's derivative challenge to the agency's best-value decision. *Allied Tech. Grp., Inc.*, B-412434, B-412434.2, Feb. 10, 2016, 2016 CPD ¶ 74 at 10.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

¹² The contracting officer notes that AFSS, in fact, received two strengths for this aspect of its proposal. One strength was credited for the proposed approach for achieving accreditation to International Organization for Standardization/International Electrotechnical Commission 17025:2017 "General requirements for the competence of testing and calibration laboratories" in the name of MSFC. COS ¶ 3.110. The second strength was credited for the proposed program management approach for meeting program requirements within a changing, dynamic, and evolving work environment which should provide the experience, processes, and techniques to successfully staff the contract. *Id.*