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Decision

Matter of: Yang Enterprises, Inc.

File: B-421331.3; B-421331.4

Date: May 23, 2023

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DIGEST

1. Protest challenging the agency's evaluation of past performance and technical proposals is denied where the agency's evaluation was reasonable and in accordance with the solicitation.
 2. Protest challenging the exclusion of the protester's proposal from the competitive range is denied where the agency's determination that the protester's proposal was not among the most highly rated proposals was reasonably based on the deficiencies in the protester's technical proposal and low past performance rating.
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DECISION

Yang Enterprises, Inc., a small business of Oviedo, Florida, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. FA252122R0009, issued by the United States Space Force for operations, maintenance, and engineering support for facilities and systems at Cape Canaveral Space Force Station and supporting annexes. The protester contends that the agency improperly evaluated the protester's proposal, and otherwise unreasonably excluded the protester's proposal from the competitive range.

We deny the protest.

BACKGROUND

The agency issued the RFP pursuant to Federal Acquisition Regulation (FAR) part 15 on June 16, 2022, and amended it six times. Contracting Officer's Statement (COS) at 2; Memorandum of Law (MOL) at 2; Agency Report (AR), Tabs 3, 6-11. The RFP seeks proposals for support services to assist Space Launch Delta 45 in providing operations and maintenance, port services, ordnance, and electrochemistry (electro-chem) lab support services to Space Launch Delta 45 and Space Force mission partners at Cape Canaveral Space Force Station. COS at 2; AR, Tab 5, RFP at 27.¹ The RFP, which is set aside for small business concerns, contemplates award of a single indefinite-delivery, indefinite-quantity contract--known as the Cape Launch Operations and Infrastructure Support III (CLOIS-III) contract--that will include fixed-price, cost-plus-fixed-fee, and cost-reimbursement pricing arrangements. COS at 2; RFP at 3, 229. The CLOIS-III contract will have a five-year ordering period, with four additional one-year optional ordering periods, and a six-month optional extension pursuant to FAR 52.219-8. RFP at 70, 72-73, 209. The CLOIS-III contract will have a maximum value of \$489 million. *Id.* at 3.

The RFP states that award will be made on a best-value tradeoff basis considering three factors: (1) technical capability; (2) past performance; and (3) cost/price. *Id.* at 229. The technical capability factor is to be evaluated on an acceptable/unacceptable basis. *Id.* at 230-231. For proposals evaluated as acceptable under the technical capability factor, the agency will make tradeoffs between past performance and cost/price, with those two factors being approximately equal in importance. *Id.* at 229.

The technical capability factor consists of three subfactors: (1) organization; (2) resource management; and (3) transition plan. *Id.* at 230-231. Only the resource management and transition plan subfactors are relevant to the issues presented in the protest.

Under the resource management subfactor, offerors were to submit a staffing matrix using the form included as Attachment L-02 to the RFP. *Id.* As relevant here, the RFP provides the following criteria for a proposal to be found acceptable under the resource management subfactor:

Offeror's proposal includes a filled-out CLOIS-III Staffing Matrix (see RFP Attachment L-02) to define adequate staffing levels and skills to accomplish program requirements in alignment with the [Performance Work Statement (PWS)] that enables organizing, managing, and coordinating resources. Staffing Matrix differs from staffing plan by providing a breakdown of proposed labor for each labor category by CLIN. Total proposed staffing identified in the staffing plan for each labor

¹ Citations to the RFP are to the amended, conformed version found at Tab 5 of the agency report.

category shall match the Staffing Matrix breakdown for each category. Offeror's proposal clearly identifies any variance in labor category in years 2-9 and contains appropriate rationale for the variance. Offeror's proposal describes how the approach manages personnel in a manner conducive to executing a fluctuating workload driven by quick-response requirements of the PWS and how it manages risk to an acceptable level. The proposal provides an acceptable approach to manage any variance between staffed Full Time Equivalents (FTEs) captured under Firm Fixed Price (FFP) CLINs and labor called up via work orders under Cost Plus Fixed Fee (CPFF) CLINs (Example scenario: 5 FTEs are staffed for the labor category Crane Operator but work orders throughout the Fiscal Year account for 4.5 FTEs of labor – the offeror's approach will provide a strategy of managing cost for the remaining .5 FTE).

Id. at 231.

With respect to the transition plan subfactor, offerors were to submit an outline for transition including a description of the required tasks to meet major milestones, as well as timelines. *Id.* at 164. The RFP provides that an acceptable transition plan must include a high-level overview with a description of the required tasks to meet major milestones and timelines demonstrating the ability to achieve full performance within 180 days. *Id.* at 231.

For the past performance factor, the RFP instructs offerors to submit information regarding up to four of the most recent and relevant contracts for the offeror or its team. *Id.* at 164-167. The RFP further advises offerors that the agency reserves the right to obtain past performance information beyond the information included in an offeror's proposal. *Id.* at 167, 232. The RFP provides for an evaluation of the recency, relevancy, and quality of an offeror's past performance to assess the degree of confidence in the offeror's ability to meet the CLOIS-III contract requirements. *Id.* at 232. The RFP states that "[t]he past performance evaluation will consider the recency and relevance of the information, source of the information, context of the data, general trends in the offeror's performance, the number and severity of problems, the effectiveness of any corrective actions taken, and the offeror's overall performance record." *Id.*

Relevant to the issues presented in the protest, the RFP provides that the relevancy assessment will be made based on the extent to which the offeror's past contracts meet five criteria:

1. Experience providing Facilities, Systems, Equipment, and Utilities (F/S/E/U) [Operations and Maintenance (O&M)] support and service requirements on a Government installation.
2. Experience operating and maintaining redundant complex utility systems including electrical, water and wastewater treatment systems.

3. Experience providing engineering support to [Department of Defense] installations for the purpose of providing Facility Condition Assessments, Real Property Services, development of preventive maintenance plans.
4. Experience developing and implementing test procedures for ordnance certification. Experience performing ordnance storage, handling, inventory, packing, shipping, and receiving; as well as experience managing and operating in munitions storage areas.
5. Experience managing a workforce of more than 100 personnel with varying skill mixes.

Id. at 233. As stated in the RFP, “an offeror’s total relevancy will be determined based on the sum of relevancy criteria met across all the offeror’s submitted citations[,]” resulting in the assignment of an overall relevancy rating of very relevant, relevant, somewhat relevant, or not relevant. *Id.*

Based on its assessment of the recency, relevancy, and quality of an offeror’s past performance, the agency would then assign one of the following overall past performance confidence assessments:

Adjectival Rating	Description
Substantial Confidence	Based on offeror’s recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort.
Satisfactory Confidence	Based on the offeror’s recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort.
Limited Confidence	Based on the offeror’s recent/relevant performance record, the Government has a low expectation that the offeror will successfully perform the required effort.
No Confidence	Based on the offeror’s recent/relevant performance record, the Government has no expectation that the offeror will be able to successfully perform the required effort.
Unknown Confidence (Neutral)	No recent/relevant performance record is available, or the offeror’s performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned.

Id. at 233-234.

The RFP also generally advises offerors that the agency’s evaluation will consider the extent to which any deficiencies are correctable:

The Government will consider, throughout the evaluation, the “correction potential” of any deficiency. The judgment of such “correction potential” is within the sole discretion of the Government. If an aspect of an offeror’s proposal does not meet the Government’s requirements and is not considered correctable, the offeror may be eliminated from the competitive range.

Id. at 229.

Proposals were due by August 1, 2022. See RFP at 1. The protester timely submitted a proposal in response to the RFP. See *generally*, AR, Tab 13, Yang Proposal. Following the evaluation of initial proposals, the agency established a competitive range and notified the protester that its proposal had been excluded. Yang subsequently protested the agency’s initial exclusion decision, alleging that the agency misevaluated the protester’s proposal under the past performance, technical capability, and cost/price factors, and unreasonably failed to conduct discussions with the protester. We subsequently dismissed the protest as academic based on the agency’s proposed corrective action of reevaluating Yang’s proposal under the past performance factor and issuing a new competitive range determination. *Yang Enters., Inc.*, B-421331, B-421331.2, Jan. 17, 2023 (unpublished decision).

The agency then reevaluated the protester’s proposal, and assigned the following ratings to the six proposals timely submitted in response to the RFP:

	Offeror A	Offeror B	Offeror C
TECHNICAL	Unacceptable	Unacceptable	Unacceptable
Organization	Unacceptable	Unacceptable	Unacceptable
Resource Management	Unacceptable	Unacceptable	Unacceptable
Transition Plan	Unacceptable	Unacceptable	Acceptable
PAST PERFORMANCE	Substantial Confidence	Substantial Confidence	Substantial Confidence
COST/PRICE	\$310,791,445.83	\$296,105,343.83	\$261,803,709.75
Complete	No	No	No
Reasonable	TBD	TBD	TBD
Balanced	TBD	TBD	TBD
Realism	TBD	TBD	TBD

	Offeror D	Yang	Offeror F
TECHNICAL	Unacceptable	Unacceptable	Unacceptable
Organization	Unacceptable	Acceptable	Unacceptable
Resource Management	Unacceptable	Unacceptable	Unacceptable
Transition Plan	Unacceptable	Unacceptable	Unacceptable
PAST PERFORMANCE	Unknown Confidence (Neutral)	Limited Confidence	Unknown Confidence (Neutral)
COST/PRICE	\$330,113,481.23	\$258,415,597.72	\$364,611,162.03
Complete	No	No	No
Reasonable	TBD	TBD	TBD
Balanced	TBD	TBD	TBD
Realism	TBD	TBD	TBD

AR, Tab 19, Competitive Range Decision Document (CRDD) at 5.

Based on the evaluation results, the contracting officer determined that discussions were necessary, and set a competitive range of the proposals submitted by offerors A and C. *Id.* at 5, 14. In excluding the protester’s proposal from the competitive range, the contracting officer noted that the proposal was unacceptable under the technical factor and required significant proposal revisions under both the resource management and transition subfactors. *Id.* at 9. As detailed in the source selection evaluation board (SSEB) report, the agency had assigned eight deficiencies to the protester’s proposal under the resource management subfactor and two deficiencies under the transition plan subfactor. *Id.* at 8; AR, Tab 17, SSEB Report at 85-91. The contracting officer concluded that the protester’s technical proposal did not meet the majority of the requirements of the PWS, and did not demonstrate a thorough knowledge and understanding of the RFP and attachments. AR, Tab 19, CRDD at 9.

The contracting officer further cited the low expectation that the protester could successfully perform the contract requirements based on the past performance evaluation. *Id.* Referencing Contractor Performance Assessment Reports (CPARs) that the agency had reviewed, the contracting officer noted that his concerns were based on “several significant issues concerning staffing, management, regulatory compliance, certification and licensure, meeting emergency repair requirements, quality control, late and incomplete [contract data requirements list (CDRL)] submissions, and scheduling.” *Id.* at 9. The contracting officer also concluded that discussions were unlikely to improve the protester’s past performance evaluation, as the agency had reviewed and considered both the contracts submitted by the protester and additional past performance information the agency had discovered. *Id.*

Lastly, the contracting officer noted that while the protester had submitted the lowest cost/price, the deficiencies in the protester’s technical proposal and limited confidence past performance rating prevented the protester from having a realistic prospect for award. *Id.* at 10. Consequently, the contracting officer concluded that including the

protester's proposal in the competitive range was not appropriate, as it would harm the agency's interest in conducting an efficient competition and, furthermore, the protester did not have a realistic chance of receiving the award. *Id.*

Following a written debriefing and the agency's responses to follow-up questions, see AR Tab 32, Written Debriefing; AR Tab 33, Debriefing Follow-Up, the protester timely filed this protest with our Office.

DISCUSSION

The protester challenges several aspects of the agency's evaluation of the protester's proposal and determination to exclude it from the competitive range. First, Yang challenges the agency's past performance evaluation, arguing that the agency improperly focused on the protester's performance of a contract that it did not submit as a reference, and failed to give appropriate credit to the protester's other contracts. Next, Yang challenges the agency's evaluation of its proposal under the technical capability factor, arguing that the agency unreasonably assigned deficiencies to its proposal under the resource management and transition plan subfactors. Finally, Yang challenges the agency's decision not to include the protester's proposal in the competitive range, arguing that the agency engaged in disparate treatment and otherwise unreasonably considered which proposals were the most highly rated. For the reasons that follow, we find no basis on which to sustain the protest.²

Past Performance

The protester first contends that the agency unreasonably assigned a rating of limited confidence to the protester's proposal under the past performance factor. Protest at 24-43. This argument centers primarily on the manner in which the agency considered the protester's performance of a contract for facility maintenance and repair services supporting the United States Strategic Command (STRATCOM) at Offutt Air Force Base. Yang did not identify the contract in its proposal; rather, the agency identified the contract during its review of past performance information contained in the Contractor Performance Assessment Reporting System. The protester principally contends that the contract is of limited relevance to the CLOIS-III contract, and the agency put undue emphasis on the identified performance issues on that contract as compared to Yang's other past performance references. As discussed below, we find no ground to sustain the protest on this basis.

² Yang raises a number of additional and collateral arguments. Although our decision does not specifically address each argument, we have considered all of the protester's arguments and find that none provides a basis on which to sustain the protest. Additionally, the protester initially alleged that the agency inadequately documented its contemporaneous evaluation and unreasonably failed to conduct discussions with Yang, but the protester subsequently withdrew those arguments. See Comments & Supp. Protest at 21 n.2.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. *Fox RPM Corp.*, B-409676.2, B-409676.3, Oct. 20, 2014, 2014 CPD ¶ 310 at 3. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. *Beretta USA Corp.*, B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

The protester's proposal included information regarding four contracts performed by Yang and its proposed subcontractor. See AR, Tab 13, Yang Proposal at 212-56. The SSEB found that each contract met the RFP's recency criteria. AR, Tab 17, SSEB Report at 92-96. The SSEB further found that each contract involved performance of at least one of the RFP's relevancy criteria, with the four contracts cumulatively demonstrating experience in all five relevancy criteria, resulting in an overall relevancy rating of very relevant. *Id.* at 92-97. The SSEB noted that CPARs were not available for these contracts, but it reviewed past performance questionnaires (PPQs), which reflected positive performance assessments. *Id.* at 93-97.

In reviewing data from the Contractor Performance Assessment Reporting System, the SSEB identified the STRATCOM contract as being relevant to the evaluation for the CLOIS-III effort, as it met both the RFP's recency criteria and first relevancy criterion, relating to providing F/S/E/U O&M support and service requirements on a government installation. *Id.* at 97-98. The SSEB reviewed CPARs for four rating periods, noting that the protester had received multiple adverse ratings:

	2018	2019	2020	2021
Quality	Marginal	Satisfactory	Marginal	Satisfactory
Schedule	N/A	N/A	Satisfactory	Satisfactory
Management	Unsatisfactory	Satisfactory	Satisfactory	Satisfactory
Cost Control	N/A	N/A	Satisfactory	Satisfactory
Regulatory Compliance	Unsatisfactory	Satisfactory	Very Good	Very Good
Small Business	N/A	N/A	N/A	N/A

Id. at 100.

The SSEB reviewed the available CPARs for each rating period, starting with the assessing official's comments for 2018, which explained the bases for the multiple adverse ratings and stated that the official would not recommend the protester for

similar requirements in the future. *Id.* at 100-101. With respect to the 2019 rating period, the SSEB noted that Yang's performance had improved, and that the rating official stated they would recommend the protester for similar requirements. *Id.* at 101. The report for 2020 demonstrated some improvement in performance, but also contained an adverse rating, and the official stated that they would not recommend the protester for similar requirements, even in light of the performance improvement. *Id.* at 102. Finally, the SSEB reviewed the 2021 report, noting the positive ratings, the protester's corrective actions taken with respect to personnel incidents, and the assessing official's statement that they would recommend Yang for similar requirements. *Id.*

Following its review, the agency requested that the protester provide an explanation regarding the adverse CPARs ratings and any corrective action taken in response, as well as for the fluctuation in performance ratings year-over-year. AR, Tab 17, SSEB Report at 99. The SSEB reviewed the protester's response, *see id.*, but nevertheless concluded that it was "unable to determine a clear pattern of satisfactory performance." *Id.* at 103. The SSEB found that the protester "has been documented with a number of significant issues . . . concerning staffing, management, regulatory compliance, certification and licensure, meeting emergency repair requirements, quality control, late and incomplete CDRL submissions, and scheduling[.]" noting that "[a]ll of these areas are significant to the CLOIS-III acquisition." *Id.* at 104.

The SSEB further pointed out that the STRATCOM contract was "the only contract [the protester] performed as the prime contractor," and that the protester's ability "to successfully satisfy the requirements of the PWS as well as effectively manage their workforce is paramount[.]" particularly in light of the protester's proposal to perform [DELETED] percent of the work under the CLOIS-III contract. *Id.* As a result, the SSEB found that the positive assessments the protester had received for the four contracts submitted in its proposal were "not so weighty as to fully discount the risk introduced by [the protester's] multiple adverse past performance ratings under [the STRATCOM contract]." *Id.* The SSEB therefore found that it had a low expectation that the protester will successfully perform the requirement, and assigned a rating of limited confidence. *Id.* In excluding the protester's proposal from the competitive range, the contracting officer adopted the SSEB's conclusions regarding the STRATCOM contract. AR, Tab 19, CRDD at 8-9.

The protester raises several challenges to the agency's evaluation of its past performance. First, the protester contends that the agency unreasonably found the STRATCOM contract to be relevant, as it met only one of the RFP's five relevancy criteria, which the protester argues should have resulted in a finding that the contract was not relevant under the RFP's relevancy rating definitions. Protest at 29-32. As the agency points out, however, the RFP does not state that relevancy will be assessed for each contract. MOL at 13. Rather, it states that the agency will assess relevancy cumulatively, and that the relevancy definitions apply to the offeror's past projects as a whole. *Id.*; RFP at 233. Thus, the agency's consideration of the STRATCOM contract was consistent with the RFP's terms, as the agency found--and the protester agrees--

that it met one of the relevancy criteria. Indeed, the record reflects that the agency found that two of the protester's four submitted projects each met only one of the relevancy criteria, and considered both of them in concluding that the protester's submitted contracts cumulatively met all five of the relevancy criteria, resulting in a relevancy rating of very relevant. AR, Tab 17, SSEB Report at 92. This allegation therefore provides no basis to sustain the protest.³

Next, the protester alleges that the agency unreasonably ignored the performance quality improvement evident in the STRATCOM contract CPARs, pointing out that its most recent CPAR has ratings of only satisfactory or higher, and that the majority of its ratings for the contract are positive. Protest at 32-39; Comments & Supp. Protest at 29-30. The agency responds that it considered all of the available information regarding the protester's performance of the STRATCOM contract, and that the protester expresses only disagreement with the agency's judgment. MOL at 14-15. We find no basis to object to the agency's evaluation.

The record reflects that the agency considered the totality of information available with respect to Yang's performance of the STRATCOM contract. In this regard, the SSEB's contemporaneous evaluation reflects that the SSEB considered the satisfactory and very good ratings included in the CPARs, including those contained in the most recent available report. See AR, Tab 17, SSEB Report at 100. The SSEB, however, also scrutinized the adverse past performance information available to it. After noting the adverse ratings in prior years, as well as the comments for the 2018 and 2020 rating periods that the assessing official would not recommend the protester for similar requirements, the SSEB concluded that it was unable to determine a clear pattern of satisfactory performance. *Id.* at 103. In other words, while the most recent performance evaluation may be positive, the up-and-down dynamic evident in assessments across all rating periods prevented the agency from discerning the positive trend that the protester argues is dictated by its most recent performance appraisal.

We do not find the agency's conclusion unreasonable in light of the past performance records available to it, which do not suggest a linear progression of performance

³ The protester further contends that the agency placed undue weight on the STRATCOM contract in light of the agency's conclusion that two of the protester's submitted projects met multiple relevancy criteria, as opposed to the one satisfied by the STRATCOM contract. Comments & Supp. Protest at 28. The protester argues that the RFP requires the agency to more heavily weight projects meeting more relevancy criteria. *Id.* As discussed above, the RFP does not provide for a relevancy rating to be applied to individual projects, and instead contemplates relevancy only on a cumulative basis. See RFP at 233. Moreover, the protester does not identify--and we do not independently discern--any statement in the RFP indicating that the agency's past performance confidence assessment will accord greater weight to projects demonstrating satisfaction of multiple relevancy criteria.

improvement or stability. In this regard, an agency's past performance may be based on a reasonable perception of a contractor's past performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of corrective action. *PAE Aviation & Tech. Servs., LLC*, B-413338, B-413338.2, Oct. 4, 2016, 2016 CPD ¶ 283 at 5. And, although consideration of past performance trends and corrective actions is generally appropriate, an agency is not required to ignore instances of negative past performance. *Id.*; *Vectrus Sys. Corp.*, B-412581.3 *et al.*, Dec. 21, 2016, 2017 CPD ¶ 10 at 9. The protester's disagreement with the agency's conclusion, without more, is not sufficient to demonstrate that it is unreasonable.⁴

Finally, Yang alleges that even assuming consideration of the STRATCOM reference was reasonable, the agency placed undue weight on the reference as Yang's only prime contract. In this regard, the protester contends that the RFP's silence regarding the weight to be accorded projects performed as a prime contractor precludes the agency from placing the reliance that it did on the STRATCOM contract. Comments & Supp. Protest at 25-26. We find no reason to object to the agency's evaluation on this basis. We previously have concluded that, even where an RFP does not expressly state a specific preference for past performance as a prime contractor, an agency properly may take such information into account in its past performance evaluation, as it is reasonably predictive of the quality of contract performance. *Cyber Prot. Techs., LLC*, B-416297.2, B-416297.3, July 30, 2018, 2018 CPD ¶ 270 at 7; *DA Def. Logistics HQ*, B-411153.3, Dec. 2, 2015, 2015 CPD ¶ 358 at 4. Here, as discussed above, the agency expressly considered the predictive nature of the protester's past performance as a prime contractor, noting the importance of contract management to successful performance of the CLOIS-III contract, as well as the protester's proposal to perform [DELETED] percent of the contract requirements. AR, Tab 17, SSEB Report at 104. Accordingly, the agency properly considered the nature of the protester's role under the STRATCOM contract in conducting its evaluation.⁵

⁴ Relatedly, the protester argues that the agency did not appropriately consider its positive past performance record for the contracts that the protester submitted in its proposal. Protest at 40-43. This allegation is contradicted by the record, which demonstrates that the SSEB both reviewed and took note of the protester's performance under its submitted contracts, see AR, Tab 17, SSEB Report at 92-97, as well as weighed the positive performance reviews for those contracts against the concerns introduced by the record of the protester's performance of the STRATCOM contract, see *id.* at 103-104. The protester's disagreement with the manner in which the agency considered its positive past performance records does not demonstrate that the agency's evaluation was unreasonable in this regard.

⁵ Yang also alleges that the agency erred in failing to recognize that the protester also served as the prime contractor for one of its submitted contracts for operations and maintenance of the Arecibo Observatory in Puerto Rico. See Supp. Comments at 29, 33-34; AR, Tab 13, Yang Proposal at 245-247. The agency did not agree with the protester's characterization of itself as a prime contractor, arguing that Yang's proposal

The protester additionally contends that the agency was required to consider work it performed as a first-tier subcontractor similarly to prime contract past performance pursuant to 13 C.F.R. § 125.11. Comments & Supp. Protest at 26-27. Under that regulation, “agencies are required to consider the past performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors,” and agencies are directed to “consider the small business’ past performance for the evaluated contract or order similarly to a prime-contract past performance.” 13 C.F.R. § 125.11(a). The protester argues that the agency failed to place the protester’s submitted past performance contracts on the same footing as the STRATCOM contract, which the protester contends is required by 13 C.F.R. § 125.11.

When the Small Business Administration (SBA) promulgated 13 C.F.R. § 125.11, however, it specified that the regulation would take effect on August 22, 2022. See Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors, 87 Fed. Reg. 43731 (July 22, 2022). The agency issued the RFP here on June 16, 2022, over two months prior to the effective date of 13 C.F.R. § 125.11. Additionally, proposals were due on August 1, three weeks prior to that regulation’s effective date. Accordingly, 13 C.F.R. § 125.11 is inapplicable, and did not require the agency to place the same weight on the protester’s first-tier subcontractor experience as it did the protester’s performance as a prime contractor under the STRATCOM contract. See, e.g., *Yang Enters., Inc.*, B-418922.4, B-418922.6, May 20,

itself demonstrates that Yang was a subrecipient of a cooperative agreement awarded to the University of Central Florida (UCF). See Agency Resp., Apr. 24, 2023. For the reasons that follow, we find no basis to object to the agency’s reasonable determination that Yang was a subrecipient to UCF. See 2 C.F.R. § 200.1 (defining “subrecipient” as “an entity, usually but not limited to non-Federal entities, that receives a subaward from a pass-through entity to carry out part of a Federal award[,]” and “subaward” as “an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity”).

Yang’s proposal stated that the National Science Foundation (NSF) awarded a contract for the management of the Arecibo Observatory to a consortium led by UCF, and provided two contract numbers, one between the NSF and UCF, and one between UCF and its consortium members. *Id.* at 2. The agency also reviewed a PPQ for the Arecibo Observatory contract, which identified UCF as “the lead for the consortium” and stated that there had been “no complaints from NSF or UCF,” which led the agency to the conclusion that the protester is a major subcontractor for UCF, not the lead of the consortium or otherwise the prime contractor for the Arecibo Observatory. *Id.* at 2-3. In light of Yang’s proposal demonstrating that privity is between NSF and UCF, and in turn that UCF awarded a contract to Yang to perform part of the services contemplated by the agreement between NSF and UCF, we find no basis to object to the agency’s conclusion that Yang was not the prime contractor for this effort.

2021, 2021 CPD ¶ 209 at 8-9 (where SBA regulation that took effect after submission of initial proposals was not promulgated as retroactive or preemptive, it was not relevant to interpretation of solicitation).

For the reasons stated above, we conclude that the protester has not demonstrated that the agency's evaluation of its past performance was unreasonable or inconsistent with the RFP's terms, or otherwise contrary to law. We therefore deny this ground of protest.

Technical Capability

The protester next contends that the agency unreasonably evaluated its proposal under the technical capability factor, arguing that the agency improperly assigned deficiencies to the protester's proposal under the resource management and transition plan subfactors. Protest at 43-53; Comments & Supp. Protest at 37-43.

As an initial matter, we note that the protester does not seriously contend that its proposal should have been evaluated as technically acceptable. Indeed, the protester contests only a handful of the deficiencies assigned to its proposal under the technical capability factor. For example, the protester does not contest the agency's assessment of a deficiency based on Yang's failure to identify specific positions or labor categories to perform 13 PWS sections. See AR, Tab 17, SSEB Report at 86-87. In this regard, the RFP required an offeror's staffing matrix to "define adequate staffing levels and skills to accomplish program requirements in alignment with the PWS that enables organizing, managing, and coordinating resources," and explained that the purpose of the staffing matrix was to provide "a breakdown of proposed labor for each labor category by CLIN." RFP at 164, 231. The SSEB explained that Yang's proposal was deficient because it identifies only some roles associated with PWS paragraphs, and the omission of the proposed labor categories to perform the PWS sections failed to adequately explain how work will be accomplished and the labor that will actually perform the work. AR, Tab 17, SSEB Report at 86-87.

The SSEB also assessed a deficiency because Yang's total proposed staffing in its staffing matrix submitted in response to subfactor 2, resource management, did not match the total proposed staffing in its staffing plan submitted in response to subfactor 1, organization. Furthermore, the labor categories in the staffing plan and staffing matrix did not align, with several additional labor categories included in the staffing matrix. *Id.* at 88; *compare* AR, Tab 13, Yang Proposal at 23-24 (staffing plan) *with id.* at 49-51 (staffing matrix). The SSEB reasonably found that these inconsistencies violated the RFP's requirement that "[t]otal proposed staffing identified in the staffing plan for each labor category shall match the Staffing Matrix breakdown for each category." RFP at 164, 231.

As another example of an uncontested deficiency, the agency assessed a deficiency based on the potential schedule and performance risks associated with Yang's proposed use of software applications and systems that are not currently approved to be used on the Air Force Network (AFNET). AR, Tab 17, SSEB Report at 86. The

PWS in multiple places emphasizes the need for agency approval before adding or connecting contractor software or systems to the AFNET. See, e.g., RFP, PWS §§ 1.1.7.2.2.1 (“All contractor systems/enclaves require Assessment and Authorization through the Risk Management Framework (RMF) process.”); 1.1.7.2.8 (“Any and all additions and upgrades to software beyond what is included in the government provided Standard Desktop Configuration must have a current certification memo and be presented to the Wing Cybersecurity Office for evaluation and approval before the software is added to the AFNET.”).

As the agency observed in assessing the deficiency, although the protester identified the need to submit and obtain approval for use of the systems in its proposed transition plan, the proposal provides no proposed risk mitigation in the event of any delays in approval or disapproval to connect the proposed systems to the AFNET. AR, Tab 17, SSEB Report at 86. In this regard, the agency noted that approval of new software and systems can take between six to twelve months; thus Yang’s failure to address what, if any, mitigation it would undertake if its proposed software and systems were not approved in time for full contract performance presented a risk to successful performance. *Id.* The RFP specifically advised that the offeror was required to “identify risks, if any, associated with the proposed approach and actions the offeror will take to mitigate the identified risks[,]” and that the agency’s evaluation would address risks and proposed mitigation. RFP at 163, 230. On this record, we find no basis to object to the agency’s evaluated concern with the risks presented by Yang’s proposed use of unapproved software and systems in the absence of any credible plan to mitigate the potential schedule and performance risks associated with the need to obtain approval to use such tools.

Thus, we find no basis to object to the agency’s determination that Yang’s technical capability proposal was unacceptable as submitted where the protester has failed to adequately rebut a number of assessed deficiencies. Turning to the few deficiencies contested by the protester, while we do not discuss each individual evaluation challenge or variation thereof raised by the protester, as reflected in the representative examples addressed herein, we have considered them all and find that none provides a basis to sustain the protest.

In reviewing protests challenging the evaluation of an offeror’s proposal, it is not our role to reevaluate proposals; rather, our Office examines the record to determine whether the agency’s judgment was reasonable, and in accordance with solicitation criteria and applicable procurement statutes and regulations. *Patriot Def. Group, LLC*, B-418720.3, Aug. 5, 2020, 2020 CPD ¶ 265 at 7. A protester’s disagreement with the agency’s assessment, without more, does not render the evaluation unreasonable. *The Ginn Group, Inc.*, B-420165, B-420165.2, Dec. 22, 2021, 2022 CPD ¶ 17 at 9. Under those guiding principles, we find no merit to the protester’s arguments that the agency unreasonably assigned deficiencies to its proposal under the resource management and transition plan subfactors.

For example, the agency assigned a deficiency under the resource management subfactor relating to the protester's proposed use of a unique software application for managing data transfers for work management, labor, and costs. See AR, Tab 17, SSEB Report at 86. The agency could not determine from the proposal how the protester proposed to perform data transfers or what specific data would be transferred, as the proposal provided only a description of the database and system tools. See *id.* The agency further noted that the protester had proposed an on-site IT lab located at Patrick Space Force Base, but that facility was not among those to be furnished by the government. See *id.*

The protester argues that this deficiency was unreasonable, pointing to language in its proposal stating that an encrypted flat file data can be exported to its unique software application for cost reconciliation and government visibility, as well as that data exports would be performed via encrypted files. Comments & Supp. Protest at 40 (citing AR, Tab 13, Yang Proposal at 29, 30). The cited language, however, does not demonstrate that the deficiency was unreasonable. The thrust of the reasoning for the deficiency is that, while the protester's proposal discusses the data transfer capabilities of its software, it provides no detail regarding the data transfers themselves, such as what data will be transferred, and how those transfers will be accomplished. The protester's argument reiterates the capabilities of its proposed systems, but does not point to any details regarding the protester's proposed approach to data transfers, which is the basis for the deficiency. Furthermore, the protester does not address its proposed use of a government facility that the RFP did not indicate would be made available to the CLOIS-III contractor. The protester therefore has not demonstrated that the agency unreasonably assigned this deficiency.

Turning to the transition plan subfactor, the agency assigned a deficiency because it found the protester's proposal identified a risk associated with transportation delays but provided minimal explanation of both the cause and impact of that risk. See AR, Tab 17, SSEB Report at 90. The agency found that a more fulsome explanation was needed to understand and mitigate the risk to the government. See *id.* In response, the protester takes issue with the agency's characterization of the protester's proposed mitigation measures, see Comments & Supp. Protest at 42 (quoting MOL at 20), but the proposal's discussion of mitigation measures was not the basis of the deficiency. Rather, the agency found that it needed further information as to the cause and nature of the impact of the risk identified in the protester's proposal, not clarity or additional information regarding mitigation measures. While the protester quotes the relevant portion of its proposal, the excerpt contains only a terse, summary identification of "disruption of schedule" as a risk associated with "transportation delays," accompanied by a risk register assigning numerical values to likelihood and impact. See *id.* (quoting AR, Tab 13, Yang Proposal at 45). On this record, we do not find unreasonable the agency's conclusion that the protester's proposal provided only minimal explanation of the cause and impact of the risk associated with transportation delays.

As demonstrated by the representative examples discussed above, we have considered each of the protester's challenges to the deficiencies assigned by the agency under the

resource management and transition plan subfactors, and find no basis to conclude that they were unreasonably assigned. Accordingly, these allegations also fail to demonstrate that the protest should be sustained.

Competitive Range Determination

Finally, the protester raises multiple challenges to the agency's decision to exclude the protester's proposal from the competitive range. First, the protester alleges that this decision was based upon an improper evaluation of the protester's proposal. Protest at 63-64. The protester further alleges that the agency engaged in disparate treatment, arguing that because its proposal was one of only two to receive acceptable ratings in a technical capability subfactor, it necessarily was one of the most highly rated proposals, and the agency therefore was required to include it in the competitive range. Comments & Supp. Protest at 11-16. The protester also argues that the agency's decision was based solely on the number of deficiencies assigned to the protester's proposal, not an analysis of their seriousness or ability to be corrected. *Id.* at 16-19. Alternatively, Yang alleges that because the agency's decision to exclude the protester's proposal from the competition was tantamount to a nonresponsibility determination, the agency was required to refer the matter to SBA for consideration under its certificate of competency (COC) program. None of these allegations provides a basis to sustain the protest.

Our Office will review an agency's evaluation and exclusion of a proposal from the competitive range for reasonableness and consistency with the solicitation criteria and applicable statutes and regulations. *Cylab Inc.*, B-402716, July 13, 2010, 2010 CPD ¶ 163 at 4. Contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. FAR 15.306(c)(1); *General Atomics Aeronautical Sys., Inc.*, B-311004, B-311004.2, Mar. 28, 2008, 2008 CPD ¶ 105 at 5. In this regard, a protester's disagreement with an agency's evaluation and competitive range judgment does not establish that the agency acted unreasonably. *CEdge Software Consultants, LLC*, B-409380, Apr. 1, 2014, 2014 CPD ¶ 107 at 6.

With respect to the protester's allegation that the agency's exclusion of the protester's proposal from the competitive range was based upon an improper evaluation, as discussed above, we find no basis to object to the agency's underlying evaluation of the protester's proposal. That derivative challenge therefore is denied.

The protester next alleges that it was unreasonable for the agency not to find that the protester's proposal was one of the most highly rated because its proposal was one of only two to receive an acceptable rating under a technical capability subfactor and it presented the lowest total cost/price. See Comments & Supp. Protest at 11, 15. The protester further argues that because the two proposals included in the competitive range also were technically unacceptable, they, too, must have required substantial

revision to be found technically acceptable, and that the agency therefore engaged in disparate treatment in excluding the protester's proposal. *Id.* at 15.

While agencies may properly exclude from the competitive range proposals that are not considered to be among the most highly rated, judgments regarding which proposals are included in the competitive range must be made in a relatively equal manner. *Outdoor Venture Corp.*, B-401351.2, B-401351.3, Sept. 14, 2009, 2009 CPD ¶ 194 at 6. An agency may not reasonably exclude a proposal from the competitive range where the strengths and weaknesses found in that proposal are similar to those found in proposals in the competitive range. *Hamilton Sundstrand Power Sys.*, B-298757, Dec. 8, 2006, 2006 CPD ¶ 194 at 6.

As the agency points out, the protester's proposal was not one of the most highly rated. See Supp. MOL at 7-9. With respect to the technical capability factor, the contracting officer found that the protester's proposal failed to meet the majority of the PWS requirements, and did not demonstrate a thorough knowledge and understanding of the RFP. See AR, Tab 19, CRDD at 9. Additionally, after reviewing the deficiencies assigned by the SSEB, the contracting officer concluded that the protester's proposal required significant revisions to be made acceptable under the technical capability factor. See *id.* This stands in contrast to the two proposals included in the competitive range, both of which the contracting officer found demonstrated a complete understanding and sufficient knowledge of CLOIS-III requirements, even in light of the deficiencies assigned by the SSEB. See *id.* at 15, 17. The contracting officer further found that those proposals required only minor revisions to be acceptable under the technical capability factor. See *id.*

The protester responds that the contracting officer provided no explanation for his conclusion that the protester's proposal required more extensive revisions than those included in the competitive range, and that any explanation at this point is a *post hoc* argument that should be given little weight. See Supp. Comments at 8-10. While we agree that the contracting officer provided little in the way of a contemporaneous explanation for his conclusion, our review of the record supports that conclusion as a reasonable one. In this regard, our Office will not limit its review to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations submitted in response to a protest. *Serco, Inc.*, B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, 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 as long as those explanations are credible and consistent with the contemporaneous record. *Epsilon, Inc.*, B-419278, B-419278.2, Feb. 2, 2021, 2021 CPD ¶ 71 at 4. Here, we find the agency's explanation for its rationale to be reasonable and consistent with the contemporaneous evaluation.

The primary example to which the agency points as demonstrating that the protester's proposal required correction to a greater degree than those included in the competitive

range is the SSEB's finding under the resource management subfactor, discussed above, that the protester's proposal did not identify specific positions or labor categories to perform 13 sections of the PWS. See Supp. MOL at 11; AR, Tab 17, SSEB Report at 86. Although the protester contends that the proposals included in the competitive range had similar deficiencies, the record indicates that the other offerors' deficiencies were less extensive than the deficiency assigned to the protester's proposal. With respect to offeror C's proposal, the SSEB noted that the proposal did not identify positions or labor categories to perform three PWS sections. See AR, Tab 17, SSEB Report at 57-58. Similarly, the SSEB could not determine whether offeror A's proposal had identified labor to perform one PWS section. See *id.* at 19.

While these deficiencies are similar in kind to the protester's failure to identify specific positions or labor categories for 13 PWS sections, they are substantially different in magnitude. On this record, we do not find unreasonable the contracting officer's conclusion that the protester's proposal required a greater degree of correction than those included in the competitive range. Moreover, relying in part on that distinction to make the competitive range determination is consistent with the RFP's notification to offerors that the agency would consider the "correction potential" of deficiencies in evaluating proposals.⁶ See RFP at 229.

The agency further points out that it was not just the evaluation under the technical capability factor that led the contracting officer to conclude that the protester's proposal was not among the most highly rated. See Supp. MOL at 8. That conclusion also rested on the limited confidence rating assigned to the protester's proposal under the past performance factor, which was lower than the substantial confidence rating assigned to the proposals included in the competitive range.⁷ See AR, Tab 19, CRDD at 9, 15, 17. Moreover, and contrary to the protester's contentions, see Comments & Supp. Protest at 15, the contracting officer took into account that the protester had proposed the lowest total evaluated cost/price, finding that even with that advantage, the protester did not have a realistic prospect for award in light of the nature of its proposal's technical deficiencies, as well as its low--and unlikely to improve--past performance confidence rating. See AR, Tab 19, CRDD at 9-10.

⁶ For similar reasons, the record refutes the protester's contention that the agency's competitive range determination rested on the purely mathematical exercise of counting the number of deficiencies assigned to the protester's proposal. See Comments & Supp. Protest at 16-19. Rather than simply totaling up deficiencies as alleged by the protester, the record demonstrates that the contracting officer substantively considered the nature, extent, and correction potential of those deficiencies, consistent with the RFP. See AR, Tab 19, CRDD at 8-10.

⁷ As discussed above, the RFP provides for a tradeoff only between past performance and cost/price. Thus, even if the protester could revise its technical proposal to be acceptable, its comparatively low past performance rating would remain a substantial obstacle to contract award.

On this record, the agency's conclusion that the protester's proposal was not among the most highly rated and did not have a realistic chance of award was reasonable.

Finally, the protester contends that because the agency excluded its proposal from the competitive range on the basis of unacceptable ratings under the resource management and transition plan subfactors and low confidence rating under the past performance factor, the agency's decision was tantamount to a nonresponsibility determination, which the protester argues required the agency to refer Yang to SBA for a COC. We disagree.

Under SBA's COC program, agencies must refer a determination that a small business is not responsible to SBA, if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. SBA's regulations specifically require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). SBA is then empowered to certify the responsibility of the small business concern to the agency. 15 U.S.C. § 637(b)(7)(A).

With respect to the agency's evaluation of Yang's technical proposal, our decisions have distinguished between non-comparative technical evaluations involving responsibility-related factors that would require a COC referral, and those involving factors not related to responsibility that would not require a COC referral. In this regard, where an agency finds the proposal of a small business to be unacceptable under a factor pertaining to its ability to perform, such as whether it has adequate corporate experience or production equipment and facilities, the determination is essentially one of nonresponsibility, meaning that referral to SBA, which has the ultimate authority to determine the responsibility of small business concerns, is required. *Barquin Solutions*, B-419315.2, B-419315.3, Jan. 19, 2021, 2021 CPD ¶ 55 at 6. In contrast, where an agency finds a proposal to be unacceptable for failure to adequately explain or demonstrate a technical approach, the finding does not constitute a determination that the offeror is not a responsible prospective contractor. *See id.* at 6-7 (denying protest that a COC referral was required where the agency excluded a proposal on a pass/fail basis that failed to adequately demonstrate a user interface for non-technical users or on features of the protester's proposed solution that were not actually demonstrated during its technical demonstration); *Micro Technologies, LLC*, B-414670, B-414670.2, Aug. 1, 2017, 2017 CPD ¶ 236 at 6 (same, where evaluation factor "was styled 'technical capability,'" but was not concerned with traditional responsibility matters, and proposal unacceptability was based on failures to include relevant and required details about the proposed technical approach).

As addressed in the deficiencies discussed above, the agency's evaluated technical concerns with Yang's proposal do not implicate responsibility matters, such as concerns

with Yang's experience or capabilities. Rather, the evaluation reflects the agency's concerns pertained to Yang's failure to provide required information or adequate detail for its proposed technical approach. For example, the failure to provide an adequate staffing matrix with required labor category information that was also consistent with the protester's proposed staffing plan reflects the agency's reasonable concerns that the protester failed to comply with the RFP's unambiguous proposal submission requirements and evaluation criteria relating to the protester's proposed approach to perform the requirements of the CLOIS-III contract. Similarly, the failure to adequately describe perceived performance risks or to address required proposed mitigation measures again reflects Yang's failure to provide an adequate technical proposal in accordance with the RFP's requirements. On this record, we find no basis to conclude that the agency's determination that Yang's technical proposal was technically unacceptable was based on responsibility-like factors that necessitated a referral to SBA for a COC.

With respect to the past performance evaluation, the agency also correctly responds that, while past performance is traditionally a matter of responsibility, the agency evaluated proposals under that factor on a comparative--rather than acceptable or unacceptable--basis. See MOL at 38-39. As discussed above, the agency determined that the protester's proposal was not among the most highly rated and did not have a substantial chance of award based in part on its limited confidence past performance rating, as contrasted with the substantial confidence ratings assigned to the proposals submitted by offerors A and C. Where an agency makes such a comparative evaluation of past performance, we previously have concluded that referral to SBA is not required. See, e.g., *DA Def.*, *supra* at 8.

The protest is denied.

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