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## Decision

**Matter of:** SNAP, Inc.  
**File:** B-409609; B-409609.3  
**Date:** June 20, 2014

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### DIGEST

1. Protest allegations that the agency failed to assign various strengths to the protester's technical proposal, failed to evaluate price in making its competitive range determination, and engaged in disparate treatment of offerors, are dismissed as untimely where the record shows that the protester knew or should have known of the factual basis for these allegations more than ten days prior to raising them.
  2. Protest challenging the agency's assignment of various weaknesses and significant weaknesses to the protester's technical proposal, and the agency's subsequent exclusion of the protester's proposal from the competitive range, is denied where the record shows that the evaluation and subsequent competitive range decision were reasonable.
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### DECISION

SNAP, Inc., of Chantilly, Virginia, protests the decision of the Department of Homeland Security, U.S. Citizenship and Immigration Services, to exclude its proposal from the competitive range under request for proposals (RFP) No. HSSCCG-13-R-00023 for flexible agile development services. SNAP argues that the agency unreasonably evaluated the firm's technical proposal, engaged in disparate treatment, failed to consider price in its competitive range determination, and improperly utilized unstated evaluation criteria.

We dismiss the protest in part and deny it in part.

## BACKGROUND

The RFP, issued on July 11, 2013, contemplated the award of multiple cost-plus-fixed-fee task orders<sup>1</sup> to small businesses for Flexible Agile Development Services (FADS) to provide development services for the agency's Electronic Immigration System and other systems. RFP § C-16. The contemplated services will give the agency a flexible agile development capability to accomplish information technology (IT) development projects. RFP § C-15. The contractor will provide agile development teams to participate in IT development projects using various agile and lean processes.<sup>2</sup> Id.

Proposals were to be evaluated on a best value basis considering technical, past performance and price/cost factors. RFP § M-71. The technical factor was to be significantly more important than either past performance or price/cost, and past performance was to be more important than price/cost. Id. When combined, all non-price factors were to be significantly more important than price/cost. Id. The technical factor was divided into three equally-weighted subfactors: technical methodology and approach, corporate experience, and management approach. Id.

Thirty-six proposals were submitted in response to the RFP, including one from SNAP. AR, exh. 14, Technical Evaluation Committee (TEC) Report, at 4. After an initial evaluation, SNAP's proposal was assigned an overall technical rating of acceptable, supported by acceptable ratings for each subfactor. Id. at 5. SNAP's proposal received overall past performance ratings of outstanding and low risk, and had an evaluated cost of \$63,961,959.39. AR, exh. 15, Business Evaluation Committee (BEC) Report, at 8, 206. The proposal received two strengths, nine weaknesses, and two significant weaknesses under the technical methodology and approach subfactor. AR, exh. 14, TEC Report, at 145-6. The proposal received no strengths and one weakness under the corporate experience subfactor, and no strengths, one weakness and one significant weakness under the management approach subfactor. Id. at 147-8.

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<sup>1</sup> Proposals were solicited under the National Institute of Health Information Technology Acquisition and Assessment Center Chief Information Officer-Solutions and Partners 3 Small Business Governmentwide Acquisition Contract, using Federal Acquisition Regulation (FAR) Part 15 procedures. Agency Report (AR), exh. 16, Competitive Range Determination, at 1. This protest falls within our jurisdiction to hear protests related to the issuance of task orders valued in excess of \$10 million. 41 U.S.C. § 4106(f)(2).

<sup>2</sup> According to the RFP, agile software development "is a group of software development methods based on iterative and incremental development, where requirements and solutions evolve through collaboration between self-organizing, cross-functional teams." RFP § C-19.

The agency established a competitive range in order to enter into discussions with selected offerors. AR, exh. 16, Competitive Range Determination, at 1. Four offerors were selected for the competitive range, and the remaining offerors, including SNAP, were excluded. Id. at 2. This protest followed.

## THRESHOLD ISSUES

SNAP's initial protest only challenged the agency's evaluation of weaknesses in its proposal. In its comments on the agency report, SNAP raised four supplemental grounds of protest: (1) the agency improperly failed to assign its technical proposal various strengths; (2) the agency's assignment of strengths to other offerors' proposals evidenced disparate treatment; (3) the agency failed to consider SNAP's lower price in excluding the firm from the competitive range; and (4) the agency utilized unstated evaluation criteria. DHS asks that we dismiss SNAP's first three supplemental protest grounds, arguing that the first and third are untimely and that the second lacks a sufficient legal and factual basis. We agree.

Our Bid Protest Regulations require that protests based on other than alleged improprieties in a solicitation be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2014). With respect to the allegation that DHS improperly failed to assign SNAP's proposal certain strengths, the protester argues that it could not have raised this protest ground until after disclosure of the evaluation plan's allegedly atypical definition of "strength."<sup>3</sup> Comments at 20. SNAP argues that the plan's definition of this term is a "radically lower" and different standard than the typical definition of strength, which the firm asserts is "exceeding solicitation requirements." Supp. Comments at 16. We take SNAP to argue that, while its proposal lacked strengths under the traditional definition of the term, the firm's proposal warranted strengths under the agency's allegedly lower standard.

Our review of the language used in the evaluation plan reveals nothing novel about the agency's definition of strength, and it is not a radically lower standard than is the traditionally understood definition. At the time of its debriefing, SNAP was on notice that DHS had assigned only two strengths to the firm's proposal. If SNAP believed its proposal warranted additional strengths, it could have, and should have, raised this allegation within 10 days of the debriefing. Its failure to do so renders the allegation untimely. 4 C.F.R. § 21.2(a); Building Operations Support Services, LLC, B-407711, B-407711.2, Jan. 28, 2013, 2013 CPD ¶ 56 at 7 n.11.

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<sup>3</sup> The evaluation plan defined "strength" as "[a]ny part of a proposal that results in a benefit to the Government, or has the potential for positive impact on the quality of products or services." AR, exh. 5, Evaluation Plan, at 9.

SNAP next argues that DHS did not evaluate the firm's proposal under the same standards as it used in assessing the strengths of other proposals. Comments at 21. The entirety of SNAP's argument is that, since certain other proposals were rated good or outstanding, DHS must have assigned many more strengths to those proposals. Id. From this inference, SNAP concludes, with no support, that DHS necessarily engaged in disparate treatment. Id. The agency argues that this allegation is speculative and lacks any factual basis. We agree.

Our Bid Protest Regulations require that protests include a detailed statement of the legal and factual grounds of protest and that the grounds be legally sufficient. Systems Dynamics Int'l, Inc.--Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 3; see also 4 C.F.R. § 21.1(c)(4) and (f). This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. Id. Protesters must provide more than a bare allegation; the allegation must be supported by some explanation that establishes the likelihood that the protester will prevail in its claim of improper agency action. Federal Computer Int'l Corp.--Recon., B-257618.2, July 14, 1994, 94-2 CPD ¶ 24. SNAP's allegation does not meet this standard.

In addition, the agency's March 24 summary dismissal request included the competitive range determination as an attachment. See Request for Summary Dismissal at Encl. 2. This document revealed the complete array of adjectival ratings for proposals in the competitive range, which was the sole factual underpinning for SNAP's allegation. Since the firm failed to raise its allegation until more than 10 days after March 24, the allegation is untimely. For the same reason, we dismiss as untimely SNAP's allegation that DHS failed to consider the firm's price in making its competitive range determination. The competitive range determination sets forth DHS's basis for including, and excluding, various proposals from the competitive range. Id. It was readily discernable from the document whether the agency considered price in making its competitive range determination. SNAP's failure to raise the issue within 10 days of March 24 renders the allegation untimely.

## DISCUSSION

SNAP argues that DHS assigned various irrational weaknesses and significant weaknesses to its proposal. In a related argument, SNAP contends that, in assigning these weaknesses, the agency utilized unstated evaluation criteria in the form of "idiosyncratic" definitions of terms that run contrary to industry custom. Comments at 30. We have considered each of SNAP's arguments, and for the reasons discussed below, conclude that they provide us no basis to find the agency's actions unreasonable.

### Technical Evaluation

SNAP challenges eight of the nine weaknesses and both significant weaknesses assessed against its proposal under the technical methodology and approach subfactor. SNAP also challenges the assignment of a weakness to its proposal under the corporate experience subfactor, as well as the weakness and significant weakness assigned under the management approach subfactor. SNAP argues that the weaknesses were based on failures of the agency to accurately, fairly and fully consider the actual content of its technical and management proposal. SNAP concludes that, but for the agency's arbitrary and irrational evaluation, its proposal would have been included in the competitive range.

The determination of whether a proposal is in the competitive range is principally a matter within the sound judgment of the procuring agency. Sea Box, Inc., B-408182.5, Jan. 10, 2014, 2014 CPD ¶ 27 at 7. In reviewing a protest challenging an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the evaluation was reasonable and consistent with the stated evaluation factors and applicable statutes and regulations. Id. Contracting agencies are not required to include a proposal in the competitive range where the proposal is not among the most highly-rated. Id. at 8 (citing FAR §15.306(c)(1)).

We have considered each of SNAP's arguments and find them unpersuasive for two reasons. First, most of the allegations amount to no more than disagreement with the agency's reasoned judgment. See Re-Engineered Business Solutions, Inc., B-405662.4, B-405662.5, Sept. 19, 2012, 2012 CPD ¶ 261 at 9. Second, we agree with DHS that SNAP has not shown it was prejudiced by any of the alleged errors; prejudice is a necessary element of any protest. We have reviewed and considered each of SNAP's allegations, but discuss here only a few examples.

SNAP's proposal received a significant weakness under the technical methodology and approach subfactor<sup>4</sup> related to the firm's alleged lack of understanding of technical debt as it relates to Section 6.3(a) of the PWS.<sup>5</sup> SNAP's proposal states, in relevant part, "[a]n incomplete user story or one that did not meet the acceptance

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<sup>4</sup> The technical methodology and approach subfactor was used to assess the viability and robustness of the proposed approach and capabilities for satisfying the requirements of the PWS. RFP § M-71.

<sup>5</sup> Section 6.3(a) states that the contractor "shall develop code that does not add new technical debt to a release; the contractor shall correct any defects identified by testers, code reviewers, automated tools, or as part of the [Continuous Integration/Continuous Delivery (CI/CD)] activities etc." RFP § C-20.

and [Definition of Done]<sup>6</sup> criteria may not make it back into the current sprint cycle and deferred [sic] to the next sprint, often called technical debt.” AR, exh. 11, SNAP Technical Proposal, at 12. In assigning this significant weakness the agency observed that “[t]echnical debt is a deliberate decision to postpone specific technical work while still meeting the business need, not incomplete stories or missing acceptance criteria.” AR, exh. 14, TEC Report, at 146.

In support of its position, DHS explains that technical debt occurs as a result of a deliberate decision and negotiated agreement with the business owner at the outset of the story development to postpone specific technical work while still meeting the business need. Contracting Officer’s Statement at 10-11. An example is where the technical work may involve a specific feature desired by the business owner, but is postponed because it is not required to meet the immediate business need. Id. at 11. According to the agency, technical debt is not generated by incomplete stories, not meeting the Definition of Done, or failure of the developed code to meet the acceptance criteria. Id.

SNAP argues that its proposal evidences such a deliberative process where it discusses meeting with the agency in order to compile a list of requirements and assess the product backlog “coupled with assessment of technical debt and other non-functional requirements.” AR, exh. 11, SNAP Technical Proposal, at 10. However, SNAP also contends that the RFP does not define technical debt and, while technical debt is defined in different ways, the firm knows of no definition that describes technical debt as a deliberate decision and negotiated agreement, as proffered by the agency. Comments at 12-13. The protester explains that issues arising as a result of agile development “can cause incomplete user stories. Incomplete user stories are often deferred to a subsequent sprint(s) because they cannot be shippable. These stories therefore become Technical Debt.” Id. at 13.

Section 6.3(a) of the PWS requires that the code developed by the contractor not add new technical debt to a release. RFP § C-20. To the extent that a contractor would seek to incur technical debt in this context, we conclude that requiring a deliberative process and prior agreement with the agency would be reasonable. However, in contravention of this requirement, the CI/CD process proposed by SNAP appears to permit the incurrence of technical debt with respect to incomplete user stories or those stories that do not meet acceptance and Definition of Done criteria by deferring such activities to a later sprint without such deliberation or agreement with the agency. AR, exh. 11, SNAP Technical Proposal, at 12. We

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<sup>6</sup> The Definition of Done is designed for developers to determine when a user story or feature is deemed testable, acceptable and complete. Contracting Officer’s Statement at 8.

therefore conclude that the agency's assessment of a weakness here was reasonable.

We do observe that other language in the RFP appears to permit technical debt.<sup>7</sup> However, we do not understand the agency's concern here to be whether technical debt is permitted. We read the significant weakness to express concern that SNAP's proposed approach contemplated what can be reasonably interpreted as routine use of technical debt to address incomplete and unacceptable work, whereas the agency would utilize more deliberation and required approval before the decision to incur technical debt is made. As the RFP is clear that the agency, not the contractor, controls the entire development process, which would include the decision to postpone required work and incur technical debt,<sup>8</sup> we view as reasonable the agency's concern about SNAP's proposed approach on this issue.

The second significant weakness under the technical methodology and approach subfactor relates to SNAP's proposed approach to unit testing. With respect to SNAP's proposal, the TEC report states, "[u]nit testing should occur before code is checked in to version control. The Offeror proposes that this occur after code check in. This could result in broken builds and defects discovered later in the cycle." AR, exh. 14, TEC Report, at 146. SNAP responds that the agency's reading of the firm's proposal is irrational. The protester argues that its proposal clearly describes hand-off to version control as being completed after unit testing, and that code is unit tested before being deployed. We understand the parties to agree that unit testing is to properly occur before code check-in.

A review of SNAP's proposal shows that Figure 1.1.4-1 depicts code development and integration occurring before automated unit testing. AR, exh. 11, SNAP Technical Proposal, at 14. The narrative on the same page describes automated unit testing as occurring during check in. Id. Additionally, SNAP points to language

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<sup>7</sup> The PWS states, "FADS developers will be required to develop high quality code and are responsible for any technical debt that is incurred as a result of their development activities." RFP § C-17. The RFP explains that if technical debt is incurred by the development teams in the process of completing their user stories, the team will be required to "address that debt in future technical debt user stories." AR, exh. 7, Amendment 000001, Question and Answer, at Question 39.

<sup>8</sup> For example, the RFP states, "[t]he FADS contractors will be expected to work with a technical architecture and design specified by the government, and to work within the Agile process and SELC frameworks defined by the government team." RFP § C-16. While the agency and contractors will work together to develop and estimate user stories and establish acceptance criteria, the agency "will determine whether or not acceptance criteria have been satisfied." RFP § C-17. Finally, the RFP states that the agency may adopt other agile processes and the contractor will be expected to conform its processes to these approaches. Id.

found earlier in its proposal, which the firm asserts shows unit testing occurring before the code is integrated and deployed. Id. Thus, the record shows that SNAP's proposal contains a facial inconsistency as to when unit testing is to occur.

While the significant weakness is based on DHS's understanding that SNAP proposed to conduct unit testing after code check-in, and does not mention the above-cited inconsistency, we nonetheless conclude that the evaluation was reasonable. Offerors are responsible for submitting a well-written proposal with adequately-detailed information that allows for a meaningful review by the procuring agency. Hallmark Capital Group, LLC, B-408661.3 et al., Mar. 31, 2014, 2014 CPD ¶ 115 at 9. Here, the conflicting language in SNAP's proposal reasonably supports the significant weakness.

As a final example, the agency assessed a weakness in SNAP's proposal under the corporate experience subfactor regarding the firm's past experience working with multiple vendors. The agency found that SNAP's corporate experience was unclear with respect to work with multiple vendors, and that this lack of demonstrated experience could make collaboration across the multiple FADS contractors more difficult. AR, exh. 14, TEC Report, at 147. SNAP argues that this weakness is unreasonable because the firm's proposal described the experience of its subcontractors under two other DHS contracts that the agency knows were performed in multi-vendor environments. SNAP concludes that even if the firm's proposal was not explicit, the circumstances of its subcontractors' performance under those DHS contracts are too close at hand for the agency to ignore.

We have recognized that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's past performance when it is "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. See, e.g., International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. While usually reserved for the consideration of past performance information, SNAP argues that the doctrine is also applied in the context of corporate experience, citing to our decision in Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112.

The protester misreads our decision. Nuclear Production Partners stands for the proposition that an agency may consider close at hand experience information known to the agency and not found in the firm's proposal. Id. at 20. The question here, however, is whether we will require the agency to consider experience information under the equitable principles of the "too close at hand" doctrine. We decline to extend the doctrine to the circumstances presented here.

The "too close at hand" doctrine is not intended to remedy an offeror's failure to include information in its proposal. Great Lakes Towing Company dba Great Lakes

Shipyard, B-408210, June 26, 2013, 2013 CPD ¶ 151 at 8. Such circumstances are instead governed by the well established principle that offerors are responsible for submitting a well-written proposal with adequately-detailed information that allows for a meaningful review by the procuring agency. Hallmark Capital Group, LLC, B-408661.3 et al., supra, at 9.

Here, offerors were notified that their proposals would be evaluated under the corporate experience subfactor to assess the likelihood of successful outcomes based on “the similarity and extent to which the offeror has performed Agile development services similar to what’s required under FADS.” RFP § M-71. Offerors were specifically instructed to identify and describe projects involving use of agile development methods as part of a team of multiple vendors in the development of a single system. RFP § L-66. Since demonstration of experience in a multi-vendor environment was a specific requirement of the RFP, it was SNAP’s responsibility to include this information in its proposal. The fault in failing to include this information in its proposal rests with the protester, and is not a circumstance for which this equitable doctrine is intended to remedy.

SNAP also argues that the weakness was irrational because the RFP required all examples of corporate experience to be in a multi-vendor environment. Comments at 14. As a result, SNAP argues that since its proposal included this corporate experience example, the agency “was on notice” that the proffered examples necessarily met the RFP’s requirement. Id. We do not agree. SNAP was responsible for submitting a proposal with adequate detail to allow for meaningful review by the procuring agency. It was reasonable for the agency to evaluate the contents of SNAP’s proposal, not to make assumptions about its content.

#### Unstated Evaluation Criteria

SNAP argues that, in assigning weaknesses to its technical proposal, DHS used unstated evaluation criteria in the form of “idiosyncratic” definitions of terms that run contrary to industry custom. Comments at 30. While acknowledging that DHS has the discretion to specify unique processes that may not be consistent with such industry custom, SNAP asserts that the agency must identify those deviations in the RFP. Id. Absent such identification, SNAP argues that it could only propose a solution that comports with prevailing agile norms, as it alleges it did here. Id.

As a general rule, agencies are required to advise offerors of the evaluation criteria against which proposals will be evaluated. Although agencies are not required to identify each and every element encompassed within the solicitation’s evaluation scheme, unstated evaluation considerations must reasonably be subsumed within the stated considerations. IBM Global Business Servs., B-404498, B-404498.2, Feb. 23, 2011, 2012 CPD ¶ 36 at 4. Our decisions refer to such unstated considerations as unstated evaluation criteria. See, e.g., Walsh Investors, LLC, B-407717, B-407717.2, Jan. 28, 2013, 2013 CPD ¶ 57 at 7.

Contrary to SNAP's argument, we conclude that the RFP clearly notified offerors of the relevant evaluation considerations under the technical factor. In this regard, offerors were informed that DHS would evaluate proposed approaches and capabilities for satisfying the requirements of the PWS. RFP § M-71. Further, the PWS specifically defined agile software development and enumerated various tasks that were to be performed in the context of agile processes. RFP §§ C-17 to C-21. Thus, far from utilizing unstated evaluation criteria, DHS's evaluation of SNAP's approach to satisfying the PWS requirements used evaluation criteria explicitly stated in the RFP.<sup>9</sup>

SNAP apparently concludes that DHS's interpretation of terminology used in the RFP, including technical debt, is unreasonable. This challenge is more in line with our decisions dealing with solicitation ambiguities. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Colt Defense, LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. Where there is a latent ambiguity, both parties' interpretation of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Id.

To address one of SNAP's arguments, the RFP does not define the term technical debt. However, SNAP acknowledges that there are many definitions of the term. Comments at 12-13. Since the term is subject to varying interpretations, a fact which was presumably known or should have been known to SNAP when it submitted its proposal, we view any ambiguity in the solicitation in this regard as being patent. As a result, SNAP was obligated to file its protest prior to the date set for receipt of proposals and did not do so; any such challenge now is untimely. 4 C.F.R. § 21.2(a)(1).

Yet, even in this example, we do not understand the parties' definitions of the term to be that different. Specifically, both parties conceptually recognize that technical debt involves delaying specific work, which would otherwise be due. Contracting Officer's Statement at 10-11; Comments at 12-13. The parties seem to disagree about the application of technical debt to the RFP requirements and the circumstances under which technical debt can be incurred.

We do not view the agency's understanding of the disputed RFP terminology--such as technical debt, or the agency's view of agile processes--to be outside the

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<sup>9</sup> To address one of SNAP's examples, evaluation of an offeror's approach to satisfy the technical debt requirements are explicitly stated in the RFP, as discussed in more detail above.

reasonable scope of the broadly-worded concepts set forth in the RFP. We view the crux of the protester's arguments to be disagreements with the agency as to the best practices for performing the RFP's requirements. Such disagreement with the agency's judgment in its determination of the relative merit of SNAP's proposal does not establish that the evaluation was unreasonable. M & N Aviation, Inc., B-409048, Dec. 27, 2013, 2013 CPD ¶ 299 at 3.

### Prejudice

In any event, we conclude that the protester was not prejudiced by any alleged error in the agency's evaluation of the firm's proposal. As discussed above, SNAP's timely challenge is to the agency's evaluation of various weaknesses and significant weaknesses in its proposal. The agency argues that, since SNAP failed to timely argue that its proposal should have received more strengths, the highest rating the firm's proposal could receive under any subfactor--even if it were to prevail in this protest--would continue to be acceptable. Legal Memorandum at 10. As a result, the agency argues that SNAP cannot show prejudice. Id. We agree.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9-10; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

Here, the evaluation plan defined an acceptable rating as a proposal that "meets most solicitation requirements; and demonstrates the capability to perform the requirements to the extent that timely and quality performance is anticipated." AR, exh. 5, Evaluation Plan, at 7. The next higher rating, good, would require a finding that the proposal "exceeds many solicitation requirements and demonstrates the capability to perform all aspects of the requirements to the extent that timely quality performance is anticipated." Id. DHS argues, and we agree, that there is no basis to conclude that SNAP's technical ratings could be upgraded to good even if all of the weaknesses identified in its proposal were removed, because the firm's proposal lacks sufficient evaluated strengths to warrant such a rating. Legal Memorandum at 11. Since SNAP cannot show that it was prejudiced by any alleged impropriety in the agency's evaluation, the protest is denied.

The protest is dismissed in part and denied in part.

Susan A. Poling  
General Counsel