G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: DynCorp International LLC

File: B-411126.4; B-411126.5; B-411126.6

Date: December 20, 2016

David M. Nadler, Esq., Adam Proujansky, Esq., Justin A. Chiarodo, Esq., David Y. Yang, Esq., Stephanie M. Zechmann, Esq., and Philip E. Beshara, Esq., Blank Rome LLP, for the protester.
Joel Singer, Esq., Patrick K. O'Keefe, Esq., and Kyle J. Fiet, Esq., Sidley Austin LLP, for AAR Airlift Group, Inc., the intervenor.
Kathleen D. Martin, Esq., Department of State, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the protester's technical proposal as unacceptable and the awardee's technical proposal as acceptable is denied where the evaluations were reasonable, consistent with the solicitation, and did not reflect unequal treatment.

2. Protest challenging the evaluation of the awardee's past performance is denied where the agency reasonably considered the awardee's overall performance record.

3. Protest challenging the evaluation of the experience and past performance of one of the awardee's proposed subcontractors is denied where the record supports the agency's understanding of the corporate identity of the subcontractor.

4. GAO will not review the merits of the protester's arguments regarding an alleged violation of the Procurement Integrity Act (PIA) arising from allegations that are the subject of a lawsuit before a federal district court. The protester's allegations regarding the procedural adequacy of the agency's PIA investigation is denied where the record shows that the agency's investigation was consistent with the requirements of the Federal Acquisition Regulation.

5. Protest challenging the agency's affirmative determination of the awardee's responsibility is denied where the protester does not identify information that the agency unreasonably failed to consider.

DECISION

DynCorp International LLC, of Fort Worth, Texas, protests the award of a contract to AAR Airlift Group, Inc., of Palm Bay, Florida, under request for proposals (RFP) No. SAQMMA14R0319, which was issued by the Department of State (DOS), for aviation support services. DynCorp argues that the award to AAR was improper for the following reasons: the agency unreasonably and unequally evaluated the offerors' technical proposals; the agency unreasonably evaluated the awardee's past performance; the agency failed to reasonably evaluate the past performance and experience of one of AAR's proposed subcontractors; the agency failed to reasonably review allegations by DynCorp that AAR violated the Procurement Integrity Act (PIA); and the agency unreasonably found AAR a responsible offeror.

We deny the protest.

BACKGROUND

DOS issued the solicitation on July 18, 2014, seeking proposals to provide worldwide aviation support services (WASS) for the DOS Bureau for International Narcotics and Law Enforcement Affairs, Office of Aviation (INL/A). INL/A provides aviation support for the eradication and interdiction of illicit drugs, training of contractor and host nation personnel, movement of personnel and equipment, reconnaissance, personnel recovery, medical evacuation, security of personnel and equipment, and ferrying of aircraft. RFP at 25. The RFP sought support services in four primary areas: (1) human capital, to recruit and retain a highly adaptable, technically competent and diverse workforce; (2) aviation support, to provide safe and professional aviation support, while providing the best value in aircraft and technical integration services; (3) customer support, to provide high quality aviation support that responds to customers' needs for aircraft operations, maintenance, logistics, acquisitions and technical integration; and (4) strategic plans, to review, assess and develop plans for current and future DOS aviation needs. Id. at 25-26.

The RFP anticipated the award of a single indefinite-delivery, indefinite-quantity contract with a 6-month phase-in period, a 1-year base period, nine 1-year options, and a 6-month phase-out period. Id. at 39. The contract will have a minimum ordering value of $100,000, and a maximum ordering value of $10,000,000,000. Id. at 8. The RFP advised that proposals would be evaluated based on price and the following six non-price factors: (1) management and administration, which had three subfactors, (a) management of program, projects, and contracts, (b) management information system, and (c) program safety management system; (2) operations, which had three subfactors, (a) flight operations, (b) aircraft training and standardization, and (c) flight safety; (3) maintenance, which had three

subfactors, (a) airworthiness compliance, (b) aircraft maintenance management, and (c) aircraft engineering; (4) logistics, which had three subfactors, (a) aviation logistics management, (b) logistical support to air wing, and (c) bill of materials; (5) small business plan; and (6) past performance. Id. at 174. For the price evaluation, offerors were required to submit prices based on fixed labor rates in response to a sample task. Id. at 191. The RFP provided that "[t]he principal basis for evaluating price as a factor for award under this solicitation will be an evaluation of the reasonableness of the offerors' respective overall proposed prices submitted [in the pricing tables]." Id.

The RFP stated that the evaluation factors were "listed in descending order of importance," with the operations, maintenance, and logistics factors having equal importance. Id. at 175. For purposes of award, the solicitation stated that "all evaluation factors other than Price, when combined, are significantly more important than price." Id. As relevant here, the RFP also provided that "[t]he Government may reject, without consideration of past performance or price, any proposal that has been rated 'Unacceptable' under any Technical factor. Such [a] proposal is considered technically unacceptable." Id. at 174.

DOS received proposals from DynCorp and AAR by the closing date of October 2, 2014. On January 28, 2015, the agency advised DynCorp that its proposal had been eliminated from the competitive range. On February 12, DynCorp filed a protest (B-411126) with our Office, challenging its exclusion from the competitive range. The protester argued that the agency unreasonably evaluated DynCorp's proposal under the technical, past performance, and price factors, that the agency engaged in unequal treatment of the offerors, and that the competitive range decision constituted an improper de facto sole source award to AAR. DynCorp filed a supplemental protest (B-411126.2) on March 16, based on additional alleged evaluation errors identified in the documents provided by the agency. On March 18, DOS advised our Office that it would take corrective action in response to the protests by reevaluating proposals and conducting discussions, if required. Based on the agency's notice of corrective action, we dismissed the protest on March 24.

As discussed in further detail below, DynCorp filed a protest (B-411126.3) on May 7, during the corrective action, arguing that AAR violated the Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101-2107. The protester argued that the agency should have excluded AAR from the competition based on the alleged violations. On May 27, we dismissed the protest based on the agency's notice that the PIA allegations were the subject of an ongoing DOS Office of Inspector General (OIG) investigation.

On October 13, DOS issued RFP amendment 5. As discussed in detail below, this amendment addressed requirements under the management information system subfactor of the management and administration evaluation factor. Also on October 13, the agency conducted the first round of discussions with the offerors,

and requested and received revised proposals from the offerors. The agency conducted a second round of discussions with offerors on February 5, 2016, and again requested and received revised proposals.

DOS evaluated the offerors' revised proposals and found that DynCorp's proposal was unacceptable under the management information system evaluation subfactor of the management and administration evaluation factor, and was unacceptable overall. Agency Report (AR), Tab 9, DynCorp Final Technical Evaluation, at 19. The evaluation ratings and evaluated prices for the offerors' final revised proposals were as follows:

	DYNCORP	AAR
Management and Administration	**Unacceptable**	**Superior**
Management of program, projects, and contracts	Marginal	Superior
Management information system	Unacceptable	Superior
Program safety management system	Marginal	Acceptable
Operations	**Superior**	**Superior**
Flight operations	Superior	Superior
Aircraft training and standardization	Acceptable	Superior
Flight safety	Acceptable	Superior
Maintenance	**Marginal**	**Acceptable**
Airworthiness compliance	Marginal	Acceptable
Aircraft maintenance management	Acceptable	Acceptable
Aircraft engineering	Acceptable	Acceptable
Logistics	**Acceptable**	**Superior**
Aviation logistics management	Marginal	Superior
Logistical support to Air Wing	Superior	Superior
Bill of Materials	Acceptable	Superior
Small Business Plan	**Pass**	**Pass**
Past Performance	**Satisfactory Confidence**	**Satisfactory Confidence**
Evaluated Price	**$3,478,007,377**	**$3,576,624,000**

AR, Tab 21, Source Selection Decision Document (SSDD), at 5-9.[1]

[1] For the four technical evaluation factors, the agency assigned one of the following ratings: superior, acceptable, marginal, or unacceptable. RFP at 186. For the past (continued...)

The source selection authority (SSA) reviewed the consensus evaluation reports prepared by the agency's technical evaluation team, past performance team, and price evaluation team; the contracting officer's award recommendation; and the contracting officer's analysis of the PIA allegations. Id. at 1. Based on the information provided, the SSA selected AAR's proposal for award. The SSA noted that DynCorp's proposal was unacceptable under the management and administration factor, and thus unacceptable overall. Id. at 2. With regard to AAR's proposal, the SSA found that it was "technically superior" and offered a fair and reasonable price. Id. at 10.

DOS notified DynCorp of the award on September 1, and provided a written debriefing the same day. This protest followed.

DISCUSSION

DynCorp argues that DOS's award of the contract to AAR was improper for six primary reasons: (1) the agency unreasonably found DynCorp's proposal unacceptable under the management information system subfactor of the management and administration evaluation factor, and therefore ineligible for award; (2) the agency should have rejected AAR's proposal as unacceptable under the management of program, projects and contracts subfactor of the management and administration evaluation factor; (3) the agency unreasonably evaluated AAR's past performance with regard to its proposal to subcontract with Science Applications International Corp (SAIC); (4) the agency unreasonably evaluated AAR's past performance; (5) the agency failed to reasonably review DynCorp's allegations that AAR violated the PIA; and (6) the agency unreasonably found AAR a responsible offeror.[2] For the reasons discussed below, we conclude that DOS reasonably found that DynCorp's proposal was unacceptable, and also find no merit to any of the protester's arguments that the awardee's proposal was unacceptable or that the awardee was otherwise ineligible for award.[3]

(...continued)
performance evaluation factor, the agency assigned one of the following ratings: substantial confidence, satisfactory confidence, unknown confidence (neutral), limited confidence, or no confidence. Id. at 187. The small business plan evaluation factor was evaluated on a pass/fail basis. Id. at 173.

[2] Although this decision does not address every argument raised by DynCorp, we have reviewed all of the protester's challenges and find that none provides a basis to sustain the protest.

[3] DynCorp also raised challenges to the evaluation of the realism and reasonableness of AAR's proposed price. On October 20, 2016, we dismissed the (continued...)

In addition to these primary arguments, the protester also argues that the agency treated the offerors unequally with regard to the assignment of strengths and weaknesses under the technical and past performance evaluation factors. We conclude that the protester is not an interested party to raise these remaining arguments. In this regard, under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. See 4 C.F.R. § 21.0(a)(1). A protester is not an interested party to raise an argument where it would not be in line for contract award were its protest argument to be sustained. Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 9. Because we conclude that the agency reasonably found the protester's proposal unacceptable, and the awardee's proposal acceptable, we do not address any of the protester's arguments regarding the assignment of strengths and weaknesses for the offerors' proposals that would not ultimately affect the agency's conclusions regarding the acceptability of the offerors' proposals. See id. (protester not an interested party to challenge evaluations that would not affect technical acceptability).

The evaluation of an offeror's proposal is a matter within the agency's discretion. National Gov't Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5. A protester's disagreement with the agency's judgment in its determination of the relative merit of competing proposals, without more, does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. 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.

DynCorp's Technical Proposal

DynCorp argues that DOS unreasonably found its proposal unacceptable under the management information system (MIS) subfactor of the management and administration evaluation factor. The protester argues that the agency's interpretation of the solicitation requirements for this subfactor was unreasonable

---

(...continued)
protester's arguments because the RFP did not provide for the evaluation of the realism of offerors' proposed prices, and also did not specify the kind of price reasonableness analysis the protester argues was required. We therefore concluded that each of the arguments failed to state a valid basis of protest. See 4 C.F.R. § 21.5(f).

and has shifted during the course of the procurement in a manner that renders the agency's current interpretation unreasonable. The protester also argues that, even if the agency's interpretation was reasonable, AAR's proposal reflected the same understanding of the MIS requirements as DynCorp's proposal, and the agency therefore treated the offerors unequally. For the reasons discussed below, we find no basis to sustain the protest.

As DOS explains, the agency initially planned to divide the aviation services requirements for INL/A into four areas: information technology (IT), maintenance, logistics, and operations. Contracting Officer's Statement (COS) at 2. The agency subsequently decided to divide the requirements into two contracts: (1) the WASS requirements that are the subject of this procurement, which include maintenance, logistics, and operations, and (2) the IT requirements, which were separately awarded under what is known as the IT associate contract. Id.

The RFP here required offerors to propose to implement a new MIS, which is a system that would contain and maintain critical information for each area of the WASS contract, to replace the agency's legacy system and to transition the agency to the new MIS. COS at 2-3. DynCorp's arguments here concern whether the WASS contractor or the IT associate contractor will be responsible for maintaining the MIS after transition from the legacy system.

As relevant here, the MIS subfactor required offerors' proposals to address the following:

> The Offeror shall describe its approach for implementing a management information system to manage and support all DoS Aviation Program activities. At minimum, include the following information:
>
> a) Provide samples of policies assuring MIS is compliant with Federal IT requirements.
>
> b) Provide examples of specifying, acquiring and implementing a MIS incorporating aircraft logistics, flight operations, maintenance, accounting and cost data and analysis.
>
> c) Provide examples of managing the expected changes to the hardware, operating system, and applications that will address testing changes before applying to the operational environment.
>
> d) Provide two examples of your most recent and relevant experience in the implementation of the proposed MIS. Include project contact information (POC, phone, email).

RFP at 178.

Initially, the performance work statement (PWS) stated that "[t]he IT associate contractor will assume responsibility for the MIS after transition." AR, Tab 2a, PWS § 2.c.43.a. This responsibility, however, was revised in the first of four rounds of questions and answers (Q&As) provided by the agency, which addressed the MIS requirements as follows:

> PWS 2.C.43.a Enterprise MIS Transition
>
> [Question] Please confirm that at the conclusion of MIS testing the IT contractor will assume responsibility for the MIS system.
>
> [Answer] No. Once the MIS is successfully tested and implemented, operation and maintenance will remain with the [WASS] contractor. The IT [associate] contractor will be responsible for ensuring connectivity and integrity of the network on which all program software resides.

AR, Tab 2f, Q&A Set 1 (Aug. 13, 2014), Q&A No. 21.

DynCorp's initial proposal did not provide for the transfer of responsibility for maintenance of the MIS to the IT associate contractor. See AR, Tab 4, DynCorp Initial Proposal, Vol. II.A, at 55, 61, 64. On January 28, 2015, DOS advised DynCorp that its initial proposal would not be included in the competitive range. Among the weaknesses cited in a pre-award debriefing was the agency's concern that the protester's proposal failed to provide for transfer of maintenance responsibility for the MIS to the IT associate contractor. Protest (B-411126) at 30-31.

On February 12, DynCorp filed a protest (B-411126) with our Office challenging its exclusion from the competitive range. With regard to the MIS requirements, the protester argued that the solicitation required the WASS contractor to perform the MIS requirements, and that the agency therefore unreasonably assigned a weakness to DynCorp's proposal. Id. The protester cited the Q&A quoted above, arguing that this guidance from the agency showed that the maintenance responsibility for the MIS would remain with the WASS contractor. Id. at 31. On March 18, DOS advised our Office that it would take corrective action in response to DynCorp's protest by reevaluating offerors' proposals and conducting discussions, if appropriate.

On October 13, the agency issued solicitation amendment 5, which stated as follows: "Section 2.C.43.a, the sentence, 'The IT associate contractor will assume responsibility for the MIS after transition.' is deleted in its entirety and is replaced

with, 'The IT associate contractor will support the existing MIS [the legacy system] until transition to new MIS is complete.'" RFP amend. 5 at 2.[4]

Also on October 13, the agency opened the first round of discussions and provided technical evaluation notices (TENs) to each offeror. The agency's discussions with DynCorp did not address the offeror's proposed approach to the MIS requirements, which at that time did not provide for the transfer of MIS responsibility to the IT associate contractor. In the first round of discussion questions for AAR, the agency provided TENs which addressed AAR's approach to provide access to the IT associate contractor to AAR's server room facilities and test lab, and to training the IT associate contractor on use of the MIS, following transition from the legacy system. AR, Tab 29, AAR Discussions (1st Round), TENs 4, 6, 8. Each of the TENs advised AAR that "[p]er the PWS 2.C.43.a 'The IT associate contractor will assume responsibility for the MIS after transition.'" Id. As discussed above, however, this PWS language was deleted from the PWS in RFP amendment 5.

On November 16, DynCorp and AAR provided their discussions responses and first technical proposal revisions. As discussed in further detail below, AAR's TEN responses addressed the agency's request for more information concerning its approach to the MIS requirements, and also stated that "[a]s requested by the COR [contracting officer's representative], we will deliver responsibility for the enterprise to the IT Associate Contractor, or other designated personnel." AR, Tab 30, AAR Discussions Reponses (1st Round), TEN 8, at 1. These TEN responses were incorporated into AAR's first revised technical proposal.

On February 2, 2016, DOS conducted a second round of discussions with the offerors; this round of discussions did not address the MIS requirements for either offeror. On March 7, DynCorp and AAR provided their discussions responses and second proposal revisions. AAR's second revised proposal incorporated the same language above concerning responsibility for the MIS. AR, Tab 15, AAR 2d Revised Technical Proposal, at II-43, II-46-47.

DynCorp's second technical proposal revision, however, changed its approach to the MIS requirements by shifting responsibility for the MIS to the IT associate Contractor, as follows:

> While we use Data Virtualization whenever possible; we will properly develop, test, and maintain [extract, transform, and load] scripts where

[4] Additionally, on October 20, DOS issued RFP amendment 6, which included a Q&A that reaffirmed that "[t]he IT Associate Contractor is, and will be responsible for the existing MIS . . . collaterally during the transition period," but advised that the other applicable PWS provisions concerning the AWSS contractor's obligations were not deleted. RFP amend. 6 at 5.

> necessary in support of DOS' Associate IT Contractor(s), who are responsible for network, systems, and security aspects of operations and maintenance.

AR, Tab 6, DynCorp 2d Technical Proposal Revision, Vol. II.A.2, at 77. In addition, DynCorp stated that:

> Our proposal assumes that lifecycle administration and maintenance of the automated logbooks, [radio frequency identification], and barcode scanner systems are the responsibility of DOS' Associate IT Contractor.

Id. at 81-82. Finally, DynCorp stated that:

> As Government owned-property, DynCorp assumes DOS' Associate IT Contractor will perform maintenance and security activities (software imaging/assurance, antivirus updates, hardware maintenance, etc.) for our proposed automated logbooks.

Id. at 82.

DOS's evaluation of DynCorp's second technical proposal revision found that "[t]he Offeror's clarification that the Associate IT Contractor will establish and maintain the test environment for the Offeror's new MIS . . . is considered a significant risk to the program." AR, Tab 9, DynCorp Final Technical Evaluation, at 19. The agency assigned a deficiency based on this concern and concluded that the protester's proposal was unacceptable for the MIS evaluation subfactor. Id. Based on the agency's conclusion that DynCorp's proposal was unacceptable for the MIS evaluation subfactor, the agency found that the protester's technical proposal was unacceptable, overall. Id. at 3-4; Tab 21, SSDD, at 3.

DynCorp does not dispute that its second technical proposal revision changed its approach to the MIS requirements by expressly stating that it would transfer responsibility for maintenance to the IT associate contractor after transition from the legacy system. Instead, DynCorp argues that DOS's interpretation of the MIS requirements was unreasonable and inconsistent with the agency's prior interpretation of those requirements.

As discussed above, the record shows that the RFP initially assigned responsibility of the maintenance of the MIS to the IT associate contractor, but that responsibility was subsequently revised in the first round of Q&As, which expressly shifted responsibility to the WASS contractor. AR, Tab 2a, PWS § 2.c.43.a; Tab 2f, Q&A Set 1 (Aug. 13, 2014), Q&A No. 21. DynCorp's initial proposal followed the interpretation set forth in the Q&As, and did not assign responsibility for maintenance of the MIS to the IT associate contractor. During the two rounds of

discussion that took place during corrective action, the agency never directed DynCorp to change the protester's approach for responsibility for the MIS.

Despite the changes in RFP amendment 5, and the absence of any direction from the agency during discussions, DynCorp elected to revise its proposal to expressly shift responsibility for the MIS to the IT associate contractor. Nothing in the record explains why DynCorp submitted its first revised proposal based on an interpretation of the PWS that assigned responsibility for maintenance of the MIS to the WASS contractor, but then submitted its second revised proposal based on a different interpretation of the PWS which assigned responsibility for the MIS to the IT associate contractor. In light of RFP amendment 5's deletion of the PWS statement that "[t]he IT associate contractor will assume responsibility for the MIS after transition," we conclude it was not reasonable for DynCorp to assume that the IT associate contractor would assume responsibility for the MIS after transition. On this record, we conclude that DOS's interpretation of the solicitation was reasonable, and that protester's interpretation was not reasonable.

Next, DynCorp argues that DOS's discussions with AAR show that the agency interpreted the MIS requirements differently for each offeror. In this regard, the protester argues that AAR's responses to the agency's discussions questions concerning the MIS requirements, which were incorporated into its first and second technical proposal revisions, show that the awardee proposed the same approach as DynCorp for transferring responsibility for the MIS to the IT associate contractor.

As discussed above, DOS conducted the first round of discussions with AAR on the same date it issued RFP amendment 5. Although RFP amendment 5 deleted the PWS provision that the IT associate contractor would be responsible for maintenance of the MIS, the agency simultaneously provided AAR with TENs that referenced the deleted language. Specifically, the agency provided three TENs to AAR which addressed the offerors' approach to provide the IT associate contractor access to AAR's server room facilities and test lab, and to training the IT associate contractor on use of the MIS, following transition from the legacy system. AR, Tab 29, AAR Discussions (1st Round), TENs 4, 6, 8. Each of the TENs cited the PWS language that was deleted from RFP amendment 5: "Per the PWS 2.C.43.a 'The IT associate contractor will assume responsibility for the MIS after transition.'" Id.

AAR's responses to the TENs, which were incorporated into its revised technical proposals, included the following language:

> We will provide the IT Associate Contractor access to the system at whatever security and administration level as requested by the COR and required to maintain the DOS Air Wing mission.

AR, Tab 15, AAR 2d Revised Technical Proposal, at II-43.

> As requested by the COR, we will deliver responsibility for the enterprise to the IT Associate Contractor, or other designated personnel.

Id. at II-46-47.

> We will provide the IT Associate Contractor access at whatever security and administration level as requested by the COR and required to maintain the DOS Air Wing mission.

Id. at 47.

DOS states that the TENs for AAR were "generated prior to the issuance of Solicitation Amendment 005," and for this reason the agency considered the TENs addressing this issue to be "closed" without a need for further review. Supp. COS (Dec. 1, 2016) at 1. The agency acknowledges, however, that it did not specifically advise AAR that the TENs which contained the deleted PWS language were inconsistent with the agency's understanding of the MIS requirements. Id. at 1-2.

With regard to AAR's proposal revisions concerning the MIS requirements, the agency states that it did not interpret AAR's revised proposal as taking exception to the requirement for the WASS contractor to maintain the MIS. Id. at 3. The agency explains that the statements cited by the protester in AAR's proposal were understood within the context of the statement "as requested by the COR," that is, the agency understood AAR to have proposed to maintain the MIS, but to also be ready to transfer responsibility if requested. Id.

In support of its interpretation, DOS cites numerous provisions of AAR's proposal which it contends demonstrates the awardee's commitment to performing maintenance of the MIS. For example, the agency cites the awardee's proposed Systems Development Life Cycle for transitioning to the new MIS consists of a nine-step process, step eight of which involves: "Maintenance and Operations--Operate and maintain the system, report defects, make minor enhancements to the system, and conduct periodic reviews." AR, Tab 15, AAR 2d Revised Technical Proposal, Vol. II.A.2, at II-48-49. This provision was not revised following the two rounds of discussions during corrective action.

To the extent DynCorp argues that the protester and awardee proposed the same approach to the MIS requirements, we conclude that the agency had a reasonable basis to distinguish between the offerors' proposals. In this regard, DynCorp's proposal unambiguously places responsibility for MIS maintenance on the IT associate contractor upon completion of the implementation of the new MIS. In contrast, the agency reasonably interpreted AAR's proposal as assuming responsibility for MIS maintenance, as well as acknowledging that the offeror would

transfer such responsibility if requested by the agency. In sum, we find no basis to conclude that the agency unreasonably found the protester's proposal to be unacceptable, and the awardee's proposal to be acceptable.

AAR's Technical Proposal

Next, DynCorp argues that DOS unreasonably evaluated AAR's proposed staffing plan under the management of program, projects and contracts subfactor of the management and administration evaluation factor. The protester contends that the awardee's revised technical proposal improperly incorporated a response to a TEN by reference through a graphic, rather than setting forth the information in full. The protester argues that the agency should not have considered the information because the use of a graphic to refer to information outside the proposal violated the solicitation instructions and permitted the awardee to exceed the solicitation page limits. For the reasons discussed below, we find no basis to sustain the protest.

The management of program, projects, and contracts subfactor required offerors to address the following requirement in their proposals:

> Submit graphic(s) and summary discussion to make clear your proposed organizational structure comprehensively, across all functional areas, and all geographic locations. Demonstrate work flow, lines of authority and communication, reporting, staffing, administrative procedures, work processes, and workload distribution. Highlight key points where proposed organization ties in directly and indirectly with USG staff.

RFP at 176.

DOS assigned AAR's initial proposal a deficiency based on the following concern: "It is unknown if the team is postured correctly to meet all PWS requirements." AR, Tab 29, AAR Discussions (Round 1), TEN 10, at 1. The agency further found that despite information concerning overall staffing levels, "it is not possible to determine understanding of the complex nature of the work based on the lack of specificity of personnel skills/qualifications in order to support the PWS to an [Acceptable Quality Level]." Id. The agency addressed these concerns with AAR during the first round of discussions in TEN 10.

AAR's response to TEN 10 included an 8-page attachment called the International Narcotics and Law Enforcement Affairs (INL) Footprint Table which detailed the offeror's "manpower solution across the enterprise." AR, Tab 30, AAR Response to TEN 10; id., INL Footprint Table. AAR's first and second revised technical proposal included a graphic approximately half a page in size, consisting of overlapping pictures of part of the pages of the INL Footprint Table from AAR's TEN 10

response. AR, Tab 14, AAR 1st Revised Technical Proposal, Vol.II.A.1, at II-36; Tab 15, AAR 2d Revised Technical Proposal, Vol.II.A.1, at II-36.

DOS concluded that AAR's response to TEN 10, including the INL Footprint Table, addressed the agency's concern and further found that the awardee's proposed staffing approach merited a strength because it "was clearly laid out and the proposed organization exemplifies understanding of the significantly complex nature of the work." AR, Tab 17, AAR Final Technical Evaluation, at 7. The agency's evaluation cited both the TEN 10 response and the section of AAR's proposal which referenced the INL Footprint Table. Id.

DynCorp argues that DOS should not have considered AAR's INL Footprint Table because it was not fully incorporated into the awardee's revised proposal. In support of its argument, DynCorp cites our decision in Vectronix, Inc., B-407330, Dec. 19, 2012, 2013 CPD ¶ 13, where we found that the agency reasonably rejected the protester's proposal as unacceptable because its final proposal revision did not include the changes to its technical approach that were detailed in its response to discussions, and that were required to make its proposal acceptable. Id. at 7-8.

In contrast to Vectronix, AAR's technical proposal revisions referenced its response to TEN 10, and included a graphic referring to the INL Footprint Table provided by the awardee during discussions. Also in contrast to Vectronix, DOS states that it understood the awardee's use of the graphic was a reference to the TEN 10 response. COS at 85. The agency states that it therefore referred to the TEN 10 response and found that the awardee's proposal was acceptable. Id. On this record, we find no basis to conclude that the agency should have rejected AAR's proposal based on any doubt as to whether the awardee intended to include the INL Footprint Table in its second technical proposal revision.

Next, DynCorp argues that the agency should not have considered the INL Footprint Table because it was not set forth in full in the awardee's revised proposal, as required by the solicitation. The protester also contends that the incorporation of the chart by reference allowed the awardee to exceed the solicitation's page limits.

As a general matter, offerors must prepare their proposals within the format limitations set out in an agency's solicitation, including any applicable page limits. ManTech Advanced Sys. Int'l, Inc., B-409596, B-409596.2, June 13, 2014, 2014 CPD ¶ 178 at 3. Offerors that exceed a solicitation's established page limitations assume the risk that the agency will not consider the excess pages. Id. Our Office has held that where an offeror's proposal incorporates material by reference and the agency considers that material, the additional material should be considered part of the page count. See Outreach Process Partners, LLC, B-405529, Nov. 21, 2011, 2011 CPD ¶ 255 (permitting a protester to satisfy requirements for one section of a

proposal by reference to another section of the proposal would improperly circumvent proposal page limits, without allowing other offerors the same opportunity).

The solicitation contained the following prohibition on "cross referencing" information between proposal sections: "Each volume shall be written on a stand-alone basis so that its contents may be evaluated without cross-referencing to other volumes of the proposal. Information required for proposal evaluation which is not found in its designated volume will be assumed to have been omitted from the proposal." RFP at 136. The protester argues that the RFP therefore prohibited AAR from incorporating information from its TEN response by reference.

Even if this RFP provision required the agency to disregard the awardee's attempt to incorporate information by reference, the record does not demonstrate that the protester was prejudiced by the agency's waiver of this requirement, even though it allowed the awardee to effectively add eight additional pages to its proposal. In this regard, we find no basis to conclude that the agency's consideration of the referenced material in AAR's proposal allowed the awardee to exceed the solicitation's page limit, or that the protester could have improved its chances for award had it been allowed to also incorporate additional material by reference while remaining within the page limits.

The final page limit for offerors' proposals was 134 pages for section A (management and administration evaluation factor) and 445 pages overall.[5] DynCorp argues that the incorporation of the INL Footprint Table by reference allowed the awardee to include an additional eight pages. The record shows, however, that section A of the awardee's second revised technical proposal was 104 pages, and its technical proposal was 405 pages, overall--both well below the page limits. Moreover, section A of the protester's technical proposal was 122

[5] The RFP initially stated that proposals for section A (management and administration evaluation factor) were limited to 75 pages, and proposals were limited to 350 pages, overall. RFP at 130-131. RFP amendment 7 increased the page limit by 10 percent, and the agency's requests for final proposal revisions on February 5, 2016, and April 21, increased the page limits by an additional 10 percent and 5 percent, respectively. As a result, the final page limit for section A was 95 pages, and the overall technical proposal page limit was 445 pages (rounded to the nearest page). The agency also advised that, for purposes of the 10 percent increase in RFP amendment No. 7, offerors were allowed to allocate the additional 38.5 pages in any section. RFP amend. 7 at 2. Thus, offerors' final revised proposals could have allocated up to 134 pages to section A.

pages, and its technical proposal was 415 pages, overall--also below the page limits.[6]

Our Office will not sustain a protest challenging an agency's waiver of a solicitation requirement unless the protester can demonstrate that it was prejudiced by the waiver, i.e., that the protester would have submitted a different proposal or that it could have done something else to improve its chances for award, had it known that the agency would waive the requirement. Western Alt. Corrections, Inc., B-412326, Jan. 19, 2016, 2016 CPD ¶ 71 at 11. Here, even if the agency's review of the eight additional pages incorporated by reference into AAR's proposal was inconsistent with the solicitation instructions, it did not allow the awardee to exceed the proposal page limits.[7] In light of the fact that AAR did not violate the overall page limitation, and the fact that DynCorp's proposal was below the applicable page limits, we conclude that DynCorp does not demonstrate that it was prejudiced by the agency's action. In this regard, the protester does not demonstrate that it could have improved its chances for award had it been allowed to incorporate additional information by reference while still remaining under the applicable page limitations. We therefore find no basis to sustain the protest.

AAR's Past Performance

Next, DynCorp argues that DOS failed to reasonably evaluate AAR's past performance. The protester primarily argues that the agency's evaluation of the awardee's past performance failed to adequately consider contracts that were cited in the agency's review of the awardee's record in the Contractor Performance Assessment Reporting System (CPARS). For the reasons discussed below, we find no basis to sustain the protest.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency; our Office will, however, question an agency's evaluation of past performance where it is unreasonable or undocumented. Solers,

[6] The awardee's response to DOS's April 21, 2016, request for final proposal revisions included change pages, but did not appear to increase the overall length of its proposal by more than a page. See AR, Tab 7, DynCorp Final Proposal Revision.

[7] In response to questions from our Office regarding the page limitations, DynCorp raised new arguments concerning AAR's compliance with those limits. DynCorp Comments (Dec. 6, 2016) at 2-3. These arguments were not raised within 10 days of the production of documents, and are therefore untimely. 4 C.F.R. § 21.2(a)(2); Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 11 (supplemental protest arguments must independently satisfy the timelines requirements of our Bid Protest Regulations).

Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 8. A protester's disagreement with the agency's judgment concerning the merits of the protester's past performance, without more, does not establish that the evaluation was unreasonable. Constellation NewEnergy, Inc., B-409353.2, B-409353.3, July 21, 2014, 2014 CPD ¶ 219 at 6.

DOS assigned both DynCorp and AAR ratings of satisfactory confidence under the past performance factor. AR, Tab 21, SSDD, at 5, 7. DynCorp argues that DOS failed to adequately consider AAR's past performance record in connection with a CPARS report issued by the U.S. Transportation Command for the Fixed Wing Air Support Central Africa Region contract. The protester notes that the CPARS report for the period of July 1, 2014, to January 31, 2015, assigned AAR marginal ratings in two of the four evaluated factors (quality and regulatory compliance) based on a July 2014 incident which involved an emergency aircraft landing and collision in Uganda. AR, Tab 35, AAR CPARS Reports, Report, at 7-13.

DOS states that the contracting officer reviewed the CPARS report and concluded that, although the incident in Uganda resulted in negative ratings for AAR, the CPARS report was for a 7-month period, and that the balance of the report demonstrates satisfactory performance by the awardee. Supp. COS (Nov. 7, 2016) at 7. The contracting officer states that AAR "ultimately was rated with four 'Satisfactory' ratings." Id.

DynCorp argues that the CPARS report for this contract shows two marginal ratings that were not corrected. The protester contends that the contracting officer's inaccurate characterization of the CPARS report shows that the agency failed to reasonably consider the available information, and therefore failed to reasonably evaluate the impact of this event on the awardee's past performance rating.

The CPARS report stated that AAR was initially assigned one satisfactory, two marginal, and one unsatisfactory rating, and that the reviewing official initially stated that a future award to this contractor for similar requirements would not be recommended. AR, Tab 35, AAR CPARS Reports, Report, at 10. These ratings were revised for the final version of the report, with AAR receiving two satisfactory ratings, and two marginal ratings. Id. at 8. The reviewing official revised the CPARS report to state that award would be recommended to AAR for similar requirements in the future. Id. at 9. The final remarks by the reviewing official noted as follows: "AAR's marginal ratings in the areas of Quality and Regulatory Compliance resulted from an unsatisfactory incident which occurred in the first month of contract performance, a significant event which impacted the Government. AAR's performance for the remainder of the evaluation period is considered satisfactory." Id. at 13.

Based on this record, we agree with DynCorp that the contracting officer's characterization of the CPARS report as assigning all satisfactory ratings to AAR's

performance of the contract was inaccurate, in that the final review still included two marginal ratings. Nonetheless, the narrative remarks state that the awardee's performance after the July 2014 incident was satisfactory. Moreover, the CPARS report recommended a future award for similar requirements. On this record, we see no basis to conclude that the possible mischaracterization of the final ratings for the contract performance period demonstrates that the agency failed to consider the information in the CPARS report, or that the agency unreasonably evaluated AAR's past performance, overall. In this regard, given the reviewing agency's views regarding the remainder of AAR's performance, and its willingness to consider AAR for future award, we find no merit to the protester's argument that the agency should have interpreted this CPARS report to mandate an overall unacceptable rating for the awardee's past performance.

Evaluation of AAR's Proposed Subcontractor

Next, DynCorp argues that DOS unreasonably evaluated the experience and past performance of AAR's proposed subcontractor, SAIC, because it was one of the two corporate successors to a predecessor firm. For the reasons discussed below, we find no basis to sustain the protest.

In September 2013, the firm known as Science Applications International Corporation was reorganized into two separate firms, one called SAIC and the other called Leidos, Inc. For purposes of clarity, this decision refers to the original SAIC entity as "Old SAIC," and the two firms that resulted from its reorganization as "New SAIC" and "Leidos." AAR proposed New SAIC as one of its subcontractors. DynCorp argues that the awardee's proposal relied on the experience and past performance of both New SAIC and Leidos, and did not distinguish between the two. The protester argues that the lack of clarity in the awardee's proposal regarding the identity of its subcontractor and the agency's failure to reasonably evaluate this matter rendered the evaluation of AAR's proposal unreasonable with regard to the management and administration, maintenance, and past performance evaluation factors.

DOS states that it was aware of the circumstances of the reorganization of Old SAIC into Leidos and New SAIC, and that it understood that AAR had proposed New SAIC as its subcontractor. COS (Oct. 24, 2016) at 76. The agency further states that it understood the references to six SAIC contracts identified in AAR's proposal to refer to contracts that were awarded to Old SAIC and novated to New SAIC. Id. at 76-77. In this regard, the agency notes that AAR's proposal indicated that the four contract references for New SAIC were awarded prior to the 2013 reorganization of Old SAIC, and that performance continued after the reorganization. Id. (citing AR, Tab 15, AAR 2d Revised Technical Proposal, at II-49, II-57, II-65A; Tab 16, AAR Past Performance Proposal, at II-132, II-136, III-154). The agency further notes that the past performance reference responses for New

SAIC confirmed that this company was the appropriate contractor for these references. Id. at 77-78 (citing AR, Tab 39b, AAR Past Performance Materials).

The record provided in this protest demonstrates that the relevant contracts were novated from Old SAIC to New SAIC. See Intervenor's Comments (Nov. 3, 2016), Exhs. B-1, B-2. The protester does not specifically challenge the fact that the contracts cited in AAR's proposal were novated from Old SAIC to New SAIC, and instead argues that the agency did not necessarily have the information regarding the novations at the time it made the evaluation. In this regard, the protester notes that the specific information concerning the novations was provided in the intervenor's comments on the agency report, and was not provided in AAR's proposal.

DynCorp contends that the agency's failure to review the information regarding the novations renders the evaluation of AAR's proposal unreasonable, citing our decision in Wyle Laboratories, Inc., B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16. In that decision, our Office found that although the agency awarded the contract to New SAIC, the proposal that was selected for award was submitted by Old SAIC and was based on the technical capabilities and cost structure of Old SAIC. Id. at 8. We further found that the agency expressly assumed that the resources of Old SAIC would be available for performance despite the award to New SAIC. Id. at 9. On that record, we concluded that award to New SAIC was improper. Id. at 10-11.

Here, in contrast, the record shows that the relevant contracts were cited in AAR's proposal for purposes of demonstrating New SAIC's experience and past performance. Thus, there was no question as to which entity's resources would be relied upon for purposes of contract performance. The record here also shows that the relevant contracts were novated from Old SAIC to New SAIC, and that contract performance continued by New SAIC after the novations. Moreover, the record does not show that the agency mistakenly evaluated New SAIC's proposed role as a subcontractor to AAR based on technical resources and cost structure of Old SAIC--as was the case in Wyle Laboratories. On this record, where the agency assumed that the attribution of experience and past performance was appropriate, and the record does not demonstrate that the assumption was unreasonable, we find no basis to sustain the protest.

Procurement Integrity Act Investigation

Next, DynCorp argues that DOS failed to reasonably investigate the protester's allegations that AAR had violated the PIA through its recruitment of DynCorp staff and receipt of confidential and propriety DynCorp material. For the reasons discussed below, we conclude that the merits of the protester's allegations are not matters our Office will review because they are currently the subject of litigation before a federal district court in connection with a suit filed by DynCorp against

AAR. We also conclude that the agency's investigation met the procedural requirements of the Federal Acquisition Regulation (FAR).

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act, provide, among other things, that a federal government official "shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(a)(1). Additionally, as relevant here, the PIA provides that "[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." Id. § 2102(b).

The FAR requires a contracting officer who "receives or obtains information of a violation or possible violation of [the PIA] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor." FAR § 3.104-7(a). If the contracting officer determines that there is no impact on the procurement, he or she must forward the "information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to an individual designated in accordance with agency procedures." Id. § 3.104-7(a)(1). If that individual agrees with the contracting officer's analysis, the procurement may proceed; if the individual does not agree, the individual must forward the information to the head of the contracting activity (HCA) and advise the contracting officer not to proceed with the award. Id. § 3.104-7(a)(2).

On May 1, 2015, AAR advised the contracting officer that an employee in the company's human resources department received an email from a prospective subcontractor that is a current subcontractor to DynCorp. The email from the subcontractor included a propriety DynCorp document relating to the INL program, in the form of a Microsoft Excel spreadsheet, called a profit margin analysis. AR, Tab 22, PIA Investigation Memorandum, at 3-4. On May 4, 2015, counsel for DynCorp sent a letter to the contracting officer alleging that AAR had committed PIA violations. Id. at 4.

DynCorp's May 7, 2015, protest (B-411126.3), which was filed during the agency's corrective action addressing DynCorp's first protest (B-411126, B-411126.2), argued that AAR violated the PIA by hiring former DynCorp employees with experience on the WASS program and requesting that they disclose confidential and propriety information relating to DynCorp. Protest (B-411126.3) at 5-6.

The contracting officer notified the DOS legal counsel, the contracting officer's branch chief, and the SSA of the alleged violations. COS at 80. The SSA notified the HCA of the alleged PIA violations. Id. The contracting officer also notified

DOS's OIG, which advised the contracting officer that it would conduct an investigation of the allegations. Id.

The contracting officer requested and received affidavits from senior AAR officials in response to the allegations. COS at 25; AR, Tab 22, PIA Investigation Memorandum, at 4-5, 7-8. These affidavits stated that AAR could not have used the information cited in the allegations, and further stated that AAR did not use the information. COS at 25; AR, Tab 22, PIA Investigation Memorandum, at 5, 7-8. In addition, the contracting officer analyzed the offerors' proposed labor and fees to determine whether there was evidence that AAR had improperly used DynCorp's proprietary and confidential information. COS at 24-25; AR, Tab 22, PIA Investigation Memorandum, at 3, 9.

The following additional relevant facts arose based on events that took place concurrently with the protests before our Office and the agency's corrective action. On September 4, 2015, DynCorp filed suit against AAR in the U.S. District Court for the Middle District of Florida (M.D. Fla.). DynCorp argued that, in connection with the WASS procurement, AAR had misappropriated DynCorp trade secrets in violation of the Florida Uniform Trade Secrets Act (FUTSA), Fla. Stat. §§ 688.001-688.009, and also committed other business torts. The arguments raised by DynCorp regarding FUTSA relied on the same allegations raised in its protest to our Office ((B-411126.3), that is, AAR hired current and former DynCorp employees and induced them to disclose confidential and proprietary DynCorp information, and that AAR was improperly in possession of the DynCorp profit margin analysis document. DynCorp Complaint, 6:15-cv-1454-ORL-3P-GJK (M.D. Fla., Sept. 4, 2015) ¶¶ 17-39; 43-49

On October 9, the district court denied DynCorp's request for a preliminary injunction. On October 19, DynCorp filed an amended complaint, which added more details regarding the allegations. On January 14, 2016, the district court dismissed the amended complaint, finding that the allegations failed to state a claim under FUTSA. On February 2, DynCorp filed an appeal of the dismissal of the amended complaint with the U.S. Court of Appeals for the 11th Circuit. On November 21, during the pendency of this protest, the court of appeals reversed the district court's decision dismissing the complaint. Based on information provided by the protester, the suit is on remand to the M.D. Fla. court.

The contracting officer issued his PIA analysis on August 26, 2016, prior to the award of this contract. In addition to the investigation described above, the contracting officer stated that he considered affidavits submitted by AAR to the M.D. Fla. court. Based on his review of the record, the contracting officer concluded that there was no violation of the PIA.

With regard to the first allegation concerning AAR's hiring of former DynCorp employees with knowledge of the WASS program, the contracting officer concluded

that the record demonstrated that the former DynCorp employees were provided information voluntarily by DynCorp, and that to the extent these employees shared this information with AAR, such a disclosure was covered by the "savings clause" of the PIA. AR, Tab 22, PIA Investigation Memorandum, at 9. This statutory provision states that the PIA does not "restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information." 41 U.S.C. § 2107(2).[8] Additionally, the contracting officer concluded that his analysis of the offerors' proposed profit and fee showed that AAR's proposal remained constant during the procurement, and thus did not demonstrate a PIA violation. See COS at 80; AR, Tab 22, PIA Investigation Memorandum, at 9.

With regard to the second allegation concerning AAR's receipt of the DynCorp profit margin analysis document, the CO found that the affidavits submitted by AAR senior personnel demonstrated that there was no violation of the PIA. The contracting officer concluded that there was "no basis to conclude that AAR's sworn Declarations were inaccurate and found no reason to question the validity of the Declarations." COS at 25; see AR, Tab 22, PIA Investigation Memorandum, at 10.

DynCorp's protest challenging the current award (B-411126.4) raised the two allegations, discussed above. Protest (B-411426.4) at 68-76. On September 19, 2016, DOS requested that our Office dismiss the protest because it was the subject of litigation before the U.S. Court of Appeals for the 11th Circuit (as discussed above, the court of appeals had not ruled on DynCorp's appeal at the time). On September 27, our Office denied the agency's request to completely dismiss the PIA allegations, but advised the parties that we would review only the procedural aspects of the agency's review.

With regard to the merits of the allegations, we advised the parties that we would not review this matter because it was the subject of litigation before the U.S. Court of Appeals for the 11th Circuit. Our Office does not review matters that are the subject of litigation before, or have been decided on the merits by, a court of competent jurisdiction. 4 C.F.R. § 21.11(b). Decisions by our Office have consistently held that this regulation necessitates the dismissal of a protest regardless of whether the issues before the court and the protest before our office are identical, so long as the disposition of the case pending before a court could render the protest before our Office academic. Colleague Consulting, LLC--Recon., B-413156.18, Sept. 12, 2016, 2016 CPD ¶ 257 at 2-3; see Harrington, Moran, Barksdale, Inc., B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 2 n.2. We concluded that the issues raised in the complaints and addressed by the district court and court of appeals concerned the same facts and issues that our Office

[8] The contracting officer cited the former provision at 41 U.S.C. § 423(h)(2), which has been recodified at 41 U.S.C. § 2107.

would be required to address in issuing a decision as to whether AAR's actions violated the PIA.

With regard to the procedural aspects of the agency's review, DynCorp raises three primary arguments: (1) the CO's investigation did not adequately consider all available information concerning DynCorp's allegations; (2) the CO's investigation failed to adequately consider the investigation by the DOS OIG; and (3) the CO's PIA determination did not meet the requirements of FAR § 3.104-7 regarding the HCA's role.[9]

First, DynCorp argues that the contracting officer's investigation was defective because it failed to consider all of the relevant available information concerning the potential PIA violation. In particular, the protester argues that the contracting officer should have more fully investigated the allegations, rather than relying on the declarations submitted by AAR personnel.

As discussed above, the record shows that the contracting officer conducted an investigation of DynCorp's PIA allegations regarding AAR that considered responses from AAR, a review of the offerors' proposals, and consideration of affidavits submitted by AAR in connection with DynCorp's suit filed at the M.D. Fla. court. Although the protester argues that the contracting officer's investigation should have considered additional sources of information, or should have been more skeptical of the information collected, the protester's disagreement with the adequacy of the review, without more, does not demonstrate that it was inconsistent with the procedural requirements of FAR § 3.104-7. To the extent the protester argues that the contracting officer drew unreasonable conclusions from his investigation, we will not review this argument as it concerns the merits of the issues currently before the M.D. Fla. court.

Next, DynCorp argues that the contracting officer failed to reasonably consider the results of the DOS OIG investigation concerning the allegations raised by the protester. As the agency explains, the review by the DOS OIG was conducted

[9] DynCorp also argues that the allegations cited in this protest regarding AAR gave rise to an unfair competitive advantage that DOS failed to consider. As the record shows, the agency reviewed the protester's PIA allegations and concluded, as a related matter, that AAR did not receive any unfair competitive advantage as a result of the alleged actions. AR, Tab 22, PIA Investigation Memorandum, at 10. The protester argues that the agency's analysis regarding the unfair competitive advantage was inadequate because it relied too heavily on the contracting officer's PIA analysis. Because, as discussed above, the central facts of that issue are related to the suit before M.D. Fla. District Court, we will not review the merits of this allegation. See 4 C.F.R. § 21.11(b).

independently from the review conducted by the CO. COS at 80. In this regard, the agency states that the DOS OIG is an independent office, and the contracting officer had no role in the DOS OIG's investigation. Id.

Nonetheless, prior to award, the DOS OIG provided "a brief verbal assessment" to the contracting officer, contracting officer's branch chief, the SSA, and DOS legal counsel, which advised that there "were no findings that would preclude the Department of State from awarding the contract to AAR Airlift." Id. at 80-81 (citing AR, Tab 24, Contracting Officer's Memorandum Summarizing Conversation with DOS OIG (August 31, 2016), at 1). The contracting officer states that the HCA was made aware of the information provided by the DOS OIG. Id. at 81.

Although the CO and other procurement officials were not provided a copy of the OIG's investigation, the record shows that the OIG advised the CO that there was no basis to withhold the award to AAR. On this record, we find no basis to conclude that the contracting officer's PIA determination was defective.

Next, DynCorp argues that the CO's PIA investigation failed to comply with the requirements of FAR § 3.104-7 because the HCA did not conduct an independent review of the CO's conclusions. As discussed above, the FAR requires the contracting officer to conduct an investigation of PIA allegations. FAR § 3.104-7(a). If the investigation concludes that there is not a violation of the PIA, the contracting officer must advise the individual designated by agency procedures of that result. Id. § 3.104-7(a)(1). DOS regulations provide that the contracting officer must advise the HCA. 48 C.F.R. § 603.104-7.

DynCorp contends that the HCA did not review the contracting officer's findings, and that the procedural requirements of FAR § 3.104-7 were therefore not followed. The contracting officer states, however, that the HCA was aware of the facts of the PIA investigation and the contracting officer's conclusion. COS at 24-25, 28, 110-11; AR, Tab 24, Contracting Officer's Memorandum Summarizing Conversation with DOS OIG (August 31, 2016), at 1. Further, the details and results of the PIA investigation were cited in the source selection decision, which was approved by the HCA. See AR, Tab 21, SSDD, at 9-10 (details of the PIA investigation), cover page (signature of the HCA). Nothing in the FAR (or the agency's regulations) requires the HCA to prepare and document a separate investigation and analysis of a PIA allegation, as the protester suggests. On this record, we find no basis to sustain the protest.

AAR's Responsibility

Finally, DynCorp argues that DOS unreasonably found AAR to be a responsible offeror and therefore eligible for award of the contract. We find no basis to sustain the protest based on this argument.

The FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set forth in FAR § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. For example, the contracting officer must consider, among other factors, whether the putative awardee has a "satisfactory performance record," and a "satisfactory record of integrity and business ethics." FAR § 9.104-1(c), (d).

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer failed to consider available relevant information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7. Where the record shows that the contracting officer was aware of the facts or allegations identified by the protester, we will generally not review an allegation that the contracting officer should have found the awardee nonresponsible based on those facts or allegations. See DynCorp Int'l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 19-20.

DynCorp argues that the contracting officer's affirmative determination of responsibility was inadequate because it failed to reasonably consider the protester's allegations discussed above regarding AAR's alleged access to DynCorp's confidential and proprietary information as well as the protester's allegations regarding AAR's past performance. As set forth above, we conclude that DOS reasonably met its obligations under the FAR to review DynCorp's allegations regarding AAR's actions in connection with the protester's confidential and proprietary information, and also conclude that the agency reasonably evaluated the awardee's past performance. Nothing in the arguments raised by DynCorp concerning the determination of AAR's responsibility demonstrate that the contracting officer failed to consider available, relevant information regarding AAR's responsibility.

The protest is denied.

Susan A. Poling
General Counsel