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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Nova Builders

File: B-402091; B-402091.2; B-402091.3

Date: January 19, 2010

Jacob B. Pankowski, Esq., Richard L. Moorhouse, Esq., and Sean M. Connolly, Esq., Greenberg Traurig LLP, for the protester.

William W. Goodrich Jr., Esq., Richard J. Webber, Esq., and Kavitha J. Babu, Esq., Arent Fox LLP, for Clark/McCarthy Healthcare Partners, the intervenor.

Stacey North-Willis, Esq., and Charlma Quarles, Esq., Department of Veterans Affairs, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement involving the award of a fixed-price incentive contract for preconstruction and construction services, the source selection authority's (SSA) selection of a lower-priced proposal that the SSA found to be "essentially equal" to the protester's under the non-price factors is reasonable, where the SSA performed a comprehensive evaluation and documented his source selection decision, including each of the areas of disagreement with the evaluation of the source selection evaluation team, and the SSA's conclusions are supported by the record and are consistent with the RFP.

DECISION

Nova Builders of Arlington, Virginia protests the award of a contract to Clark/McCarthy Healthcare Partners of Tampa, Florida under request for proposals (RFP) No. VA-101-09-RP-0123, issued by the Department of Veterans Affairs (VA) for preconstruction services and optional construction of a VA medical facility in New Orleans, Louisiana. Nova challenges the reasonableness of the evaluation and source selection decision.

We deny the protest.

BACKGROUND

The RFP contemplated the award of a fixed-price incentive (successive targets) contract. Under this type of contract, the selected contractor and the agency agree to an initial target price (which consists of an initial target cost plus an initial target profit), and at some point during the contract (usually before completion of the first item) the parties negotiate either a firm fixed price or firm target price for the remainder of the work, with profit to be calculated pursuant to a formula established by the contract. Federal Acquisition Regulation (FAR) § 16.403-2; RFP at 37-39. As the RFP stated here, the selected contractor would perform the preconstruction and design work under contract line item number (CLIN) 1 based on a proposed initial target price for construction, then the parties would negotiate a firm fixed price or firm target price for the construction work to be performed through optional CLIN 2 if the agency chose to exercise that option upon completion of CLIN 1. Thus, only the CLIN 1 price was fixed at the outset; the CLIN 2 price was “estimated” and would not be negotiated until the project design drawings and other preconstruction work were completed during CLIN 1 and the VA chose to exercise the CLIN 2 option. The RFP established a total ceiling price of \$750 million for the performance of both CLINs 1 and 2. RFP at 19.

The RFP stated that award would be made based on the evaluation of “both cost and technical considerations most advantageous to the government,” with the technical evaluation “considered significantly more important than [p]rice.” Id. 33-34. With regard to the technical evaluation, the RFP identified four equally weighted factors: key personnel, technical/management approach, schedule, and small business participation. With regard to price, the RFP provided for the evaluation of “reasonableness, realism, and acceptability to the [g]overnment” of the offeror’s proposed preconstruction services and initial target price, including proposed initial target cost and initial target profit. Id. at 34.

With regard to the small business participation factor, the RFP provided that the proposals of large business offerors (including Nova and Clark) would be evaluated based on the following subfactors listed in “decreasing” order of importance: (1) the extent the offeror included small businesses through a teaming arrangement,¹ (2) the degree to which the offeror’s proposed subcontracting plan “exceeds” the goals set forth elsewhere in the solicitation,² and (3) the offeror’s record of meeting or

¹ Teaming arrangements with service disabled veteran owned small businesses were considered more important than teaming arrangements with veteran owned small businesses, which were considered more important than teaming arrangements with all other small businesses of any category. RFP at 34.

² Exceeding goals for service disabled veteran owned small businesses was considered more important than exceeding goals for veteran owned small

(continued...)

exceeding small business performance goals in federal contracts performed in the last 3 years.³ Id. at 34. Under this factor, each offeror was required to “describe the participation of small businesses in the [teaming] arrangement” and “provide a copy of the teaming arrangement[']s executed agreement” in its proposal. Id. at 31. Each offeror’s subcontracting plan was required to

indicate the total target as a percentage of contract value for each of the categories listed [below]. The goals for this project, expressed in terms of percentage of planned subcontracting dollars, are as follows:

SMALL BUSINESS	28.7%
SERVICE DISABLED VETERAN OWNED BUSINESS	7%
VETERAN OWNED BUSINESS	10%
SMALL DISADVANTAGED BUSINESS	5%
WOMEN OWNED BUSINESS	5%
HUBZONE SMALL BUSINESS ⁴	3%

Id. at 31-32. The RFP did not identify separate goals for CLINs 1 and 2, but again repeated that offerors’ proposed subcontracting plans “shall indicate the total target as a percentage of contract value for each of the categories listed.” Id. at 32. The RFP further required that offerors provide copies of the “Standard Forms [SF] 294 and 295 for all federal construction projects completed within the last three years,” as well as an explanation for any of the goals not met.⁵ Id.

Three offerors responded to the RFP, including Nova and Clark.⁶ Nova’s initial proposal reflected an overall price of [REDACTED], which Nova offered to reduce by [REDACTED] if the agency accepted Nova’s [REDACTED]. Clark’s initial proposal reflected an overall price of [REDACTED], without any reference to [REDACTED]. Agency Report (AR), Tab 8b, Final SSET Price Evaluation Report,

(...continued)

businesses, which was considered more important than exceeding goals for all other small businesses of any category. RFP at 34.

³ Exceeding subcontracting goals was considered more important than meeting subcontracting goals. RFP at 34.

⁴ “HUBZone” refers to “historically underutilized business zone” small businesses.

⁵ The SF 294 is a “subcontracting form for individual contracts,” and the SF 295 is a “summary subcontract report.” Both forms report the contractor’s subcontracting goals for performed contracts.

⁶ Both Nova and Clark were large businesses that partnered or teamed with other large businesses to provide the services required by the RFP.

attach., at 1, 3; Tab 42, Interim SSET Price Evaluation Report, attach., at 1, 3. At the conclusion of discussions, Nova’s final proposal revisions eliminated earlier references to [REDACTED], and both offerors reduced their proposed prices as stated below:

CLIN	Description	Nova	Clark
0001A	Preconstruction Services	[REDACTED]	[REDACTED]
0001B	General Conditions	[REDACTED]	[REDACTED]
	Total CLIN 1 Price	[REDACTED]	[REDACTED]
0002AA	Initial Target Cost	[REDACTED]	[REDACTED]
0002AB	Initial Target Profit (dollars)	[REDACTED]	[REDACTED]
0003AB	Initial Target Profit (percent)	[REDACTED]	[REDACTED]
	Total CLIN 2 Price (Initial Target Price) ⁷	[REDACTED]	[REDACTED]
	Total Price (CLINs 1 and 2)	\$741,711,347	\$714,508,488

AR, Tab 8b, Final SSET Price Evaluation Report, attach., at 1, 3.

Both Nova and Clark identified specific subcontracts with small businesses to perform a portion of the work. For CLIN 1, Nova identified one specific subcontract for [REDACTED] with a service disabled veteran owned small business under a “Teaming Agreement.” AR, Tab 3D, Nova’s Technical Proposal, Small Business Participation, at 116; Teaming Agreement. Clark identified for CLIN 1 subcontracts with a number of small businesses totaling [REDACTED] under “Consultant Agreements.” AR, Tab 5E, Clark’s Technical Proposal, Small Business Participation, at 2; Subcontracting Plan, at 7-8th unnumbered pages; Consultant Agreements.

In their proposals, Nova and Clark’s small business plans also included target goals for each of the small business categories required by the RFP.⁸ Each offeror identified separate target goals for CLINs 1 and 2, as identified below:

⁷ The initial target price is the sum of the initial target cost and initial target profit. RFP at 19.

⁸ We note that the dollars amounts identified by the offerors as target goals for CLIN 1 are different from the dollar amounts they proposed to subcontract.

CLIN 1	Nova		Clark		VA goals
Total contract price ⁹	[REDACTED]		[REDACTED]		
Total subcontracting dollars	[REDACTED]		[REDACTED]		
Small businesses	[REDACTED]	[REDACTED] ¹⁰	[REDACTED]	[REDACTED]	28.7%
Service disabled veteran- owned small businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	7%
Veteran owned businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	10%
Small disadvantaged businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	5%
Women owned businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	5%
HUBZone small businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	3%

⁹ The subcontracting plans submitted by offerors were based on initial proposal prices. The plans were not altered during final proposal revisions when offerors reduced their prices.

¹⁰ Offerors calculated goals as a measure of subcontracting dollars, not as a measure of total contract value. By way of example here, [REDACTED] divided by [REDACTED] reflected a planned small business goal of [REDACTED] percent.

CLIN 2	Nova		Clark		VA goals
Total contract price	[REDACTED]		[REDACTED]		
Total subcontracting dollars	[REDACTED]		[REDACTED]		
Small businesses (total)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	28.7%
Service disabled veteran- owned small businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	7%
Veteran owned businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	10%
Small disadvantaged businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	5%
Women owned businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	5%
HUBZone small businesses	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	3%

AR, Tab 3D, Nova’s Technical Proposal, Small Business Participation, at 116-18; Tab 5E, Clark’s Technical Proposal, Subcontracting Plan, at 3rd unnumbered page; RFP at 31-32.

The source selection evaluation team (SSET) separately evaluated technical and price proposals, generating reports that identified strengths and weaknesses of each proposal under the evaluation factors. The final SSET reports reflected that Nova’s proposal was rated technically superior to Clark’s, but that Clark’s price proposal was rated superior to Nova’s.¹¹ In this regard, Nova’s and Clark’s proposals received technical scores of 70 and 61 points, respectively, out of a possible 80 points,¹² and their proposals received price scores of 14 and 15 points, respectively, out of a

¹¹ The third offeror’s proposal was rated inferior to both Nova’s and Clark’s proposals under the technical and price factors.

¹² Each of the four technical evaluation factors was worth 20 points. As reflected in the SSET’s final technical evaluation report, Nova’s technical proposal received scores of 17 points for key personnel, 18 points for technical/management approach, 16 points for schedule, and 19 points for small business participation. AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 4. Clark’s technical proposal received scores of 15 points for key personnel, 15 points for technical/management approach, 19 points for schedule, and 12 points for small business participation. Id. at 7.

possible 20 points. AR, Tabs 8a and 8b, Final SSET Technical and Price Evaluation Reports.

As reflected in the SSET evaluation reports, the largest area of scoring differential was under the small business participation factor, where the SSET assigned Nova's proposal a score of 19 (out of a possible 20) points and Clark's proposal a score of 12 points.

There, the SSET assessed Nova's proposal strengths for, among other things, meeting or exceeding the goals for small disadvantaged veteran owned small businesses, implementing a "formal and detailed [REDACTED]," and being "proactive in garnering local small business partners by holding 'job fair' forums." The SSET also found several weaknesses in Nova's proposal, including that the proposal did not meet several of the small business goals for the preconstruction phase of the procurement with regard to small disadvantaged businesses, women owned businesses, and HUBZone businesses. However, the SSET determined that these weaknesses were offset by "strengths associated with [Nova's] overall small business goals and [its] formalized [REDACTED]." AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 4.

In contrast, the SSET assigned Clark's proposal 12 points under the small business participation factor. Although the SSET identified strengths in Clark's proposal for including a "[REDACTED]," meeting all of the VA's small business goals and exceeding the goal for service disabled veteran owned small businesses, and for being "proactive in garnering local small business partners by holding 'job fair' forums," the SSET noted weaknesses in Clark's proposal for failing to meet small business goals in past projects by "substantial margins," and because, despite holding job fairs, "the proposal demonstrates limited utilization of local New Orleans partner firms which will hamper their ability to successfully garner local small business firms." Id. at 7.

Upon the completion of the SSET reports, the contracting officer, with the assistance of the SSET chairman, combined the SSET's technical and price evaluation reports into a draft "proposal evaluation report" (PER), which was prepared and modified from time to time during the evaluation to assist the source selection authority (SSA) by capturing the information in the SSET reports in a single document. Hearing Transcript (Tr.)¹³ at 501, 971-73.

Late in the evaluation, on September 21, 2009, the contracting officer became the SSA, and the former SSA continued to act as a supervisory contracting officer. The new SSA inserted comments in the most recent PER questioning some of the

¹³ Our Office conducted a 3-day hearing, during which we heard testimony from the former and current SSAs and the SSET chair.

judgments of the SSET with regard to the technical evaluation of proposals, particularly with regard to the small business participation factor and price factors. There is no record of the SSET ever responding to these concerns.

In addition, the SSA, supervisory contracting officer, and SSET chair received advice from a consultant, hired to assist the agency in the evaluation, who challenged some of the SSET's conclusions and identified numerous "inconsistencies" between the RFP and statements in the PERs. Based on his analysis, the consultant opined that the agency faced "considerable risk . . . of 'successful' protest." AR, Tab 19, Consultant's Email to SSA and Supervisory Contracting Officer, Sept. 15, 2009, at 2. As a result, the most recent PER was modified to address some of the consultant's concerns.¹⁴ Tr. at 409-10, 997-98, 1002-04.

The new SSA considered all of the information provided by the SSET and the consultant, and performed his own independent assessment of proposals. Although the SSA accepted and adopted the majority of the SSET's technical and price analyses, the SSA disagreed with some of the SSET's conclusions, particularly with regard to the evaluation of the small business participation factor. As a result, the SSA increased Clark's score under the small business participation factor by 3 points (thereby adjusting Clark's score under this factor to 15 points) and lowered Nova's score by 3 points (thereby adjusting Nova's score under this factor to 16 points).¹⁵ The SSA documented each area of disagreement in a detailed source selection decision, provided his rationale for why he believed the SSET's conclusions were in error, and summarized his evaluation under each of the evaluation factors. AR, Tab 6, Source Selection Decision, at 3-5, 10.

For example, under the small business participation factor, where the SSET assigned Clark's proposal a weakness because individual team members had not met small business goals on some past projects, the SSA found that this weakness was

¹⁴ For example, the consultant advised that, in earlier PERs, the SSET had improperly given Nova's proposal the credit for [REDACTED] that reduced the firm's overall price when such [REDACTED] were not contemplated by the RFP; the consultant also disagreed with the SSET's conclusion, as reflected in the PERs, that Clark's [REDACTED] is a "disincentive[]" to [REDACTED]. AR, Tab 19, Consultant Email to SSA and Supervisory Contracting Officer, Sept. 15, 2009, at 2-3. The raising of these concerns led to PER revisions that removed both the credit for [REDACTED] and the documented concern regarding [REDACTED]. Compare AR, Tab 13a, PER (Sept. 23, 2009), at 17 with AR, Tab 13b, PER (Sept. 15, 2009), at 18. To the extent that Nova challenges these revisions, we find them reasonable.

¹⁵ The SSA's changes to the small business participation factor resulted in changes to the overall technical factor scores as follows: 67 points for Nova's proposal and 64 points for Clark's proposal. AR, Tab 6, Source Selection Decision, at 4.

mitigated by statements in Clark's proposal that [REDACTED]. The SSA noted that the Nova team had also failed to meet small business goals in the past, but the SSET offset the weaknesses and gave Nova's proposal a strength because it believed that a newly implemented [REDACTED] would address this issue. The SSA disagreed with this assessment because the [REDACTED] had only recently been developed, had been implemented in only one contract, and "there are no results to determine the effectiveness of [REDACTED]." The SSA also disagreed with the SSET's conclusion that Clark's "[l]imited utilization of local New Orleans partner firms will hamper [its] ability to garner local small business firms." As noted by the SSA, Clark's proposal had included [REDACTED] whereas Nova's proposal did not include [REDACTED]. Furthermore, the SSA noted that Nova's proposal included a preconstruction (CLIN 1) small business goal of only [REDACTED] percent, as compared to other offerors who proposed small business goals of [REDACTED] percent of their preconstruction prices. With regard to the SSET's remaining conclusions, the SSA agreed with the SSET's assessment that both offerors were "proactive" in holding "job fair" forums to attract small business, Clark's small business plan either met or exceeded all of the VA's small business goals, and Nova's small business plan met or exceeded some of the VA's small business goals but did not meet others. *Id.* at 3-4, 10; Contracting Officer's Supp. Statement at 2-4; Tr. at 602, 606-08, 650-58; AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 4, 7.

The SSA also disagreed with some of the SSET's conclusions with regard to the price evaluation. Although the SSA did not alter the scores for this factor and accepted most of the strengths and weaknesses assessed to proposals under this factor, the SSA rejected the SSET's assigned weaknesses that Clark's price proposal presented risk because the offeror did not demonstrate an "understanding of the local New Orleans market" and would not be able to "absorb minor unforeseen issues without causing distress." The SSA found that these weaknesses were "unsubstantiated," that Clark "has shown they have the capability to work in different markets and complete the work within budget and on time," and that Clark has the "tools in place" to respond to "minor unforeseen issues." AR, Tab 6, Source Selection Decision, at 4-5. The SSA noted, too, that although Clark's preconstruction (CLIN 1) price was higher than Nova's, Clark's overall lower price (by approximately \$27 million) "gives the Government [the] greatest flexibility to absorb any changes without exceeding the ceiling price." *Id.* at 10.

With regard to the remaining evaluation factors, the SSA did not alter the SSET's scores, concurring with the SSET's analysis and highlighting some of the evaluation conclusions. *Id.* at 9-11. For example, the SSA noted that although the Nova team was currently using a contracting method similar to the one here, the Clark team had also worked on a project of similar size and scope. The SSA noted that both offerors teamed with firms that show an understanding of the local New Orleans market, and both offerors were similarly "organized and oriented in alignment with the CLINs." In addition, the SSA found that both offerors' proposals included "thorough and complete" preconstruction and construction schedules. *Id.* at 9-10.

Considering all of the information before him, the SSA concluded that Nova's and Clark's proposals were "essentially equal" under the technical factor, despite Nova's slightly higher overall technical score, and that Clark's lower-priced proposal "offers the best overall value" to the government. AR, Tab 6, Source Selection Decision, at 9, 11-12. The SSA selected Clark for award and this protest followed.

DISCUSSION

Nova contends that the SSA's source selection decision was unreasonable due to the "repeated failures of [the SSA] to make a source selection decision consistent with the evaluation findings of the SSET" and the solicitation. Nova's Post-Hearing Comments at 1. In essence, Nova contends that the SSA was unreasonable in rejecting the SSET's findings, particularly with regard to the small business participation and price factors.

In reviewing an agency's source selection decision, we examine the record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. AIU North America, Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 7-8. Although source selection officials may reasonably disagree with the ratings and recommendations of evaluators, they are nonetheless bound by the fundamental requirement that their independent judgments be reasonable, consistent with the stated evaluation scheme, and adequately documented. Id.; DynCorp Int'l LLC, B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 at 4. A protester's mere disagreement with a source selection official's judgments does not demonstrate that those judgments are unreasonable. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

As our review of the record confirms, the SSA here performed a thorough and complete analysis of the evaluation record, which is contemporaneously documented in a well-reasoned source selection decision. Although appointed to the position late in the procurement, the SSA served as the contracting officer for this procurement and was in repeated contact with the former SSA and SSET chair throughout the procurement, including participating in drafting the PERs. Thus, the SSA was knowledgeable as to the details of the entire evaluation. Once appointed as the SSA, the SSA questioned the SSET with regard to some of their conclusions that either appeared inconsistent with the evaluation criteria or were unsubstantiated by the record, and the SSET never responded to the SSA's concerns. Tr. at 268-69, 449, 654. We note, also, that the consultant hired by the agency to assist with this procurement also raised concerns about some of the SSET's conclusions, which the SSA considered. AR, Tab 19, Consultant Email to SSA and Supervisory Contracting Officer, Sept. 15, 2009, at 1-4. The SSA, in his source selection decision, documented each area of disagreement with the SSET and provided supporting rationale for his evaluation conclusions. We find that the SSA's conclusions, including the areas of disagreement with the SSET, are supported by the record and are consistent with the

evaluation criteria. Although we do not discuss each of Nova's challenges to the evaluation, we discuss several of the protested issues below.

Small Business Participation

For example, as noted above, the SSET assigned Clark's proposal a weakness under the small business participation factor because individual team members had not met small business goals on some past projects. However, the SSET offset a similar weakness assessed to Nova's proposal and gave the proposal a strength because Nova proposed to implement a [REDACTED]. AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 4, 7.

The SSA disagreed with these SSET conclusions.¹⁶ The SSA found that the weakness assigned to Clark's proposal did not recognize statements from Clark's proposal that [REDACTED] which had been [REDACTED]. The SSA also concluded that Nova's [REDACTED] had been overrated by the SSET because [REDACTED] had only recently been developed, had been implemented in only one contract, and "there are no results to determine the effectiveness of [REDACTED]." AR, Tab 6, Source Selection Decision, at 3-4, 10.

Nova contends that the SSA should not have accepted Clark's "conclusory" proposal statements about its [REDACTED] without making any attempt to confirm [REDACTED]. Nova asserts, also, that the SSA acted disparately when he failed to credit Nova's proposal for making good faith efforts to meet small business goals on past contracts, and when he failed to positively consider Nova's "more substantive response" concerning its [REDACTED]. Second Supplemental Protest at 7-9; Nova's Comments at 14-16; Nova's Post-Hearing Comments at 14-18.

Our review of the record, however, supports the reasonableness of the SSA's conclusions. With regard to the SSA's acceptance of Clark's proposal statements, the SSA similarly accepted statements in Nova's proposal. In fact, it was Nova's description of the limited and recent deployment of its [REDACTED] to only one

¹⁶ The record shows that Nova's team failed to meet the small business goals on six contracts; Clark's team failed to meet the goals on five contracts, four of which the proposal noted involved [REDACTED]. AR, Tab 3D, Nova's Technical Proposal, Small Business Participation, at 127-28; Tab 5E, Clark's Technical Proposal, Small Business Participation, at 3. Only Clark provided the SF 294/295 for all of its team members' prior contracts. Nova chose to provide only the SF 294/295 for the contract in which it implemented the [REDACTED]. Nova's failure to provide the SF 294/295 for all contracts as required by the RFP was another factor that the SSA reasonably considered in adjusting point scores under the small business participation factor. AR, Tab 6, Source Selection Decision, at 4, 10; Contracting Officer's Statement at 4; RFP at 31-32.

contract, as well as the SF 294/295 that Nova provided for this contract that showed that small business goals had not been met even with [REDACTED], which led the SSA to conclude that the SSET had overrated [REDACTED]. Contracting Officer's Supplemental Statement at 4; see AR, Tab 3D, Nova's Technical Proposal, Small Business Participation, at 120, 128, SF 294/295. Furthermore, Nova did not discuss any good faith efforts in connection with any of the other contracts where its team members failed to meet small business goals. AR, Tab 3D, Nova's Technical Proposal, Small Business Participation; Tr. at 591-92. In contrast, Clark addressed each of the contracts where small business goals were not met, and indicated that [REDACTED] for meeting goals in four of those contracts. AR, Tab 5E, Clark's Technical Proposal, Small Business Participation, at 3, SF 294/295. The SSA had no reason to doubt Clark's statements concerning [REDACTED] to meet small business goals, and Nova has provided no evidence suggesting that Clark's statements were erroneous. Based on the record, we find the SSA's evaluation conclusions here were reasonable and did not evidence disparate treatment.

In another example, the SSET assessed Clark's proposal a weakness under the small business participation factor because it believed that Clark's "limited utilization of local New Orleans partner firms will hamper [its] ability to garner local small business firms." AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 7. However, the SSA disagreed with this assessment because Clark's proposal had [REDACTED]—thus showing that the SSET's belief that Clark could not garner local small businesses was "unsubstantiated." AR, Tab 6, Source Selection Decision, at 3, 10; Contracting Officer's Supplemental Statement at 2; Tr. at 650-54.

Nova contends that the foregoing discussion by the SSA regarding Clark's use of local businesses constitutes an unstated evaluation criterion that could not be considered under the small business participation factor. However, Nova also argues that its proposal should have been credited for teaming with local large businesses. Although we agree with Nova that local business involvement would constitute an unstated evaluation criterion under this factor because it is not reasonably encompassed within the small business participation factor, local business involvement was not applied as an evaluation factor by the SSA. Rather, the record shows that the SSA's discussion of this issue was merely in response to the SSET's comments that indicated that this aspect of Clark's proposal may inhibit Clark's ability to obtain small business participation. See Tr. at 651-52, 657. The SSA's elimination of a weakness associated with the SSET's application of unstated criteria was reasonable.

In another example, Nova challenges the SSA's statement that Nova's "preconstruction [CLIN 1] small business goal of [REDACTED] for a preconstruction price of [REDACTED] of the preconstruction price, while other offerors are between [REDACTED]" of their preconstruction prices. AR, Tab 6, Source Selection Decision, at 3, 10. Although Nova does not challenge the accuracy of this statement, Nova contends that the SSA deviated from the stated evaluation criteria when he

“ignored Nova’s commitment to small business contracting under [CLIN 2],” and when he considered the goals as a percentage of total preconstruction or contract dollars as opposed to a percentage of subcontracting dollars.¹⁷ Nova’s Comments at 12-14.

The SSA admitted at the hearing that he gave more weight to offerors’ proposed subcontracting goals for CLIN 1 because he was “getting ready to award” CLIN 1 and the CLIN 2 price and subcontracting plan were likely to change when the CLIN 2 option was exercised. Tr. at 728-29. However, we do not find that this was unreasonable or inconsistent with the RFP. The RFP did not specify how subcontracting goals would be evaluated under each CLIN, thus leaving the agency with the discretion of how to evaluate each CLIN. While the evaluation record shows that the SSA considered the offerors’ goals under both CLINs, which is consistent with the protester’s view that the goals for the “entire project” must be considered, we find that the SSA acted within his discretion in giving more weight to CLIN 1, given that CLIN 2 was only an option and the subcontracting plan for CLIN 2 could well change with the exercise of that option.

We similarly reject Nova’s contention that the SSA unreasonably considered the offerors’ goals as a percentage of the overall contract value for CLINs 1 and 2, as opposed to a percentage of total subcontracting dollars.¹⁸ As stated above, the RFP expressly required offerors’ subcontracting plans to indicate their “total target [goals] as a percentage of contract value,” and therefore offerors were on notice that

¹⁷ Nova also contends that the SSA deviated from the stated evaluation factors when he credited firms for meeting small business goals, when the RFP required only that offerors’ subcontracting plans be evaluated for exceeding (not meeting) the goals. Second Supplemental Protest at 3-5; see RFP at 34. However, this allegation is untimely under our Bid Protest Regulations as it was not raised within 10 days of when the basis of protest should have been known. 4 C.F.R. § 21.2(a)(2) (2009). The agency report provided to the protester on November 12, 2009, included both the RFP and the final SSET technical evaluation report, which identified that proposals were evaluated for meeting, not just exceeding, small business goals. AR, Tab 8a, Final SSET Technical Evaluation Report, attach., at 4, 7. Furthermore, the SSA provided a statement on December 7 that confirmed that Clark’s proposal had been credited for meeting small business goals. Contracting Officer’s Supplemental Statement at 2. Nevertheless, Nova failed to raise this ground of protest until December 28, after the GAO hearing. Although Nova contends that the SSA’s testimony during the hearing provided an independent basis of protest, we find that the testimony merely supported what was evident from the record documents provided to Nova weeks earlier. This protest ground is dismissed as untimely.

¹⁸ As Nova points out, its goals for some of the small business categories are higher than Clark’s when measured as a percentage of subcontracting dollars.

this would be evaluated. RFP at 31-32. Although Nova contends that the RFP provided contrary guidance by listing the VA's goals as a percentage of subcontracting dollars and including a sample subcontracting plan as an attachment to the RFP that similarly calculated goals as a percentage of subcontracting dollars, we do not find that these aspects of the RFP can reasonably be interpreted to indicate that offerors' target goals as a percentage of contract value could not or would not be evaluated.¹⁹

Nova also complains that the SSA misevaluated offerors' small business subcontractor teaming arrangements. Nova contends that the SSA did not give the appropriate weight to offerors' teaming arrangements, and that he evaluated these arrangements under the wrong subfactor. Nova's Post-Hearing Comments at 13.

As stated above, under the small business participation factor, the agency was required to evaluate, in "decreasing" order of importance the following subfactors: (1) the extent the offeror included small businesses through teaming arrangements, (2) the degree to which the offeror's proposed subcontracting plan exceeded the VA's stated small business goals, and (3) the offeror's record of meeting or exceeding small business performance goals in past contracts. RFP at 34. The SSA testified that he considered all subcontractor arrangements under the second subfactor, which evaluated offerors' subcontracting plans. Tr. at 553-54. Nova contends that this was in error, as teaming arrangements should have been considered under the first subfactor, which was given more weight in the evaluation. We agree with Nova that teaming arrangements should have been evaluated under the first subfactor, but find that Nova was not prejudiced by this aspect of the evaluation.

Both offerors subcontracted or teamed with small business subcontractors. As stated above, under CLIN 1, Nova planned to subcontract [REDACTED] to a service disabled veteran owned small business ([REDACTED]) for [REDACTED], and Nova included in its proposal a "Teaming Agreement" to that effect. AR, Tab 3D, Nova's Technical Proposal, Small Business Participation, at 116; Teaming Agreement. For CLIN 1, Clark proposed to subcontract [REDACTED] to [REDACTED] service disabled veteran owned small businesses [REDACTED] to provide [REDACTED]; [REDACTED];²⁰ and [REDACTED]. Clark included with its proposal "Consultant Agreements" with each of these subcontractors. AR, Tab 5E, Clark's Technical Proposal, Small Business Participation, at 2; Subcontracting Plan at 7-8th unnumbered pages; Consultant Agreements.

¹⁹ To the extent that Nova contends that the solicitation language is ambiguous, the ambiguity is patent and should have been protested as an apparent solicitation defect on or before the time that proposals were due. See 4 C.F.R. § 21.2(a)(1).

²⁰[REDACTED].

Nova contends that only its arrangement with [REDACTED] should be categorized as a teaming arrangement and considered under the most heavily weighted first subfactor of the small business participation factor and that Clark's subcontracting arrangements cannot be considered under this subfactor. It bases this conclusion on the fact that it submitted a "Teaming Agreement" for its proposed subcontractor, whereas Clark only submitted "Consultant Agreements" for its subcontractors. Nova's Post-Hearing Comments at 13.

The term "teaming arrangement" is not defined in the solicitation, but the SSA considered this term to include both joint venture team members and subcontractor arrangements. Tr. at 551. The FAR similarly defines "team arrangement" to include situations where

- (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

FAR § 9.601.

Here, Nova's proposal makes clear that its relationship with [REDACTED] is as a prime/subcontractor and not a joint venture or other partnership. Nova also identifies the [REDACTED] as a "consultant" and not as key personnel. AR, Tab 3D, Nova's Technical Proposal, at 40, 42, 44, 116; Teaming Agreement §§ 2, 7. Based on our review of the proposals, we think that Nova's relationship with [REDACTED] is essentially no different than the prime/subcontractor relationships identified by Clark, and, in accordance with the definition set forth above, if Nova's proposed subcontractor relationships could be considered "teaming arrangements," so could Clark's. The fact that the two offerors titled their agreements with their subcontractors differently does not require, based on the RFP or the FAR, that the agency give more weight to Nova's relationship with the Ranger Group. Although it is true that [REDACTED]'s status as a service disabled veteran owned small business entitled it to the most weight under the evaluation subfactor for teaming arrangements, see RFP at 34, we note that Clark also subcontracted with [REDACTED] service disabled veteran owned small businesses [REDACTED], as well as [REDACTED] other small businesses. Thus, not only has Clark subcontracted with more specified service disabled veteran owned and other small businesses than Nova, Clark's planned subcontracting dollars exceed that of Nova's by [REDACTED] times. Accordingly, it appears that Clark's proposal would have been entitled to receive even more favorable consideration than it received under the RFP had the SSA considered the subcontracting arrangements of these two offerors to be teaming arrangements under the first subfactor. Thus, even assuming that both offerors' subcontracting arrangements should have been considered as teaming arrangements under the first subfactor, based on the record, Nova was not

prejudiced by the SSA's consideration of these similar arrangements under a lesser weighted subfactor.²¹

Finally, Nova objects to the scoring changes made by the SSA under the small business participation factor. As discussed above, the SSA reasonably considered each of the strengths and weaknesses documented by the SSET, agreeing with some and disagreeing with others where he found that the SSET either did not "thoroughly" consider the record or their conclusions were "unsubstantiated." Tr. at 281-82, 459, 461, 650, 652, 654, 787, 797, 874. When all of the issues were considered together, the SSA appropriately determined that there was less difference between Nova's and Clark's proposals under the small business participation factor than the SSET had originally determined. Based on this record, we find the SSA's judgments to be reasonable.²²

Price Evaluation

Nova challenges the SSA's evaluation of proposals under the price evaluation factor. Specifically, Nova complains that the SSA rejected the SSET's assessment of a weakness to Clark's price proposal because of risks associated with Clark's "apparent lack of understanding of the local New Orleans market and the inability to absorb minor unforeseen issues without causing distress." AR, Tab 6, Source Selection Decision, at 4-5; Tab 8b, Final SSET's Price Evaluation Report, at 2. The SSA determined that the SSET's concerns were "unsubstantiated." AR, Tab 6, Source Selection Decision, at 5; Tr. at 787, 791, 794.

Initially, we question whether consideration of local market knowledge is encompassed within the price evaluation factor, which does not suggest in any way that this would be a consideration. In any event, we agree with the SSA that the SSET's concern about Clark's understanding of the local market was "unsubstantiated." As the SSA noted, contrary to the SSET's observations, Clark's proposal demonstrated a knowledge of the local New Orleans market. In this regard,

²¹ Nova's argues, based on the testimony of the SSET chair, that Clark's proposal did not demonstrate a "substantial and significant use of small businesses." Nova's Post-Hearing Comments at 19. However, as noted above, this testimony is not supported by the proposals, which demonstrate that both firms identified the work that their small businesses would perform, and Clark committed to providing a greater number of subcontracts and subcontracting dollars to small businesses than did Nova.

²² Nova also protested the SSA's evaluation of proposals under the key personnel and technical/management approach factors, contending that the SSA unreasonably concluded that Nova's and Clark's proposals were "similar" under these factors. Based on our review of the record, we find no merit to Nova's arguments.

Clark [REDACTED] under this RFP, and its proposal comprehensively addressed local market conditions. AR, Tab 4B, Clark's Phase I Proposal, Local Market Conditions, at 1-8; Tab 5E, Clark's Technical Proposal, Technical/ Management Approach, at 16. Clark, as a large business contractor who has successfully performed similar work in the past, demonstrated to the SSA its "capability to work in different markets and complete the work within budget and on time," and the SSA noted that the SSET had failed to explain how these markets differed from New Orleans.²³ AR, Tab 6, Source Selection Decision, at 5; Tr. at 791. We thus find that the SSA's elimination of this weakness in Clark's proposal was reasonable.

Similarly, to the extent covered by the price evaluation factor, we agree with the SSA that Clark's ability to address minor unforeseen challenges was also "unsubstantiated." As noted by the SSA, Clark had project management and cost control "tools in place" to respond to "minor unforeseen issues" that could arise during the performance of the contract. AR, Tab 6, Source Selection Decision, at 5. In addition, the SSA asked the SSET to further explain its concerns, and the SSET did not respond. AR, Tab 13a, PER (Sept. 23, 2009), at 12; Tr. at 268-69. Based on this record and considering the SSET's failure to substantiate its concerns, we find the SSA's conclusion here was reasonable.

Nova complains that the SSA gave too much weight to the \$27 million price differential between offeror's proposals, arguing that the price differential is "meaningless." Nova's Comments at 18. Nova also challenges the SSA's conclusion that Clark's lower overall price "gives the Government [the] greatest flexibility to absorb any changes without exceeding the ceiling price." Nova's Post-Hearing Comments at 22; see AR, Tab 6, Source Selection Decision, at 10. Nova contends that any price differential between the two offerors' proposals was "ephemeral" given that the initial target price was only an estimate that would be renegotiated to develop a firm fixed price or firm target price upon the execution of CLIN 2. Nova's Post-Hearing Comments at 22. Thus, Nova contends, it is not clear that the agency could implement a greater number of change orders to Clark without having to increase the overall ceiling price, and the price proposals should have been considered "essentially equal." Id.; Nova's Comments at 18.

Although it is true that there is some estimation of prices in the proposal, the RFP contemplated that the agency would evaluate the reasonableness, realism, and completeness of offerors' proposed initial target prices. RFP at 34-35. The RFP required, and offerors provided, detailed "Cost Estimate Reports," calculations, and assumptions to support the development of their initial target prices. RFP at 32.

²³ Although Nova argues that the acquisition plan establishes differences between the New Orleans and other markets, Nova's Comments at 21, the plan does not address other markets and only addresses the New Orleans market conditions. AR, Tab 11, Acquisition Plan; Tr. at 793.

Thus, the proposed initial target prices are not as “meaningless” as Nova contends. The SSA’s consideration of strengths and weaknesses associated with these proposed prices are consistent with the RFP and are reasonably based on the information provided by the offerors. Although Nova disagrees with the SSA’s conclusions, it has not shown them to be unreasonable.²⁴

Best Value Decision

Finally, Nova challenges the SSA’s best value decision. Nova contends that the decision inadequately documents the SSA’s rationale, evidences a lack of consideration of key discriminators because it focuses on areas of disagreement with the SSET, and gives too much weight to the \$27 million price differential. In sum, Nova contends that the SSA’s source selection is flawed because it minimized Nova’s technical superiority and overemphasized price.²⁵

As discussed above, the SSA’s source selection decision adequately explains why he concluded that Nova’s technical proposal was “essentially equal” to Clark’s proposal and was not worth the higher price. AR, Tab 6, Source Selection Decision, at 9, 11-12. In this regard, the record shows that the SSA performed a thorough and comprehensive evaluation and documented his source selection decision in a manner that is consistent with both the RFP and the FAR. Although the SSA did not

²⁴ Nova also complains that the SSA was not provided with, and therefore failed to consider, a cost/price analysis performed by the agency consultant, which predicts “firm target prices” for each offeror based on hypothetical “firm target costs” and hypothetical profit rates that do not exist in the offerors’ proposals. Supplemental Protest at 2-3; Nova’s Hearing exh. 1, Consultant’s Cost/Price Analysis. (As noted above, in a fixed-price incentive (successive targets) contract, “firm target prices” are negotiated by the parties if and when the agency exercises the CLIN 2 option.) The consultant’s hypothetical analysis of “firm target prices” is not rationally or reasonably based on any facts in the record, and, in any event, the RFP did not permit consideration of “firm target prices” and limited the evaluation to “initial target prices.” Tr. at 16, 21-22, 26-27, 219; RFP at 34. Therefore, the fact that the SSA was not provided with, and therefore did not consider, the consultant’s analysis of firm target prices was appropriate.

²⁵ Nova also contends that the consultant’s opinion that inconsistencies between language in the PERs and the RFP created a risk of protest, which led to changes in the evaluation documents, evidences that the agency evaluated the risk of protest as an unstated evaluation criteria. However, there is nothing improper about an agency reviewing its evaluation documents for consistency with the solicitation and making corrections once those inconsistencies are identified; in fact, this review is a very reasonable approach to ensuring a well-supported source selection. The discussion of protest risk in this context is unobjectionable.

address in his decision each and every proposal strength and weakness as Nova would have liked, he did highlight several aspects of the evaluation under each of the evaluation criteria, and he specifically addressed each area of disagreement with the SSET reports.

The protest is denied.

Lynn H. Gibson
Acting General Counsel