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Decision

Matter of: Leidos Innovations Corporation

File: B-417568.3; B-417568.4

Date: May 11, 2020

Shelly L. Ewald, Esq., and Emily C. Brown, Esq., Watt Tieder Hoffar & Fitzgerald, LLP, for the protester.

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Matthew R. Wilson, Esq., Andy K. Hughes, Esq., and Valerie H. Mullaley, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency unreasonably excluded portions of offerors' proposals from consideration and, similarly, excluded the awardee's responses to questions that were relevant to the agency's prior assessment of risk in the awardee's proposed approach, despite the solicitation's requirements that the excluded information be considered.

DECISION

Leidos Innovations Corporation, of Reston, Virginia, protests the Department of the Army's issuance of a task order to DynCorp International LLC, pursuant to fair opportunity proposal request (FOPR) No. A-MD530_0001, to provide logistics support services for MD530F rotary wing aircraft in Afghanistan. Leidos protests the agency's failure to comply with various solicitation provisions, including provisions regarding communications with offerors and the evaluation of proposals.

We sustain the protest.

BACKGROUND

In April 2018, the agency awarded eight indefinite-delivery, indefinite-quantity (IDIQ) contracts to provide logistics support services for non-standard rotary wing aircraft; Leidos and DynCorp were each awarded one of the IDIQ contracts.

In November 2018, pursuant to the IDIQ contracts and the provisions of Federal Acquisition Regulation (FAR) 16.505, the agency issued FOPR No. A-MD530_0001, seeking task order proposals to provide logistics support for MD530F rotary wing aircraft,¹ with performance primarily in Afghanistan.² As amended, the solicitation contemplated a 90-day transition period, a 1-year base performance period, and four 1-year option periods. AR, Tab 26, FOPR at 9.³ Offerors were required to submit technical and cost/price proposals in separate volumes,⁴ and the solicitation provided for a best-value tradeoff decision based on the following evaluation factors: (1) build organic Afghan capability;⁵ (2) mobilization;⁶ (3) return to service scenarios;⁷ and

¹ The MD530F is a militarized version of the commercial MD530 aircraft that was manufactured and subsequently militarized by MD Helicopters, Inc. (MDHI). Agency Report (AR), Tab 1, Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 2. MDHI currently provides the services sought in this procurement; until 2018, DynCorp was MDHI's primary subcontractor in providing those services.

² The services contemplated by the solicitation include "supply support; maintenance planning and management; furnishing or maintaining support equipment; aircraft modification; component overhauls; technical data; training support; manpower and personnel; facilities and infrastructure; packaging, handling, storage, and transportation; and computer resources [for the AAF MD 530F fleet]." AR, Tab 18, Performance Work Statement (PWS) at 3.

³ Except as otherwise indicated, references to the FOPR in this decision are to the final FOPR as reflected in amendment 7.

⁴ The solicitation elaborated that: "pricing information is only included in [the cost/price volume]. DO NOT include any pricing information in [the technical volume]." AR, Tab 26, FOPR at 6.

⁵ With regard to this factor, the solicitation provided that the agency would evaluate each offeror's approach to meeting certain PWS requirements, including the use of a "hybrid" workforce (defined as "Host National [Afghan] personnel working with the [awardee's] workforce"); providing on-the-job training for [Afghan] and customer personnel; and mentoring of [Afghan] personnel. AR, Tab 26, FOPR at 11; Tab 18, PWS at 7, 23, 38.

⁶ With regard to this factor, the solicitation provided that the agency would evaluate each offeror's approach to mobilization, including the offeror's "transition plan to address[] mobilization and demobilization of personnel and equipment." AR, Tab 26, FOPR at 11; Tab 18, PWS at 15. Offerors were instructed that, in submitting their proposals, "[t]he Offeror shall present only the Mobilization portion of the Transition plan." AR, Tab 26, FOPR at 6.

⁷ With regard to this factor, the solicitation provided that the agency would evaluate each offeror's proposed approach to repairing downed aircraft, and the offeror's "ability to obtain and maintain [original equipment manufacturer (OEM)] reach back

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(4) cost/price.⁸ The solicitation provided that the non-cost/price factors were of equal importance and, together, more important than cost/price. *Id.* at 10.

The solicitation provided that technical proposals would be comprised of PowerPoint slides and a videotaped oral presentation, stating:

Each offeror will be permitted two and one half (2.5) hours to present its technical approach. After presentation of the technical volume a one hour break will be taken, followed by a no more than 60 minute question and answer session.^[9]

Id. at 5.

Offerors were instructed that their technical proposals must: “address how the offeror intends to meet the requirements” and “include sufficient detail for evaluation of the offeror’s capabilities, to include substantiation for stated claims.”¹⁰ *Id.* at 3. Finally, the solicitation advised offerors that the agency would assign a “combined technical/risk

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capabilities.” AR, Tab 26, FOPR at 11. The solicitation defined “OEM reach back” as “[t]he ability to contact the OEM for support and information specific to a product issue,” and elaborated that “[t]he contractor shall be responsible for maintaining appropriate business relationships with the OEMs and OEM approved sources of maintenance and supply to address troubleshooting, engineering services requirements, and obsolescence issues.” AR, Tab 18, PWS, at 7, 9.

⁸ With regard to cost/price, the solicitation contemplated award of a hybrid task order with both firm-fixed-price contract line item numbers (CLINs) and cost-no-fee CLINS. Responding to the FFP CLINS included the requirement for offerors to propose fully burdened labor rates for labor categories contained in their underlying IDIQ contracts; the agency provided “plug” numbers for the cost-reimbursement CLINs. As finally amended, the solicitation stated that cost/price would be evaluated for reasonableness; consistency with the labor rates in the underlying IDIQ contracts; unbalancing; and compliance with the submission requirements contained in the solicitation’s cost/price instructions, which included the instruction that “[o]fferors shall ensure that the information presented in [the cost/price] volume is consistent and correlates with the information contained in the technical proposal volume.” AR, Tab 26, FOPR at 7, 11-12.

⁹ The solicitation further provided that, if there were “discrepancies” between the slides and/or the offerors’ oral presentations, the offerors would be permitted to submit written “corrections” within 24 hours of their oral presentations. *Id.* at 5.

¹⁰ Consistent with this provision, the solicitation provided that “All claimed capabilities . . . shall be realistic and are subject to verification by the Government.” *Id.* at 1.

rating for [the non-cost/price] factors”¹¹ and provided that “[e]ach proposal will be evaluated in accordance with the information set forth in the FOPR.” *Id.* at 11. In addition to the question and answer (Q&A) sessions following oral presentations, the solicitation provided for “interchanges” between the agency and offerors.¹² The solicitation explained that such communications would be conducted using “Interchange Notices (INs),” and expressly provided that “[o]fferor responses to INs will be considered in making the source selection decision.” *Id.* at 10.

Cost/price proposals were required to be submitted in accordance with an agency-provided template, and offerors were required to provide a basis of estimate narrative along with their cost/price proposals. As noted above, the solicitation instructed offerors to “ensure that the information presented in [the cost/price] volume is consistent and correlates with the information contained in the technical proposal volume,” and stated that cost/price proposals would be evaluated “based upon the submission requirements contained in the Cost/Price instructions.” *Id.* at 7, 11.

On or before the January 10, 2019 closing date, proposals were submitted by six offerors, including Leidos and DynCorp. The offerors subsequently made oral presentations to, and engaged in Q&A sessions with, agency personnel; both the oral presentations and Q&A sessions were videotaped by the agency. AR, Tab 1, COS/MOL at 6, 26. Thereafter, the agency’s technical evaluation team (TET), cost/price evaluation team (CPET), and the contracting officer evaluated the proposals.¹³

¹¹ In evaluating technical proposals, the agency assigned ratings of outstanding, good, acceptable, marginal, or unacceptable; each rating reflected the agency’s assessment of strengths and/or weaknesses in the offeror’s proposed approach, along with risk assessments. AR, Tab 77, Initial FODD at 4.

¹² The solicitation described “interchanges” as “fluid interaction(s) between the KO [contracting officer] and the Offerors that may address any aspect of the proposal.” AR, Tab 26, FOPR at 10. We note that GAO has consistently stated that the label an agency ascribes to a communication does not necessarily establish the true nature of that communication. *See, e.g., MCR Federal, LLC*, B-416654.2, B-416654.3, Dec. 18, 2018, 2019 CPD ¶ 335 at 2 n.2.

¹³ In evaluating technical proposals, the TET “used the in person oral presentation, video recording of the oral presentation, response to Government questions during oral presentations, clarifications submitted within 24 hours of the oral presentations, and the PowerPoint charts provided with the proposal submission.” AR, Tab 77, Initial FODD at 7.

In its technical proposal, DynCorp represented that it had a “[redacted]” with MDHI.¹⁴ AR, Tab 53, DynCorp Technical Slides at 60. However, in evaluating DynCorp’s proposal, the TET assessed a weakness regarding DynCorp’s approach to providing OEM reach back capability, noting that DynCorp “[redacted],” and concluding that this [redacted] approach “increases the risk of the contractor not being able to perform [redacted].” AR, Tab 90, DynCorp Technical Evaluation at 9. The TET also assessed a weakness to DynCorp’s proposal related to the PWS requirements for access and transfer of DynCorp’s maintenance management information system (MMIS).¹⁵ In this regard, the TET noted that DynCorp responded to agency questions regarding DynCorp’s MMIS by stating that it was “[redacted].” *Id.* The agency discussed matters related to both of these weaknesses with DynCorp during its Q&A session. AR, Tab 77, Initial FODD at 17-19.

In evaluating Leidos’s technical proposal, the TET assigned multiple strengths including a strength associated with Leidos’s repair facility in Manassas, Virginia. Leidos’s capabilities were discussed during the Q&A session, and the TET explained the basis for the strength associated with the facility, stating that it:

provides a depth of engineering support with extensive capabilities and expertise in repairs of airframe, engines, radios, and other aircraft components. This strength can enable a shorter turnaround time for repairs, thus saving cost and schedule.

AR, Tab 92, Ledos’s Technical Evaluation at 13.

After the oral presentations and Q&A sessions, the agency amended the solicitation to clarify the performance period, and provided that revised pricing proposals could be submitted by April 12, 2019; DynCorp and Leidos both submitted revised cost/price proposals.¹⁶ Following all submissions, DynCorp’s and Leidos’s proposals were rated as follows:

¹⁴ As noted above, MDHI manufactured the commercial MD530 aircraft, and militarized it to become the MD530F aircraft. AR, Tab 1, COS/MOL at 2.

¹⁵ The solicitation provided that an offeror’s MMIS must “provide comprehensive fleet management capabilities and trend analysis,” including “aircraft readiness and status tracking, supply support status, parts forecasting, spare parts ordering, critical item tracking and consumption data, calibration status, obsolescence management, discrepancy management, scheduled and unscheduled maintenance tracking, historical records management and data archival, compliance tracking and reporting of Service Bulletins, Airworthiness Directives (AD) and special inspections; and other related data.” AR, Tab 18, PWS at 25-26. The solicitation further provided that the MMIS “shall be updated daily” and “be accessible” to authorized personnel. *Id.*

¹⁶ Additionally, on April 18, the agency again amended the solicitation by reducing “plug” numbers for certain cost-reimbursement CLINs. That is, the agency reduced the costs
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	Factor 1	Factor 2	Factor 3	Evaluated Cost/Price¹⁷
Leidos	Outstanding	Outstanding	Outstanding	\$641,640,755
DynCorp	Outstanding	Acceptable	Good	\$459,979,935

AR, Tab 77, Initial Fair Opportunity Decision Document (FODD) at 20.

On April 24, the initial contracting officer¹⁸ selected Leidos for award. In documenting the basis for selection of Leidos’s higher-priced proposal, she noted that DynCorp “[redacted],” concluding that this “increases the risk” of contractor noncompliance. *Id.* at 10. She also noted that, during the Q&A session with DynCorp, the agency sought confirmation that DynCorp’s proposal reflected an intent to transfer its MMIS, and that DynCorp responded that [redacted]. *Id.* at 18. Finally, she noted, as positive considerations with regard to Leidos’s proposal, Leidos’s OEM reach back capability and the capabilities associated with Leidos’s repair facility. *Id.* at 19, 22. In performing her best-value determination, the initial contracting officer concluded that “Leidos is considered technically more competent with three outstanding ratings” and noted that the approach reflected in DynCorp’s lower-priced proposal would increase the risk of unsuccessful contract performance, concluding: “it is my opinion that . . . Leidos’s higher quality technical proposal justifies the payment of the \$181M price premium.” *Id.* at 21.

Thereafter, DynCorp filed two protests with our Office. On May 14, 2019, DynCorp filed its first protest, asserting that the agency’s source selection process was flawed and complaining, among other things, that the risk assessment related to DynCorp’s approach to meeting OEM reach back requirements was improper. AR, Tab 78, DynCorp’s First Protest, May 13, 2019.

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that would be used for purposes of evaluating the cost-reimbursement CLINS. Because this did not require updated proposals, offerors were only required to confirm receipt of the amendment.

¹⁷ Offerors’ cost/price proposals provided pricing for five different, mutually exclusive levels of effort; yet, the solicitation provided for the evaluated cost/price to be calculated by adding together the proposed cost/price for all five levels of effort. AR, Tab 26, FOPR, at 12. Accordingly, the actual cost/price of contract performance will likely be substantially lower than the total evaluated cost/price.

¹⁸ As discussed below, the contracting officer initially assigned to this procurement was replaced; accordingly, our decision distinguishes between the first and second contracting officer.

On May 21, the agency states that it received a “*Touhy* request” from MDHI,¹⁹ the manufacturer of the MD530F aircraft. Supp. COS/MOL at 6. The agency states that, based on that request, it determined that DynCorp and MDHI had been engaged in litigation since July 2018 involving allegations flowing from the termination of DynCorp’s subcontract under MDHI’s prime contract to perform ongoing MD530F logistics support (the predecessor contract to the task order at issue here). Supp. COS/MOL at 6. The agency further noted that the pleadings in that then-ongoing litigation reflected an apparently “acrimonious relationship” between DynCorp and MDHI. *Id.* at 7. For example, on March 7, 2019 (shortly after DynCorp’s oral presentation), DynCorp filed a pleading with the United States District Court for the Northern District of Alabama in which DynCorp asserted, among other things, that MDHI had “fraudulently induced [DynCorp] into providing [MDHI] a highly detailed confidential and proprietary proposal,” and that MDHI had “improperly used [DynCorp’s] confidential information.” AR, Tab 97, DynCorp Complaint at 4. On March 21, MDHI filed a pleading denying DynCorp’s accusations and counterclaiming that, under the predecessor contract for the services at issue here, DynCorp “was charging MDHI (and, ultimately, the government) more than 170% of its actual costs” by billing for “support [at] 5 locations, when it was in fact providing support at only 3 locations.” AR, Tab 98, MDHI Answer and Counterclaim at 16-17.

On June 6, the agency advised our Office that it was taking corrective action in response to DynCorp’s protest, noting that such action would include reevaluation of technical proposals, and could include conducting “additional interchanges.” AR, Tab 79, Agency Corrective Action Notice, June 6, 2019, at 1. Based on the pending corrective action, GAO dismissed DynCorp’s first protest.

Between June 21 and July 9, the agency conducted interchanges with DynCorp. AR, Tabs 86, DynCorp INs and Responses. Among other things, the agency expressed its “significant concerns as to the current relationship between DynCorp and MDHI,” noting that “there was no mention of this [litigation] in the DynCorp [oral] presentation.” *Id.* at 1-2. On June 28, DynCorp responded by generally asserting that “[the] active litigation in no way affects our ability [redacted],” adding that “if [DynCorp] is the successful offeror, we will [redacted].” *Id.* at 3. On July 9, DynCorp advised the agency that the litigation had been settled; however, the agency states that it “is not aware of the terms of the settlement agreement.” Supp. COS/MOL at 7.

On August 14, the agency issued an amendment to the FOPR (amendment 5) that required offerors to submit “verifiable assurance” of OEM support and provided for a price realism analysis. AR, Tab 24, FOPR amend. 5 at 6-7, 11-12. On August 16, the agency issued another amendment to the FOPR (amendment 6), stating that revisions to previously submitted price volumes would not be allowed, except to provide

¹⁹ Pursuant to *U.S. ex rel Touhy v. Ragen*, 340 U.S. 462 (1951), a private party engaged in litigation may request information from the government; such request is referred to as a “*Touhy* request.” See also Supp. COS/MOL at 6 n.2.

information necessary to support a price realism analysis. AR, Tab 25, FOPR amend. 6. The agency established August 29 as the closing date for submission of revised proposals.

On August 28, DynCorp filed its second protest, challenging the provisions of FOPR amendments 5 and 6 as unduly restrictive. Among other things, DynCorp complained that settlement of its litigation with MDHI should have eliminated the agency's concerns regarding DynCorp's OEM reach back capability. Notwithstanding DynCorp's assertions regarding the effect that the (undisclosed) terms of its settlement agreement should have on the agency's concerns, DynCorp protested that requiring "verifiable assurance" of OEM support "restrain[ed] competition." AR, Tab 81, DynCorp's Second Protest, at 3, 13.

On September 25, the agency stated that it would, again, take corrective action by reviewing its requirements and determining whether the terms of the FOPR were consistent with those requirements; accordingly, we dismissed DynCorp's second protest.

On October 17, offerors were advised that a new contracting officer had been appointed. AR, Tab 102, Email to Offerors. Thereafter, the second contracting officer appointed a new technical evaluation team, referred to as the reevaluation TET.

On October 22, the agency issued the final FOPR amendment (amendment 7), stating that "[a]ll requirements identified via amendments 5 and 6 are no longer applicable to this FOPR." AR, Tab 26, FOPR at 4. The agency states that, "[i]n essence, the Army . . . 'turned back the clock' to the state of proposals as they existed prior to the issuance of Amendments 05 and 06." AR, Tab 1, COS/MOL, at 9.

On November 4, the reevaluation TET began evaluating the offerors' proposals by viewing the videotape of the oral presentations, along with copies of the PowerPoint slides; thereafter the reevaluation TET assigned new ratings. The second contracting officer concluded that the prior evaluated cost/price of offerors' proposals remained valid. After reevaluating proposals, DynCorp's and Leidos's proposals were rated as follows:

	Factor 1	Factor 2	Factor 3	Evaluated Cost/Price ²⁰
Leidos	Good	Good	Acceptable	\$641,640,755
DynCorp	Acceptable	Good	Acceptable	\$459,979,935

AR, Tab 76, Second FODD at 25.

On December 12, the second contracting officer selected DynCorp’s proposal for award. Her FODD noted that, “[a]s part of the oral presentations,” the agency engaged in Q&A sessions with all offerors, and she made the following representation:

The newly assigned technical evaluators performed a review of the questions and answers and determined the questions have no significance on the re-evaluation of the technical proposals, therefore were not considered.^[21]

Id. at 24.

Overall, the second contracting officer noted that Leidos’s technical proposal was “superior” to DynCorp’s proposal, but concluded that: “in my opinion, the technical superiority does not justify the price premium.” *Id.* at 26.

On January 17, 2020, Leidos was notified of the new source selection decision. On February 3, Leidos filed this protest.²²

DISCUSSION

Leidos’s initial protest challenged various aspects of the agency’s source selection decision, including an alleged failure to comply with the solicitation provisions regarding evaluation of both technical and cost/price proposals. With regard to the technical evaluation, Leidos asserted that the agency failed to consider information Leidos provided to the agency during its Q&A session. Leidos’s Initial Protest at 29-30. With regard to evaluation of cost/price, Leidos complained that the agency failed to evaluate

²⁰ As noted above, the total evaluated cost/price reflected the cost/price of five different levels of efforts. Accordingly, the cost/price of task order performance will likely be substantially lower than total evaluated cost/price.

²¹ As discussed below, this representation regarding a review and determination by the newly assigned technical evaluators was factually inaccurate.

²² The value of the task order at issue exceeds \$25 million and, accordingly, this procurement is within GAO’s jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts issued using the authority granted under Title 10. 10 USC § 2304c(e)(2).

the labor-hour mix in offerors' proposals and failed to verify consistency between cost/price proposals and technical proposals.²³

On March 4, the agency responded to the protest, maintaining that Leidos's allegations were "not supported by the procurement record" and should be either denied or dismissed. AR, Tab 1, COS/MOL at 1, 11. In responding to Leidos's assertions regarding evaluation of cost/price proposals, the agency maintained that the solicitation did not provide for a price realism analysis and, accordingly, neither contemplated an evaluation of the labor-hour mix in offerors' proposals, nor required a "cross-walk between the [cost/price and technical proposals] for consistency."²⁴ *Id.* at 26-27.

In responding to Leidos's assertions that the agency's reevaluation failed to consider information that Leidos provided during the Q&A session, the agency acknowledged that it did not consider that information. *Id.* at 25. In this regard, the agency represented that "[t]he Army has reviewed the video recording of the question and answer session with Leidos," and asserted that "the reevaluation team elected to not consider the information contained in the question and answer sessions from any offeror."²⁵ *Id.* at 26. The agency further acknowledged that the reevaluation team "did not review a couple of revised slides that Leidos submitted subsequent to its oral presentation."²⁶ *Id.* Finally, the agency disclosed that it had conducted interchanges with DynCorp after the April 2019 award to Leidos, but determined that the reevaluation team should not be "tainted" by the information provided during those interchanges. *Id.* at 25. Overall, the agency asserted that, to the extent there were errors in its reevaluation of proposals, there was no prejudice to Leidos. *Id.* at 26, 28.

²³ Leidos's initial protest also argued that the agency failed to recognize and/or document various strengths in Leidos's proposal, and improperly elevated the importance of cost/price.

²⁴ As noted above, the solicitation instructed offerors to "ensure that the information presented in [the cost/price] volume is consistent and correlates with the information in the technical proposal volume," and provided that cost/price proposals "will be evaluated for compliance based upon the submission requirements contained in the Cost/Price instructions." AR, Tab 26, FOPR, at 7, 11.

²⁵ This response echoed the representation in the second contracting officer's FODD, quoted above, stating: "The newly assigned technical evaluators performed a review of the questions and answers and determined the questions have no significance on the re-evaluation of the technical proposals, [and] therefore were not considered". AR, Tab 76, Second Contracting Officer's FODD, at 24.

²⁶ As noted above, following an offeror's Q&A session, the solicitation contemplated the submission of "correct[ed]" slides. AR, Tab 26, FOPR at 5. The agency characterized the slides Leidos submitted after its Q&A session as indicating that Leidos's task order manager would be operating from both within the continental United States and outside the continental United States. AR, Tab 1, COS/MOL, at 26.

On March 6, in light of the agency's assertion that Leidos was not prejudiced by the agency's various actions, including the decision to withhold information from the technical evaluators, GAO directed the agency to produce "the complete evaluation record regarding Leidos's and DynCorp's proposals," elaborating that "this includes: (1) the Q&As (2) the INs/responses [and] (3) the initial evaluation." Electronic Protest Docketing System (Dkt.) No. 26. On March 11, GAO reiterated this request, stating: "GAO expects the agency to produce the Q&A portions of the DynCorp and Leidos recorded presentations." Dkt. No. 31.

On March 13, agency counsel responded, stating that "the Q&A sessions were recorded separately from the oral presentations," but further stating that "the agency cannot produce Leidos's and DynCorp's video recorded Q&A sessions" because those sessions "were erased due to an unintentional technical oversight." Agency Response to Request for Additional Documents, Mar. 13, 2020, at 1-2; see *also* AR, Tab 95, Declaration of Videographer, Mar. 12, 2020. Under the heading, "Correction of the Record," the agency further stated:

Army counsel concedes that a portion of its legal argument was premised upon an inaccurate factual statement found in the [Second Contracting Officer's] FODD . . . and a mistaken assumption that the video recorded Q&As were reviewed. . . .

Id. at 2.

Agency counsel further stated that, rather than reviewing the video of the Q&A sessions, the second contracting officer simply reviewed the Q&A summary contained in the initial contracting officer's FODD, see AR, Tab 77, Initial FODD at 18-19, and concluded that agency questions and offeror answers were "irrelevant." Agency Response to Request for Additional Documents, Mar. 13, 2020, at 1-3. Along with its response, agency counsel submitted a declaration by the second contracting officer acknowledging that her FODD representation that "[t]he newly assigned technical evaluators performed a review of the questions and answers," was a "misstatement." AR, Tab 94, Declaration of Second Contracting Officer, Mar. 12, 2020, at 1. She further stated that "[m]y initial thought process was to allow the newly assigned technical team to review the questions and answers, however, before the reevaluation process started, I decided against it." *Id.* She further acknowledged that "the [reevaluation] technical team did not review any of the questions and answers posed to any offeror from the first evaluation." *Id.* at 2. Upon receipt of the agency's "Correction of the Record," GAO advised the parties that it intended to conduct a hearing in this matter.

On March 16, Leidos filed a supplemental protest, asserting that the agency's failure to consider the Q&A session conducted with DynCorp, and the agency's similar failure to consider the subsequent INs with DynCorp during the reevaluation, was unreasonable and contrary to the terms of the solicitation. Leidos noted that during the Q&A session, the agency probed DynCorp's approach to OEM reach back support, leading to an

evaluated weakness due to the risk associated with that approach.²⁷ Similarly, Leidos protested that the agency's failure to consider the interchanges the agency conducted with DynCorp, which addressed the relationship between DynCorp and MDHI and their ongoing litigation,²⁸ was contrary to the express provision of the solicitation that stated: "Offeror responses to INs will be considered in making the selection decision." Supp. Protest, Mar. 16, 2020, at 5. Finally, Leidos maintained that the agency's failure to comply with the terms of the solicitation was prejudicial to Leidos in that, had the agency considered all required information, Leidos's highest-rated and second lowest-priced proposal would have been evaluated more favorably, and DynCorp's proposal would have been evaluated less favorably.²⁹

On April 8, GAO conducted a hearing, on the record, during which testimony was provided by both contracting officers assigned to this procurement and the chair of the reevaluation TET.³⁰ During the hearing, the witnesses' testimony was substantially similar to the facts laid out above.

An agency's award of a task order pursuant to the fair opportunity process set forth in FAR 16.505 must be reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. See, e.g., *ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234. While the evaluation of offerors' proposals is generally a matter within a procuring agency's discretion, our Office will question an evaluation that is unreasonable or inconsistent with the provisions of the solicitation. *Id.* In this regard, it is not generally reasonable for an agency to exclude selected portions of some offerors' proposals, or to similarly exclude offeror responses to agency questions where the solicitation provides that such responses are to be considered; further, it is unreasonable to effectively conclude that a prior concern has been resolved on the basis of excluding known information from consideration. See, e.g., *Qi Tech, LLC*, B-416711.8, B-416711.9, Nov. 27, 2019, 2019 CPD ¶ 412 at 8; *G. Marine Diesel; Phillyship*, B-232619, B-232619.2, Jan. 27, 2019, 89-1 CPD ¶ 90 at 4-5.

²⁷ The risk assessment and assessment of a weakness was based on DynCorp's [redacted] approach to [redacted] OEM support, and was made prior to the time the agency learned of the ongoing litigation between DynCorp and MDHI. See AR, Tab 90, DynCorp Tech. Evaluation at 9.

²⁸ As noted above, the PWS provided that the awardee "shall be responsible for maintaining appropriate business relations with the OEMs." AR, Tab 18, PWS at 9.

²⁹ Leidos's supplemental protest also complained that the quality of the oral presentation videos was inadequate, and that the agency's procedures for evaluating cost/price proposals were improper.

³⁰ Because of the requirement to maintain physical separation caused by the Covid-19 pandemic, the hearing was conducted as a telephone conference call that was transcribed by a court reporter who participated in the call.

Here, the record is clear that, during the Q&A portion of DynCorp's oral presentation,³¹ the agency addressed DynCorp's approach to providing OEM reach back and DynCorp's approach to meeting the solicitation's MMIS requirements. AR, Tab 77, Initial FODD, at 18-19. Similarly, the record is clear that, during the Q&A session with Leidos, the agency discussed Leidos's unique resources, including its Manassas facility, which the agency determined reflected a strength in that it "provides a depth of engineering support with extensive capabilities and expertise in repairs of airframe, engines, radios, and other aircraft components." Tab 92, Leidos Tech. Evaluation at 13. Although the record contains the initial contracting officer's brief summary of Leidos's and DynCorp's Q&A sessions, see AR, Tab 77, Initial FODD at 18-19, there is no way to establish the actual substance or scope of those discussions, due to the agency's erasure of the videotapes. Finally, the solicitation clearly contemplated the agency's consideration of information elicited from offerors during the Q&A sessions stating, among other things, that proposals "will be evaluated in accordance with the information set forth in the FOPR." AR, Tab 26, FOPR at 11.

The record is similarly clear that DynCorp provided responses to the agency's INs that were relevant to DynCorp's proposed approach to, and capability for, providing the required OEM support. In this regard, the record is clear that, during its oral presentation, DynCorp represented [redacted] while it was in the midst of an ongoing dispute with MDHI that included charges of fraud, misrepresentation, and/or bad faith by both parties. The record is equally clear that the solicitation unambiguously stated: "Offeror responses to INs will be considered in making the selection decision." AR, Tab 26, FOPR at 10. Nonetheless, the second contracting officer concluded that the information DynCorp provided in response to the INs should be withheld from the reevaluation TET to preclude the new technical evaluators from being "tainted."³² AR, Tab 1, COS/MOL, at 25.

³¹ Both contracting officers' contemporaneous documents characterize the Q&A sessions as "part of the oral presentations," see AR, Tab 77, Initial FODD at 17; Tab 76, Second FODD, at 24; however, following the GAO hearing in this matter, the agency asserted that, rather than being part of oral presentations, the Q&A sessions were "a series of meetings in which the Army conducted interchanges with offerors." Agency's Post-Hearing Comments, Apr. 16, 2020, at 7. As noted above, offerors were permitted to submit written "corrections" following the oral presentations. Whether we consider the Q&A sessions as part of the oral presentations or, alternatively, as interchanges, it is clear that the solicitation can only be reasonably interpreted as requiring the agency to consider the information provided during those sessions in evaluating technical proposals.

³² The agency asserts that its actions were warranted by this Office's decision in *Tetra Tech, Inc.*, B-416861.2, B-416861.3, May 22, 2019, 2019 CPD ¶ 196. In that decision, we denied a protest challenging an agency's decision not to conduct discussions with an offeror that had been excluded from the competitive range. In denying the protest, we referenced the long-standing principle that, regardless of the particular FAR provisions under which a procurement is conducted, an agency's communications with

(continued...)

On this record, we conclude that the agency failed to comply with the solicitation's provisions regarding consideration of information discussed during the Q&A sessions and provided in connection with DynCorp's INs. Further, we reject the agency's assertion that the record fails to establish prejudice. While competitive prejudice is an essential element of a viable protest, where the agency's source selection decision, which replaces a prior award to the protester, is based on a flawed evaluation process, we will resolve doubts concerning the prejudicial effect of the agency's actions in favor of the protester. See, e.g., *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 5-6; *Delfasco, LLC*, B-409514.3, March 2, 2015, 2016 CPD ¶ 192 at 7.

The protest is sustained.³³

RECOMMENDATION

In light of the agency's erasure of the video recordings of Leidos's and DynCorp's Q&A sessions, reevaluation of proposals is not possible; accordingly, we recommend that the agency resolicit revised proposals. In that context, the offerors should be given an opportunity to submit information and fully address all of the matters discussed above, which were improperly excluded from consideration.³⁴ Finally, we recommend that Leidos be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. 21.8(d)(1). Leidos should submit its certified claim for costs,

(...continued)

offerors must be fair and may not favor one offeror over another. *Id.* at 8-11. Nothing in *Tetra Tech* provides any basis for the agency to assert that it properly excluded from consideration information that was clearly relevant to the agency's prior risk assessment of DynCorp's proposed approach to provide OEM reach back support.

³³ We have considered Leidos's various additional assertions, including its arguments regarding alleged strengths in Leidos's technical proposal and the agency's evaluation of cost/price proposals. In light of our decision that the agency's evaluation was otherwise flawed, along with our recommendation below that the agency resolicit proposals, we need not address these allegations.

³⁴ We also suggest that the agency consider clarifying the solicitation provisions regarding consistency between cost/price and technical proposals and/or access to, and transfer of, the MMIS.

detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. 21.8(f)(1).

Thomas H. Armstrong
General Counsel