U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Rice Solutions, LLC

File: B-420475

Date: April 25, 2022

Derek Knoll, Rice Solutions, LLC, for the protester.
Giovanna Jean-Baptiste, Esq., Terrius Greene, Esq., Department of Health and Human Services, for the agency.
Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the agency improperly conducted discussions with only one offeror is sustained where the record does not support the agency's contention that it established a competitive range of one on a *de facto* basis before holding discussions with only the awardee.

DECISION

Rice Solutions, LLC, a small business of Plymouth, New Hampshire, protests the award of a contract to SOPOR LLC, of Manchester, Kentucky, under request for proposals (RFP) No. 75H70622R00002, issued by the Department of Health and Human Services, Indian Health Service (IHS), for certified registered nurse anesthetist (CRNA) services at the Great Plains Area, Pine Ridge Service Unit (PRSU) healthcare facility in South Dakota. The protester primarily argues that the agency's conduct of the procurement was unreasonable because IHS unfairly engaged in discussions with only the awardee.

We sustain the protest.

BACKGROUND

The solicitation, issued on December 10, 2021, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 12, sought proposals for a non-personal services contract to provide CRNA services at the PRSU healthcare facility in Pine Ridge, South

Dakota. Agency Report (AR), Ex. 1, RFP at 2, 8;[1] Additional Development (AD) Resp. at 3. The healthcare facility services the Native American population on the Oglala Lakota reservation in rural South Dakota. RFP at 8. The solicitation sought a CRNA contractor to provide critical anesthesia services in the surgery, emergency room, acute care nursing, outpatient/inpatient units, labor and delivery, and nursery departments within the PRSU. *Id*. The RFP contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for one base year and four option years. *Id.* at 33.

The solicitation anticipated that award would be made to the responsible offeror whose offer "will be most advantageous to the [g]overnment, price and other factors considered."[2] *Id.* at 177. The listed technical evaluation factors were: problem and approach; past performance; and key personnel. *Id.* The solicitation, however, provided conflicting descriptions of the weight of the technical factors.[3] Additionally, the RFP did not provide the importance of price in relation to the technical factors.[4] The agency intended to make award without discussions, but reserved the right to conduct discussions if necessary. *Id.* at 180.

The agency received three proposals in response to the solicitation, including proposals from SOPOR and Rice Solutions.[5] The members of the technical evaluation team

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[1] The RFP is not sequentially paginated. As such, citations are to the page numbers in the order by which they appear in the Adobe PDF document.

[2] The solicitation stated that award would be made on a "best value basis." RFP at 177. As will be discussed below, however, the RFP also contains a number of contradictory provisions that make it unclear whether award would be made using the best-value tradeoff process or the lowest-priced, technically acceptable methodology, a process which is also on the best-value continuum. *See id.* at 177-181; FAR 15.101-2.

[3] The solicitation, in one section, advised that the technical factors were "listed in order of importance" (*i.e.*, problem and approach, past performance, key personnel), while in another section, stated that the technical factors were "of equal importance." RFP at 177, 180.

[4] The RFP included a provision that stated: "The Contractor's technical capability and relevant past performance when combined, are more important than price for the purposes of quote evaluation." RFP at 94. As "technical capability" was not listed as an evaluation factor, and was not described or referenced in any other part of the solicitation, this appears to be a drafting error. Even assuming the term "technical capability" was intended to reference the technical factors, the RFP provides no indication as to whether the term referred to all of the technical factors or only one factor.

[5] As Rice Solutions elected to proceed with its protest without counsel, no protective order was issued for this protest. As such, our discussion of some aspects of the evaluation is, necessarily, general in nature to avoid reference to non-public information.

(TET), individually reviewed and rated each proposal. AR, Ex. 4, TET Summary. Thereafter, on January 6, 2022, the TET convened to reach a group consensus about the overall technical acceptability of the proposals. Contracting Officer's Statement (COS) at 3. The TET considered Rice Solutions to be their "second choice" for award. TET Summary at 2, 5. The TET summary never specified that Rice Solutions was eliminated from the competition.

Following the TET evaluation, the agency immediately entered into discussions with SOPOR on January 7. AD, Attach. 1, Supp. COS at 1. On January 11, the agency requested a best and final offer (BAFO) only from SOPOR, which it provided the same day. *Id.* at 1-2; AD Resp. at 6. On January 12, the contracting officer, who was also the source selection authority (SSA), selected SOPOR for award. The SSA's award decision summarized the assessment of proposals as follows:[6]

	Rice Solutions	SOPOR
Overall Technical Acceptability	Unacceptable	Acceptable
Price	$16,464,366	$11,797,386[7]

SSD at 1-2. After receiving notice that it was an unsuccessful offeror, Rice Solutions filed this protest with our Office.

DISCUSSION

Rice Solutions essentially challenges the agency's evaluation of proposals, alleging that the agency unfairly conducted discussions with only one offeror, SOPOR, thus, denying the protester an opportunity to submit a revised proposal--as was afforded to SOPOR--and be considered for award. Protest at 2-3. While we do not address every issue raised, we have considered all of the protester's arguments and, except for the issues discussed below, we find no other basis to sustain the protest.

Technical Acceptability of Rice Solutions

In defending the discussions conducted with only the awardee, the agency contends that because only SOPOR's proposal was found technically acceptable, a *de facto* competitive range of one was established. AD Resp. at 3-7. In this regard, the agency argues that because the proposals from both the protester and the third offeror had been evaluated as technically unacceptable, it was reasonable to conduct discussions

[6] Based on the record, it appears that the SSA simply transcribed (verbatim) the assessments (of each individual TET member) from the TET summary document into the source selection decision (SSD). *Compare* TET Summary *with* AR, Ex. 5, SSD at 1-2. The only information not found in the TET summary is the final sentence in the SSD, which stated the SSA's intent to select SOPOR for award. *Id.*

[7] This price reflects SOPOR's best and final offer, not SOPOR's initial proposed price. Supp. COS at 2.

with SOPOR, the only remaining offeror. *Id*. Before we address the agency's arguments regarding a *de facto* competitive range, we first discuss the agency's assertion that the protester's proposal was found to be technically unacceptable.

As noted earlier, the solicitation contains a number of incongruous provisions. Relevant here, the solicitation stated, in one section, that the technical factors--with conflicting relative importance (as discussed above)--would be evaluated using an adjectival rating system consisting of the following ratings (and their associated definitions): outstanding, good, acceptable, marginal, and unacceptable. RFP at 180-181. Yet, in another provision, the solicitation stated that a "composite rating of 'Acceptability' and 'Unacceptability' of each proposal will be the direct result of the [TET] panel's deliberations." *Id.* at 177-178. In the first instance, the solicitation appears to describe an evaluation scheme based on adjectival ratings used in a best-value tradeoff between technical factors and price. In the second instance, the solicitation would seem to relegate the listed technical evaluation factors to a subordinate role where proposals would only be assessed overall as either technically acceptable or unacceptable--in essence, reducing the evaluation scheme to a lowest-priced, technically acceptable source selection process.

The record reflects that the TET was composed of four members, and each member separately evaluated proposals, assigning adjectival ratings to each of the three technical factors. TET Summary at 2. For the technical evaluation, Rice Solutions received three "acceptable" ratings from one evaluator; one "acceptable" and two "marginal" ratings from the second evaluator; two "marginal" and one "unacceptable" ratings from the third evaluator; and one "marginal" and two "unacceptable" ratings from the fourth evaluator. *Id.* Along with the individual evaluators' adjectival ratings, the TET summary included a description of strengths and weaknesses identified under each of the technical factors for all three proposals. *Id.* 4-5.

Pertinent here, the TET summary contained two evaluation findings regarding Rice Solutions's proposal. The first finding stated:

> This proposal was found to have numerous deficiencies in the 3 elements though the team was split in their consideration if the vendor RICE SOLUTION should be considered totally unacceptable, the consensus was that there was sufficient lack of information and evidence to fully evaluate the proposal but with their status as Incumbent that *the proposal should be rated as Acceptable*.

Id. at 5 (emphasis added).

The second finding, however, provided the following: "Rice Solutions had the second adjectival rating by the group with many Marginal Ratings and a few Unacceptable Ratings; therefore, is considered 'Technically Unacceptable.'" *Id.* at 7. There are no other statements or assessments regarding Rice Solutions, nor was there any attempt

to reconcile the two apparently inconsistent findings within the TET's evaluation summary.

In defending its evaluation, the agency argues that the solicitation provided that "award will be made only in the event that the Offeror's proposal is found to be technically acceptable," and that a "Marginal" or "Unacceptable" rating in any of the technical factors would be "sufficient grounds" for finding proposals to be technically unacceptable. Memorandum of Law at 3-4 *(*citing RFP at 181). The agency's inference is that a technically unacceptable proposal must be excluded from the competitive range. *Id.* at 4. We disagree.

Although a technically unacceptable proposal could not form the basis for award under this solicitation, if the agency wanted to conduct discussions, nothing in the solicitation (or the FAR) prevented the agency from keeping the proposal within the competitive range and conducting discussions with an offeror whose proposal had been evaluated as technically unacceptable. Such discussions could have resulted in the submission of a revised final proposal that was found to be technically acceptable. *SPAAN Tech, Inc.*, B-400406, B-400406.2, Oct. 28, 2008, 2009 CPD ¶ 46;[8] *Loral EOS/STS, Inc.*, B-230013, May 18, 1988, 88-1 CPD ¶ 467 (finding the agency's decision to exclude the protester's proposal from the competitive range based on technical unacceptability was improper where the record did not support the agency's conclusion that correcting a significant deficiency would require a substantial revision of the protester's proposal).

As such, we cannot conclude that an initial rating of "technically unacceptable" automatically excluded Rice Solutions from the competitive range, had one been established by the agency. To be clear, had a competitive range been established, we do not find that Rice Solutions's proposal must have--or even necessarily should have--been included in the range; only that the proposal was not required to be eliminated (and was not automatically eliminated) from the competitive range solely based on the technical rating that Rice Solutions received.

Moreover, it is unclear from the evaluation record that the protester's proposal was even found to have been technically unacceptable. As discussed, the TET summary

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[8] Specifically, our decision in *SPAAN* stated:

> We do not find the fact that a proposal contains weaknesses or deficiencies that may be addressed during discussions requires the exclusion of that proposal from the competitive range. Rather, a competitive range is established for the purpose of determining which offerors will receive discussions and to provide those offerors with an opportunity to revise proposals and address weaknesses and deficiencies, among other things. . . . Thus, we find that [the agency] could reasonably include the proposals of Offerors A and B in the competitive range to conduct discussions with these firms. . . .

SPAAN Tech, Inc., *supra* at 9-10.

provided the evaluators' individual adjectival ratings under each of the three technical factors. TET Summary at 2. Although the document ultimately indicated that, overall, the proposals were technically "acceptable" or "unacceptable," there is no explanation or discussion of how the individual evaluators' adjectival ratings under the three technical factors--of which there were five possible adjectival ratings for each factor--were distilled to one assessment of a proposal's overall technical acceptability. Even assuming for the sake of argument that the TET, on January 6, came to a consensus about Rice Solutions's technical acceptability, it is uncertain what consensus was actually reached by the TET, especially in light of the two seemingly inconsistent findings documented in the TET summary.

What is clear from the contemporaneous record, however, is that the TET never recommended entering into discussions with any offeror, nor, as will be discussed below, did the agency establish the requisite competitive range before doing so. Similarly, in the agency's source selection decision, the SSA never stated that Rice Solutions had been excluded from consideration prior to the award decision. *See* SSD. Rather, the recommendation portion of the source selection document reflects that the SSA considered and compared all three offers--demonstrating that all offerors, including the protester, were still in consideration at that point in the competition. *Id.* at 2. In transcribing verbatim the language from the TET summary, the SSD included the same finding from the TET summary: "Rice Solutions had the second best adjectival ratings . . . therefore, is considered 'Technically Unacceptable.'"[9] *Id.*

Based on our review of the record, we cannot conclusively say that the protester's proposal had been found technically unacceptable by the evaluators. However, we need not address whether any finding of technical unacceptability was reasonable. As discussed below, we find that the agency failed to establish a competitive range before holding discussions, and thus the agency's conduct of discussions with only the awardee was improper.

Competitive Range

In response to the protester's claim about improper discussions, IHS does not dispute the fact that the agency conducted discussions with SOPOR. AD Resp. at 6. Nor does the agency dispute that IHS did not conduct discussions with the protester or any other offeror. *Id.* Rather, the agency contends, in supplemental briefings, that it was appropriate to hold discussions only with SOPOR because the agency had established "a *de facto* competitive range" of one. AD Resp. at 3. The agency argues that it eliminated the protester and the third offeror from further consideration and that the elimination was justified because the proposals were found to be technically unacceptable. *Id.* at 3-4. As such, the agency explains, it was proper to hold

[9] As noted previously, it appears that the SSA simply reproduced (verbatim) the assessments from the TET summary into the SSD. The only information not found in the TET summary is the final sentence in the SSD selecting SOPOR for award. *Supra*, note 6.

discussions with SOPOR alone, because SOPOR was the only firm left in the competition. *Id.* at 5.

As noted above, the solicitation was issued under the commercial item procedures of FAR subpart 12.6, using "procedures similar to FAR Part 15 negotiated procurements." AD Resp. at 3; RFP at 2. With regard to discussions, the RFP stated that the agency intended to make award without discussions, but reserved the right to conduct discussions if necessary. RFP at 180. Although the solicitation here did not require the agency to hold discussions with offerors, it is axiomatic that, in a negotiated procurement, once an agency chooses to conduct discussions, it must do so with all offerors in the competitive range, and that, when holding discussions, agencies may not engage in conduct that favors one offeror over another. FAR 15.306(d)(1); *SRA Int'l, Inc.*, B-410973, B-410973.2, Apr. 8, 2015, 2015 CPD ¶ 32 at 7.

The determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. *Ryan P. Slaughter*, B-411168, June 4, 2015, 2015 CPD ¶ 344 at 5. The FAR permits an agency to establish a competitive range consisting of only the most highly-rated proposals. FAR 15.306(c)(1). The fact that a proposal contains weaknesses or deficiencies--which may be addressed during discussions--does not require the exclusion of that proposal from the competitive range. *SPAAN Tech*, *supra*. Rather, a competitive range is established for the purpose of determining which offerors will receive discussions, and to provide those offerors with an opportunity to revise proposals and address weaknesses and deficiencies, among other things. *Id.* (citing FAR 15.306(c), (d)). An agency that fails to adequately document its evaluation of proposals or source selection decisions bears the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations. *SRA Int'l, Inc.*, *supra* at 7.

Although an agency has broad discretion in establishing a competitive range and is not required to memorialize its competitive range determination expressly in a formal document, the agency is required to provide sufficient information to adequately support its rationale. *See SRA Int'l Inc.*, *supra*. Here, the record is devoid of any documentation or support for the agency's contention that a competitive range had been established before entering into discussions with only one offeror, SOPOR. *See generally* TET Summary; SSD. To the contrary, the sparse record evidences otherwise. In response to our Office's request for additional development, the agency provided a declaration from the chair of the TET, in which the chairperson candidly admits that "[p]rior to this Protest, I was not familiar with the terms 'competitive range' or 'competitive range determination' and have only come to understand what those terms mean through this Protest." AD, Attach. 2, TET Chair Statement of Facts at 3. The admission in this declaration, and the contemporaneous record, belie any contention that the agency established, or even intended to establish, a competitive range before the agency entered into discussions with SOPOR.

Finally, the agency argues that "where an agency does not make a formal or express competitive range determination, a *de facto* competitive range may be found."[10] AD Resp. at 3. As the lone support for this argument, the agency suggests that a decision from the U.S. Claims Court, the predecessor to the U.S. Court of Federal Claims (COFC), stands for this proposition. *Id.* (citing *CACI Field Servs., Inc. v. United States*, 13 Cl. Ct. 718 (1987)). As a preliminary matter, our Office views decisions by the COFC (and its predecessor) as persuasive, but not controlling authority in our forum. *CJW Desbuild JV, LLC*, B-414219, Mar. 17, 2017, 2017 CPD ¶ 94 at 4 n.2. In any event, the agency misreads the *CACI* decision from the U.S. Claims Court.

In the *CACI* decision, the protester alleged, among other things, that the agency failed to engage in meaningful discussions with the firm, because the agency did not inform CACI of the deficiencies assessed in its proposal. *CACI*, *supra* at 731. There, the record reflected that, before conducting discussions with CACI, the contracting officer (CO) had "determined that all offerors except CACI were 'out of the competitive range and technically unacceptable for the purpose of conducting oral and written discussions.'" *Id.* at 730. The facts in *CACI* are clearly distinguishable from the facts here. In *CACI*, the record substantiated that the contracting officer made a competitive range determination--even though that determination had not been formalized--before entering into discussions with CACI. *Id.* (finding that the contracting officer "determined that all offerors except CACI were 'out of the competitive range'"). Where, as here, there is no record or evidence that the agency established a competitive range, we will not infer the existence of a *de facto* competitive range, in order to validate an agency's

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[10] We note that the agency never suggested or alluded to the existence of a *de facto* competitive range in the agency report responding to the protest. It was only after our Office requested additional development--regarding the process in which the agency decided to conduct discussions with only SOPOR--that the agency first articulated this theory that there had been a *de facto* competitive range of one. While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's selection decision is supportable, under certain circumstances, our Office will accord lesser weight to *post hoc* arguments or analyses due to concerns that judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

In contrast, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of evaluations and award determinations, so long as those explanations are credible and consistent with the contemporaneous record. *ITT Fed. Servs. Int'l Corp.*, B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6. Here, because we find that the agency's *post hoc* arguments are not supported by the contemporaneous record, we accord lesser weight to this argument. Nevertheless, we address the merits of the argument below.

omission of an offeror during its conduct of discussions.[11] *CACI*, *supra*; *Addx Corp.*, B-417804, B-417804.2, Nov. 5, 2019, 2020 CPD ¶ 118 at 13 ("Both the contemporaneous record and the agency's subsequent explanation are inadequate as a best-value tradeoff, or even as a *de facto* establishment of a competitive range, to justify elimination of the protester from the competition.").

Moreover, the agency's argument here requires that our Office endorse the proposition that, in a negotiated procurement, when an agency engages in discussions with only one offeror, and there is no evidence that the agency ever established--or even contemplated establishing--a competitive range, we should, nevertheless, find that a *de facto* competitive range resulted from the agency's actions. In our view, the agency's argument has no support in law or regulation, and would also render meaningless the FAR's requirement to establish a competitive range before entering into discussions. *See* FAR 15.306(c)(1). Under the agency's premise, whenever an agency conducts discussions with one offeror (or more) and no prior competitive range had been established, a *de facto* competitive range of one (or more) should simply be found to have been created, after the fact. As such, the agency's argument would eviscerate the FAR requirement that offerors must be notified of their exclusion from a competitive

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[11] Further, the posture of the case in the court's *CACI* decision is not analogous to the posture of the protest presented here, and therefore lends no support to the agency's argument. In *CACI*, the agency argued that no formal competitive range was established, in response to CACI's contention that the agency had entered into discussions that were not meaningful because significant deficiencies had not been addressed with CACI. *CACI*, *supra* at 730. The court held that, "[a]lthough [the agency] argues that no formal competitive range determination was made regarding CACI's proposal, [the agency] concedes that the CO made a *de facto* competitive range determination. . . ." *Id.* The court accepted this characterization--that a *de facto* competitive range determination was made--because:

> It is well established that a proposal must generally be considered to be within the competitive range unless it is so technically inferior or out of line as to price, as to render discussions meaningless. . . . Stated another way, a proposal will generally be considered to be within the competitive range until, as a result of written or oral discussions, it has been determined to no longer have a reasonable chance for being selected for award.

Id. (quoting *M. W. Kellogg Co. v. United States*, 10 Cl. Ct. 17, 23 (1986)). Thus, the court's conclusion in *CACI* simply stands for the proposition that when an offeror is included in discussions, the offeror is presumed to be included in the competitive range, whether there be a formal establishment or other indicia evidencing establishment, unless the agency shows otherwise. The case does not stand for the proposition that a *de facto* competitive range is automatically established when an agency enters into discussions with only one offeror, as the agency alleges here.

range. *See* FAR 15.503(a)(1) (requiring the agency to "notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition"). We conclude the agency's contention here is without merit.

Once an agency chooses to conduct discussions, it must do so with all offerors in the competitive range. FAR 15.306(d)(1); *SRA Int'l, Inc.*, *supra*. Here, IHS does not dispute that it engaged in discussions with only SOPOR. Supp. COS at 1-2; AD, attach. 9, SOPOR BAFO Email at 1. Because no competitive range had been established, the agency was required to conduct discussions with all offerors. See FAR 15.306(d)(1); *SRA Int'l Inc.*, *supra*. The agency's failure to do so--and its subsequent discussions with only the awardee--was, therefore, improper.

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *SRA Int'l Inc.*, *supra* at 7. Moreover, in the case of discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. *Piquette & Howard Elec. Serv., Inc.*, B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10. Where, as here, an agency fails to properly conduct discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester. *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 6.

Here, we cannot conclude with any certainty that, had the agency established a competitive range and properly conducted discussions, the protester would still not be eligible for award. Because we find that the agency improperly conducted discussions with only one offeror, we cannot speculate on whether the agency would have reasonably eliminated the protester's proposal from the competition. It is possible that, had the agency performed a competitive range determination, IHS would have found Rice Solutions to be within the competitive range and would have held discussions with Rice Solutions. *See* TET Summary at 2 (noting that Rice Solutions "was determined to be the second choice by the team" and that two of four individual evaluators found the protester to be "Marginal/Acceptable" after initial evaluation). As such, we resolve in favor of the protester any doubts concerning the prejudicial effect of the agency's action and sustain the protest.

RECOMMENDATION

During the pendency of the protest, the agency advised our Office of its decision to override the automatic stay of contract performance. COS at 4. In light of the agency's

decision to proceed with the performance of these services, we recommend that the agency, as soon as practicable, amend the solicitation to reconcile any incongruous provisions and articulate clearly how proposals will be evaluated using the stated technical evaluation factors, allow offerors an opportunity to submit revised proposals based on the amended solicitation, reevaluate proposals consistent with the terms of the solicitation, and make a new source selection decision. If the agency selects another offeror for award, IHS should terminate for the convenience of the government its contract with SOPOR. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Edda Emmanuelli Perez
General Counsel