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Decision

Matter of: National TRU Solutions, LLC

File: B-420913; B-420913.3; B-420913.4

Date: November 3, 2022

Kenneth B. Weckstein, Esq., Andrew C. Crawford, Esq., and Shlomo D. Katz, Esq., Brown Rudnick LLP, for the protester.

Scott M. McCaleb, Esq., Jon W. Burd, Esq., Cara L. Lasley, Esq., and W. Benjamin Phillips, III, Esq., Wiley Rein LLP, for Tularosa Basin Range Services, LLC, the intervenor.

James J. Jurich, Esq., Stephanie B. Young, Esq., Nicholas Bidwell, Esq., Greta Iliev, Esq., and Sky Smith, Esq., Department of Energy, for the agency. Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to evaluation of the protester's and awardee's technical proposals and past performance is denied where the evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest contending that exchanges conducted with the awardee regarding the awardee's price proposal were improper discussions is denied where the exchanges amounted to clarifications of vague information contained within the offeror's proposal and did not afford the awardee the opportunity to revise its proposal.
 3. Agency's post-proposal submission exchanges with awardee regarding its small business subcontracting plan were clarifications rather than discussions where the information pertains to offeror responsibility, which may be provided any time prior to award.
 4. Protest that agency improperly evaluated the proposed role of an affiliate of the awardee is denied where record shows that the awardee's proposal met the requirements for proposing an affiliate and the agency's evaluation was not unreasonable or inconsistent with the terms of the solicitation.
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DECISION

National TRU Solutions, LLC (NTS), of Newport News, Virginia, protests the award of a contract to Tularosa Basin Range Services, LLC (TBRS),¹ of Reston, Virginia, under request for proposals (RFP) No. 89303320REM000077, issued by the Department of Energy (DOE) for the disposal of nuclear waste. NTS challenges the evaluation of the offerors' technical proposals and past performance, and argues that the agency improperly evaluated the role of the awardee's proposed affiliate. The protester also contends that the agency engaged in improper discussions.

We deny the protest.

BACKGROUND

The DOE operates a "Waste Isolation Pilot Plant" (WIPP), which is an underground repository for radioactive waste generated at DOE sites. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 4. The RFP, issued on June 2, 2021, sought proposals to provide the facilities, personnel, equipment, and services to characterize, certify, transport, and permanently dispose of defense-generated transuranic waste (TRU).² AR, Tab A.1, RFP³ at 72; COS/MOL at 4. The majority of the work will be conducted at the WIPP Site, located approximately 32 miles from Carlsbad, New Mexico, and at various DOE waste generator sites. COS/MOL at 3.

The solicitation contemplated the award of a single cost-plus-award-fee (CPAF) management-and-operating (M&O) contract in accordance with Federal Acquisition Regulation (FAR) subpart 17.6 and DOE Acquisition Regulation (DEAR) part 917.6, with an indefinite-delivery, indefinite-quantity (IDIQ) contract line item number (CLIN) for the issuance of CPAF task orders. RFP at 1, 72. The RFP provided for award of a contract with a four-year base period and six 12-month option periods. RFP at 1. The total estimated contract value, including all option periods, is \$3 billion. *Id.* The maximum value of the IDIQ CLIN is \$100,000,000. COS/MOL at 5.

The RFP advised that proposals would be evaluated on a best-value tradeoff basis, considering the following four factors, listed in descending order of importance: (1) key personnel, (2) past performance, (3) management approach, and (4) cost and fee. RFP at 390. The non-cost factors, when combined, were significantly more important than total evaluated cost. *Id.* The solicitation called for the submission of three volumes:

¹ TBRS is a limited liability company (LLC) that is a wholly owned subsidiary of Bechtel National, Inc. (BNI). Agency Report (AR), Tab C.3, TBRS Vol. I, Offer and Other Documents at 106.

² Transuranic waste is waste that contains manmade elements heavier than uranium on the periodic table. COS/MOL at 4, n.2.

³ Citations to the RFP are to the version conformed through RFP amendment 3, provided by the agency at Agency Report tab 3.

volume I, offer and other documents requiring signature; volume II, technical and management proposal; and volume III, cost and fee proposal; in addition, it provided for oral interviews with each offeror’s proposed program manager and capital asset projects (CAP) manager. *Id.* at 336, 347-61. The RFP informed offerors that the evaluation of the program manager would be the most important aspect of the evaluation under the key personnel factor. *Id.* at 390.

DOE received proposals from five offerors, including NTS and TBRS, by the August 3, 2021 due date for receipt of proposals. AR, Tab B.2, Source Selection Decision Document (SSDD) at 6; COS/MOL at 6. The table below summarizes the ratings assigned to NTS’s and TBRS’s proposals and includes the offerors’ evaluated costs:⁴

	NTS	TBRS
Key Personnel	Good	Outstanding
Past Performance	Satisfactory	Satisfactory
Management Approach	Outstanding	Good
Evaluated Cost⁵	\$167,309,246	\$153,051,019

AR, Tab B.2, SSDD at 3.

The Source Selection Authority (SSA) reviewed the final consensus report of the source evaluation board (SEB), viewed video recordings of the offerors’ proposed program and CAP managers’ oral interviews, met with the SEB as necessary, and ultimately concurred with the SEB’s consensus evaluation ratings. *Id.* at 52-56. The SSA determined that TBRS’s proposal was “technically superior” to all other proposals, with discriminators over NTS under the most important evaluation factor, key personnel. *Id.* at 51, 53. The SSA rated the awardee’s proposal “outstanding” under the key personnel factor, based on the assessment of a significant strength for the awardee’s proposed program manager, which was the most important aspect of the key personnel evaluation; a significant strength for the CAP manager; and strengths for the awardee’s four other key personnel. *Id.*

The SSA rated the protester’s proposal “good” under this factor based on strengths for the protester’s program manager and CAP manager, and three significant strengths and one strength to the protester’s other key personnel. *Id.* at 12. The SSA explained that the awardee’s key personnel, and in particular the key discriminators for the program manager and CAP manager, “are comparatively superior to the attributes of the key personnel of the other [o]fferors due to the significant successful very similar field leadership experience demonstrated by the program manager, the demonstrated very similar experience (including a uniquely advantageous blend of nuclear safety

⁴ Proposals were evaluated under the non-cost factors as outstanding, good, satisfactory, marginal, unsatisfactory, and neutral. AR, Tab B.1, Final SEB Report at 23-24.

⁵ Evaluated cost included total proposed cost and fee for the transition and first year of performance. AR, Tab B.2, SSDD at 3; RFP at 394.

environment and mining/underground environment experience) of the CAP [m]anager, and a strong remaining key personnel roster which complements TBRS'[s] overall key personnel package." *Id.* at 19. The SSA also concluded that TBRS's proposal had an advantage over NTS's in past performance, despite similar ratings, where TBRS posed "slightly less risk to successful contract performance." *Id.* at 50-51. The SSA found that NTS's proposal had a comparative advantage in the management approach factor, but ultimately concluded that, because TBRS was "higher technically rated and lower-priced than NTS," no tradeoff was needed to justify the SSA's decision. *Id.* at 53.

DOE concluded that TBRS's proposal represented the best value to the agency and awarded the contract to TBRS. After requesting and receiving a debriefing on July 21, 2022, NTS timely filed this protest with our Office. Protest, exh. 5, Debriefing Slides at 1.

DISCUSSION

NTS challenges DOE's evaluation of proposals under the key personnel and past performance factors, and its selection of TBRS's higher-rated, lower-cost proposal for award. NTS asserts that DOE should have assigned additional strengths to its proposal under the key personnel factor, and that the agency unreasonably identified discriminators in favor of the awardee in evaluating TBRS's program manager and CAP manager as superior to NTS's. With regard to past performance, the protester alleges that DOE disparately evaluated the relevance of the two offerors' references, to NTS's competitive disadvantage. In addition, the protester asserts that clarifications with TBRS constituted discussions, which obligated DOE to engage in discussions with all offerors, including NTS. Finally, the protester maintains that there was an ambiguity in the awardee's proposal regarding the role of TBRS's affiliate, Bantrel, in performing the contract that either rendered the awardee's proposal unacceptable or resulted in an unreasonable evaluation. For the reasons discussed below, we find no basis to sustain the protest.⁶

The evaluation of an offeror's proposal is a matter within the agency's discretion. *National Gov't Servs., Inc.*, B-401063.2 *et al.*, Jan. 30, 2012, 2012 CPD ¶ 59 at 5. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5. Agencies must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's evaluation criteria. *Cubic Applications, Inc.*, B-411305, B-411305.2, July 9, 2015, 2015 CPD ¶ 218 at 7. A protester's disagreement with the agency's judgment in evaluating proposals or in its determination of the relative merit of competing proposals, without more, does not establish that the evaluation was

⁶ Although we do not address all of the protester's arguments in this decision, we have considered them all and any not directly addressed in this decision are without merit.

unreasonable. *Veterans Evaluation Servs., Inc. et al.*, B-412940 *et al.*, July 13, 2016, 2016 CPD ¶ 185 at 8-9.

Key Personnel

NTS argues that DOE misevaluated the program managers of both NTS and TBRS and engaged in disparate treatment.⁷ The protester contends that the agency improperly assigned its proposal only a strength, as opposed to a significant strength, for its program manager, notwithstanding the program manager's recent relevant experience as a program vice president and executive officer at the Los Alamos National Laboratory. The protester also alleges that the agency improperly found that the program manager's five years of experience as a general manager on the legacy management contract was not "very similar" to the WIPP program manager position. Comments at 43. Concerning the awardee's program manager, the protester asserts that the agency improperly failed to assign a weakness based on the proposed individual's lack of mining experience. In addition, the protester alleges that DOE failed to evaluate the two proposed program managers equally. Finally, the protester maintains that the agency applied an unstated evaluation criterion by assessing the awardee's proposal with a significant strength for TBRS's proposed CAP manager. We have considered all of the protester's arguments and find that none provide a basis to sustain the protest.

As noted above, the solicitation provided that key personnel was the most important non-cost factor. RFP at 390. The solicitation identified five positions as key, including as relevant here, the program manager and CAP manager. The RFP instructed offerors to submit resumes for the candidates proposed for these positions. *Id.* at 390-391. The RFP advised that DOE would evaluate the resumes based on the "degree to which" the proposed individuals "are qualified and suitable for the proposed position in relation to the work for which they are proposed to perform and areas of responsibility." *Id.* at 391. The solicitation further specified that, in evaluating a key person's qualifications and suitability, the agency would evaluate experience and education. The RFP also recognized that "the number and functions of key personnel will be dependent on the organizational structure of the individual Offeror and the manner in which the Offeror proposes to perform the work." *Id.* at 349.

With regard to experience, the RFP provided that each key person would be evaluated on "DOE, commercial, and/or other Government experience in performing work similar to the work to be performed in [his/her] proposed position, including leadership, experience with mines and industrial ventilation systems, if related to the position." *Id.* at 390-391. The evaluation would also consider "other accomplishments, with emphasis on baseline performance, on or ahead of schedule, within or under budget, and the ability to recover schedule variance." *Id.* at 391. The solicitation also provided

⁷ The protester also initially alleged that the agency's evaluation failed to properly consider the TRU waste experience of several NTS key personnel, including NTS's proposed program manager. The protester, however, has withdrawn these arguments. Comments at 74 (identifying protest grounds that are withdrawn).

that DOE's evaluation of the proposed program manager and CAP manager would include oral interviews to evaluate the "qualifications and suitability, including leadership capability for each proposed position as demonstrated during each oral interview." *Id.*

NTS's Program Manager

In evaluating the protester's proposal under the key personnel factor, the agency assigned NTS's proposal a strength for its proposed program manager "after considering the entirety of experience, education, references, and oral interview." AR, Tab B.1, Final SEB Report at 141. In evaluating the program manager's experience, DOE considered his current position as an executive officer for prime contractor N3B at the Los Alamos National Laboratory (LANL), as well as his former positions/work at the following companies: general manager, S.M. Stoller Corporation for the Legacy Management Program (LM); environmental, safety, and health (ES&H) director and technical services manager, S.M. Stoller; and vice president, another company. The agency also considered his two former positions working for DOE. In particular, the agency noted the proposed individual's "32-year career" included "leadership positions for the DOE both at Rocky Flats Closure Management Project and DOE LM." *Id.* DOE also explained that "[a]fter retiring from DOE, [the program manager] became a contractor leader in multiple roles which included serving in similar positions to the proposed PM [program manager] position for the WIPP M&O contract for a total of approximately three and a half years on the Los Alamos Cleanup Contract and another five years for Legacy Management." *Id.*

The SEB found that in his current role as "President and Executive Officer for N3B at LANL (from 2018 through present)," the proposed individual "runs daily operations for" a "ten-year, \$[DELETED] [million per year] environmental remediation project" where he "directs all technical and operational functions and executes all work scope as the accountable and responsible point of contact for safe contract performance, including TRU waste management and processing. . . ." *Id.* The SEB explained that this work "is similar to the work scope described" in the performance work statement (PWS). *Id.* Further, the SEB determined that this "demonstrates that [the program manager] has managed a nuclear facility similar to surface operations at WIPP as stated in Sections C.4.1 and C.4.2 of the WIPP M&O PWS." The SEB also noted, however, that "as the Vice President and Executive Officer, he served as the second in command to the Program Manager at N3B." *Id.*

In its evaluation, the SEB also discussed the program manager's "similar experience as General Manager with the S.M. Stoller Corporation for the Legacy Management Program [S.M. Stoller] (from 2008 through 2013)." The SEB noted that, in performing this work, he "was responsible for all aspects of contractor performance at 90 former Manhattan Project facilities in 28 states and Puerto Rico, including [emergency response] and stewardship, the national records archive, and IT [information technology] and cybersecurity." *Id.* at 141-142. The SEB also noted that, "[i]n this role, he led an analysis and study on standing and abandoned uranium mines to serve as a safety baseline for these radioactive material mines and identified and inventoried all

mines.”⁸ *Id.* at 142. In considering this experience, the SSA found that it was “more focused on long-term environmental stewardship versus an operational nuclear facility similar to WIPP.” AR, Tab B.2, SSDD at 14.

Ultimately, the SEB concluded that “[o]verall . . . [the program manager’s] resume demonstrated experience similar to the position for which he is proposed to perform and areas of responsibility.” AR, Tab B.1, Final SEB Report at 142. The SEB also found that, “[a]lthough [the program manager’s] experience included a position similar to the proposed position, he served in this position only for a total of approximately four years at one site (LANL) over his entire career which spanned 32 years.” *Id.* “This experience along with education, references, and oral interview . . . documents that he is qualified and suitable and is an attribute in the proposal that increases the probability of successful contract performance, therefore, is a Strength.” *Id.*

The SSA agreed with the SEB’s assessment of the program manager as a strength. AR, Tab B.2, SSDD at 14. In coming to this conclusion, the SSA found the following with regard to the program manager’s experience.

[NTS’s program manager], although having served in positions that have some similarity to the proposed Program Manager position at WIPP, is currently serving in a Vice President role for prime contractor N3B at Los Alamos National Laboratory, which is not the top leadership position equivalent or very similar to the role of Program Manager. [The program manager] also served in a Program Manager similar role for DOE’s Office of Legacy Management, but in this role was more focused on long-term environmental stewardship versus an operational nuclear facility similar to WIPP. Most of the rest of his career was spent either serving in an executive, advisory, or federal position providing guidance and/or oversight to contractors. In my opinion, this relative lack of very similar field leadership represents some limited risk to successful contract performance.

⁸ In addition, the SEB referenced the program manager’s position as the ES&H Director and Technical Services Manager for S.M. Stoller, where he “[led] a team of 110 employees that developed a corporate program for worker safety.” *Id.* The SEB found that “this is a positive attribute in that it demonstrates his contractor leadership ability as well as his knowledge of the mining industry and worker safety,” which the evaluators explained, “ha[s] relevance to [the] WIPP as describe[d] in Sections C.4.3 and C.7.3 of the WIPP M&O PWS.” *Id.* The SEB also pointed to the program manager’s position as Vice President of another company where he “provided engineering support to resolve industrial ventilation engineering issues in response to the 2014 incident at WIPP.” The evaluators determined that his “engineering support to WIPP demonstrates his familiarity with the WIPP work scope.” *Id.* In addition, the SEB found that the program manager’s experience with DOE, as “Director of the Rocky Flats Closure Management Project” was “a positive attribute in that it demonstrates that he has perspective from DOE to better understand its federal customers’ needs as well as the ability to negotiate regulatory milestones with federal and state regulators and local elected officials.” *Id.*

AR, Tab B.2, SSDD at 14-15.

As noted above, NTS disagrees with the agency's evaluation and argues that DOE improperly assigned its proposal only a strength, as opposed to a significant strength, for its proposed program manager's relevant experience as a program vice president and executive officer at LANL. Protest at 29.

Based on our review, we find nothing unreasonable regarding the agency's evaluation. As noted above, the record reflects that the agency considered the program manager's recent work at LANL. AR, Tab B.1, Final SEB Report at 141-142; Tab B.2, SSDD at 14. The agency found that, although this work is similar to the work described in the PWS and demonstrates that the program manager has managed a nuclear facility similar to surface operations at WIPP as stated in Sections C.4.1 and C.4.2 of the WIPP M&O PWS, the agency also determined that, in his roles as the vice president and executive officer, he served as the "second in command" to the program manager. AR, Tab B.1, Final SEB Report at 141. The SSA stated that, although the program manager has "served in positions that have some similarity to the proposed Program Manager position at WIPP," his current role at LANL "is not the top leadership position equivalent or very similar to the role of Program Manager." AR, Tab B.2, SSDD at 14. The contracting officer further explains in response to the protest that because the program manager's experience at LANL were both "number two positions behind the Program Manager," the agency determined "[t]hese experiences do not represent the same scope of duties as being the [program manager] for WIPP." COS/MOL at 25.

Although NTS highlights that in this role at LANL, its proposed program manager served in "program management" and performed some similar work to that required by the WIPP program manager, see Comments at 41-42, the protester does not represent that he served as the actual program manager at LANL or otherwise demonstrate that his duties covered the same work scope as those for the WIPP program manager. *Id.* As noted above, this is a material distinction that mattered to the SSA, who expressed concern that the program manager's most recent and relevant role was the *de facto* "number 2" person who did not have an overall program manager role or responsibilities on the program. See, e.g., AR, Tab B.2, SSDD at 14. The record reflects that despite this concern, DOE found that the program manager had "similar" experience at LANL and thus, credited NTS's program manager with four years of experience for his work at LANL in assessing a strength for the program manager. AR, Tab B.1, Final SEB Report at 141-142. Further, the record shows that the assessment of this strength was based on the program manager's "entirety of experience, education, references, and oral interview." *Id.* at 141.

Here, based on our review, we do not find unreasonable the agency's determination that the experience of NTS's proposed program manager contributed to an overall strength where the program manager's "experience included a position similar to the proposed position, [but] he served in this position only for a total of approximately four years at one site over his entire career which spanned 32 years." AR, Tab B.1, Final SEB Report at 142-43. To the extent NTS asserts that its program manager deserved additional credit for his experience at LANL or that the agency should have evaluated

this experience differently, the protester's disagreement with the evaluation, without more, fails to demonstrate that the agency's evaluation was unreasonable. *Veterans Evaluation Servs., supra*.

The protester also argues that the agency's determination that its program manager only had four years of experience that was "similar" to the WIPP PM position is incorrect because its program manager also had five years of experience as the general manager of a legacy management (LM) contract. Protest at 29-30. The protester asserts that it was unreasonable that the agency did not consider this experience to be very similar to the WIPP program manager position.

DOE responds that the agency's determination not to consider the LM work as "very similar" to the WIPP PM position "is reasonable given the differences between the type of work on the two contracts." COS/MOL at 28. The SSA determined that the program manager's experience on the LM contract "was more focused on long-term environmental stewardship versus an operational nuclear facility similar to WIPP." AR, Tab B.2, SSDD at 14. The contracting officer further explains in response to the protest that "Legacy Management involves surveillance and maintenance of 'legacy' sites that are no longer operational" whereas "the purpose of the WIPP contract is to 'manage, operate and maintain the WIPP.'" COS/MOL at 29 (quoting PWS Section C.0.1). The protester does not deny that the LM contract and work is not an active operational site, nor does it deny that the LM work involves long-term environmental stewardship. Protest at 29-30; Comments at 42-50. Given this distinction, which the protester does not dispute, we find nothing unreasonable regarding the agency's evaluation.

The protester also complains that DOE engaged in unequal treatment by not crediting the five years of experience of its program manager on the LM contract as "similar" work while crediting experience of the awardee's program manager not involving "an operational nuclear facility" as "similar." Comments at 48. We find no merit to this argument.

It is a fundamental principle of government procurement that competitions must be conducted on an equal basis; that is, the contracting agency must treat all offerors equally, and even-handedly evaluate proposals and quotations against common requirements and evaluation criteria. *Kingfisher Sys., Inc.; Blue Glacier Mgmt. Grp., Inc.*, B-417149 *et al.*, Apr. 1, 2019, 2019 CPD ¶ 118 at 8. Where a protester alleges disparate treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offerors' proposals. *INDUS Tech., Inc.*, B-411702 *et al.*, Sept. 29, 2015, 2015 CPD ¶ 304 at 6.

The protester points to three jobs for which it alleges the awardee's program manager received credit for "similar" work although the work did not involve an operational facility.

The first is the proposed individual's experience as program manager at Pueblo Chemical Agent Destruction Pilot Plant (PCAPP). The SEB found this experience to be "very similar," explaining that, in this role, the program manager "leads a \$[DELETED] [billion] contract with 1,600 management, operations and maintenance (O&M),

engineering, regulatory, ESH&Q [environmental, safety, health and quality], waste management, material handling, and other support personnel at a first-of-its-kind operation to bring 780,000 mustard agent artillery shells to an inert end state.” AR, Tab B.1, Final SEB Report at 215. The SEB further found that he “manages safe operations in a high hazard environment with chemical warfare components that represent potential impacts to the surrounding community as well as the workforce at facilities with similar risks as [hazard category 2] HC-2 facilities.” *Id.*

In addition, the SEB noted that the program manager “intervened in the lagging \$[DELETED] [million] capital asset Static Detonation Chambers (SDC) project by integrating multiple schedules to recover baseline variances,” and that “[b]y partnering with DoD [Department of Defense] to manage the baseline to meet goals,” the program manager “accelerated the baseline schedule a full 15 months ahead of the required treaty date and is more than \$[DELETED] [million] under the estimated costs.” *Id.* The SEB also found that the program manager “managed construction and commissioning of each of three cascade ventilation units equipped with 16,000 [cubic feet per minute] CFM and led efforts to bring all to fully commissioned status.” The SEB concluded that the program manager’s experience “is a positive attribute because it demonstrates emphasis on baseline performance, on or ahead of schedule, within or under budget, and the ability to recover schedule variance.” *Id.*

The second job challenged by the protester is the program manager’s experience as the general manager at Pile Fuel Cladding Silos (PFCS) for Sellafield Limited, which the SEB also found to be “very similar” to the work he will perform on the instant contract. The SEB explained that, as general manager, he “managed a \$[DELETED] [million] fixed fee plus incentive contract with 300 staff at three [United Kingdom] locations performing design, engineering, fabrication, construction, and commissioning of a one-of-a-kind, remote-handling HLW [high level waste] retrieval system for Sellafield’s PFCS.” AR, Tab B.1, Final SEB Report at 215. The SEB noted that his experience included “his ability to integrate three separate schedules into one fully integrated schedule across three project locations to accelerate baseline performance.” *Id.*

Finally, the protester challenges the program manager’s experience as program manager at West Valley Demonstration Plant for Energy Solutions, where he “manag[ed] a workforce that included 120 union site workers and a \$[DELETED] million waste management program from processing design to treatment, repackaging, transportation, and disposal, including 289 canisters of vitrified HLW.” *Id.* The SEB noted that the program manager “improved the schedule performance index from [DELETED] to [DELETED] in less than a year.” *Id.* The SEB found that “this experience further demonstrated [the program manager’s] ability to lead waste processing activities at a HC-2 nuclear facility.” *Id.*

While this work may not have been at a nuclear facility, the agency asserts that experience at a nuclear site like WIPP was not a requirement of the RFP. COS/MOL at 44-45. Rather, the solicitation provided that experience would be evaluated on “experience in performing work similar to the work to be performed in [his/her] proposed position.” RFP at 349. The agency points to its detailed discussion of the awardee’s

program manager's experience and qualifications in the record, summarized above, where the SEB articulated its rationale for finding this experience either similar or very similar to the work the program manager is proposed to perform under the instant contract. Although NTS asserts that this experience should not have been viewed by the agency as similar to the instant contract because it was not experience at an "operational nuclear facility," the protester does not demonstrate that the experience was not at an active, operational waste site. Nor does the protester assert or demonstrate that its proposal included the same level of detail and information provided by TBRS regarding its program manager. The protester has failed to demonstrate that the agency's consideration of the experience of the awardee's program manager as similar or very similar did not stem from differences between the proposals. *INDUS Tech., supra.*

In sum, while NTS generally argues that DOE undervalued its cited experience, it has fundamentally failed to show how the agency's evaluation was disparate with respect to the awardee. Accordingly, we find no basis to sustain the protest.

TBRS's Program Manager

In addition to the arguments discussed above, NTS challenges the agency's evaluation of TBRS's program manager on the basis he did not possess any experience in mines. The protester asserts that the awardee's proposal should have been assessed a weakness for this lack of experience because such experience was "explicitly identified in the RFP." Protest at 30-31; Comments at 16-18. The agency responds that the RFP did not explicitly require that the program manager have experience with mines, but rather specified that such experience would be considered "if related to the position." The agency maintains that "TBRS did not propose specific duties directly related to mines or mine operations" for its program manager. COS/MOL at 33.

As noted above, the solicitation provided, in pertinent part, that key personnel would be evaluated based on "experience in performing work similar to the work to be performed in their proposed position," including "experience with mines and industrial ventilation systems, if related to the position, and other accomplishments." RFP at 390. The RFP also provided that "the number and functions of key personnel will be dependent on the organizational structure of the individual Offeror and the manner in which the Offeror proposes to perform the work." *Id.* at 349.

The awardee's proposal identified the "Duties and Responsibilities" for TBRS's proposed program manager by PWS paragraph. AR, Tab C.1, TBRS Vol. II, Tech. & Mgmt Proposal at 16, fig. 2-3. TBRS proposed its program manager to have responsibility across a wide range of PWS requirements; however, it did not propose that the program manager would have direct responsibility for mining efforts, which was included in PWS requirement C.4.3.1. *Id.* TBRS instead proposed a dedicated "Mining/Underground Operations Manager" to perform the management work related to mining. *Id.*

The SEB determined that TBRS's proposed program manager's work and other selected accomplishments included "leadership of nuclear programs, articulation of a clear and effective vision for a site's future, experience with industrial ventilation systems, and strong and appropriate partnerships with stakeholders and regulators," with the following results also creditable to him: accountability of performance, baseline performance, delivery within schedule (including before treaty deadlines), delivery within budget, and ability to recover schedule variance. AR, Tab B.1, SEB Final Report at 226. Based on this experience and accomplishments, along with his education, references and oral interview, the agency concluded that TBRS's program manager was a significant strength. *Id.* at 215.

Based on our review, we find nothing unreasonable regarding the agency's evaluation. Although the protester references the PWS requirement for mining and asserts generally that the program manager "is responsible for safe and successful performance of the entire contract," the protester does not cite to anything in the RFP that required the program manager to have mining experience or that provided the agency would evaluate whether the program manager had mining experience. The record reflects that, in evaluating the program manager's experience, the agency evaluated the "experience in performing work similar to the work to be performed in their proposed position" as specified in the solicitation. RFP at 349. Further, the record shows that the SEB's determination that the proposed program manager represented a significant strength was not based on a single facet of experience; rather, it considered the "entirety of experience, education, references, and oral interview." AR, Tab B.1, Final SEB Report at 215. The protester's disagreement with the agency's evaluation, without more, fails to demonstrate that the evaluation was unreasonable.

CAP Manager

NTS contends that because the SSA identified TBRS's proposed CAP manager to be an important discriminator in the source selection, the agency applied an unstated evaluation criterion by elevating the CAP manager position to be "more important than the other three Key Person positions." Supp. Protest at 26.

Based on our review, we find that the agency did not apply an unstated evaluation criterion; rather, the emphasis that the SSA placed on TBRS's CAP manager was reasonably related to the solicitation's evaluation scheme. Although the solicitation did not provide guidance as to the relative importance of the key personnel positions, other than that the program manager was the most important key person, this did not prevent the SSA from finding the CAP manager position to be in some respect of increased importance and identifying it as a discriminator. In this connection, the solicitation distinguished the CAP manager position from other key personnel positions by identifying it as the only position, other than program manager, for which the agency would conduct an oral interview as part of its evaluation. RFP at 350. Based on the interview requirements, we do not find it unreasonable that the agency found the CAP manager to have some "'increased importance' in determining the contract success." COS/MOL at 52.

The SSA, in turn, found the CAP manager position “to be an important discriminator for Key Personnel” because “the WIPP CAP Manager will be responsible for the construction of three large line-item Capital Asset Projects in addition to the execution of a large number of General Plant Projects to improve aging and degraded infrastructure.” AR, Tab B.2, SSDD at 13. The SSA “considered the evaluation of the Program Manager and the CAP Manager as discriminators, because in [his] mind the candidates proposed for these positions are most predictive of both the Key Personnel team’s leadership capability and the likelihood of successful contract performance.” *Id.* In light of the solicitation’s overall evaluation scheme, this was a reasonable assessment and did not constitute the application of any unstated criterion. As such, we find no basis to sustain the protest.

Past Performance

NTS challenges the agency’s evaluation of the protester’s and awardee’s past performance, arguing that the agency’s relevancy determinations regarding contracts submitted as references for the offerors were improper.⁹ For the reasons discussed below, we find the protester’s arguments provide no basis to sustain the protest.

For the past performance evaluation, the solicitation provided the agency would evaluate each offeror, including all members of the offeror’s teaming arrangement, based on the agency’s assessment of recent and relevant past performance information. RFP at 391. With regard to recency, the RFP provided that DOE will evaluate contracts that are currently being performed or have a period of performance end date within the last four years from the original solicitation issuance date. *Id.* at 392. As for relevance, the agency would consider size, scope, and complexity to determine whether submitted reference contracts were relevant to the portion of the PWS that each entity is proposed to perform. *Id.* at 391.

The solicitation defined scope, size, and complexity as follows: scope is the “type of work (e.g., work as identified in the PWS [excluding Section C.8.0], including similar work of a non-nuclear nature and/or similar non-DOE work.);” size is the “dollar value (approximate average annual value in relation to the proposed work; annual contract value of approximately \$200 [million] for evaluation purposes);” and complexity is the “performance challenges (e.g., prior innovations, work performance improvements, subcontractor management, etc.).” *Id.* The solicitation explained that “[t]he higher the degree of relevance of the work, the greater the consideration that may be given.” *Id.* at 391-92.

The solicitation also provided that the agency would not “apportion the assessment of past performance differently amongst the members of a [contractor’s teaming arrangement] on a past performance contract, as each entity is considered to be responsible for overall performance of the ongoing or prior contract.” *Id.* at 392. The

⁹ The protester also initially argued that the agency did not give NTS enough credit for its experience with TRU waste or its award fee ratings, but withdrew these arguments. Comments at 71.

RFP further explained that “[a]ll partner companies on past performance contracts will be equally credited (positively and negatively) for past performance information,” but that, “relevancy determinations on a past performance contract may differ depending upon what scope each entity is proposed to perform.” *Id.*

The RFP provided that DOE would evaluate the offeror and all members of a teaming arrangement and any teaming subcontractors “in accordance with the work each entity is proposed to perform to cover the work scope described in the PWS.” RFP at 392. The solicitation further provided that the “resulting rating will consider whether the [offeror’s] team as a whole (including Teaming Subcontractors) have demonstrated relevancy to all PWS (excluding Section C.8.0) requirements.” *Id.* The solicitation explained that “[i]f the [o]fferor or [t]eaming [s]ubcontractor(s) do[es] not have a record of relevant past performance or if information is not available, the [o]fferor or [t]eaming [s]ubcontractor(s) will be evaluated neither favorably or unfavorably.” *Id.*

NTS challenges DOE’s determination that a contract (the [DELETED] contract) that it submitted as a reference for NTS’s member, Atkins Nuclear Secured (Atkins), was not relevant. The protester asserts that, because the agency determined this reference contract not relevant, NTS was not given credit for Atkins’s excellent performance.

NTS’s proposal advised that its team member, Atkins, “is responsible for performing all scope activities described by PWS C.1 through C.8,” and for past performance, included four contracts for Atkins. AR, Tab D.1, NTS Tech. Proposal at 114; *see also* Tab B.1, Final SEB Report at 440-446. The SEB found that three of Atkins’s contracts were “relevant” and that one was “not relevant.” For the three contracts determined “relevant,” the SEB found that they had at least some similarity to all of the PWS elements. *See* AR, Tab B.1, Final SEB Report at 440, 442-43, 446 (detailing the scope of similarity of the contract to all PWS requirements).

The SEB found that Atkins’s performance on the [DELETED] contract was “not relevant,” however, “[g]iven the lack of scope similarity to Atkins performance responsibilities of the WIPP PWS[.]” AR, Tab B.1, Final SEB Report at 444. The SEB concluded that the reference contract included “greater size, not similar scope, and similar complexity to the requirements of this solicitation.” *Id.* With regard to scope, the SEB first noted that NTS’s proposal stated that “Atkins, as a member company, will be responsible for leading all PWS activities, including C.1.0 – C.7.0.” *Id.* at 444.

The SEB then identified, for each PWS area, the extent to which the contract demonstrated a similar scope. For example, the SEB found that there was “little evidence” that the contract had “scope similar to Contractor Transition (C.1.0),” and that this “scope element was not addressed.” *Id.* Similarly, the evaluators found that there was “no evidence” of scope similar to the following PWS areas and that “these scope elements were not addressed:” Centralized Characterization Project (C.2.0), including CH Waste Certification (C.2.1); RH Waste Certification (C.2.2); TRU Waste Site Interface (C.2.3); TRU Waste Site Mobile Loading Services (C.2.4); Performance Demonstration Program (C.2.5); Transportation Activities (C.3.0), including Shipping

Coordination (C.3.1); Transportation Packaging and Equipment (C.3.2); and Experimental & Testing Activities (C.6.0). *Id.*

Although the SEB found that the contract had “some similarity” and “similarity” to several PWS requirements, it ultimately determined, as noted above, that due to the “lack of scope similarity to Atkins performance responsibilities of the WIPP PWS, this contract is considered to be overall not similar in scope.” *Id.*

In response to the protest, the agency asserts that, because “Atkins is responsible for the performance of the entire PWS as one of the member companies founding NTS,” “NTS had to demonstrate similarity to all seven PWS elements per the terms of the solicitation.” COS/MOL at 78; RFP at 391 (“The Offeror . . . will be evaluated on the Government’s assessment of relevant and recent past performance information obtained for the Offeror performing work similar in size, scope, and complexity to the portion of the PWS (excluding Section C.8.0) that each entity is proposed to perform.”). The agency explains that the similarity in scope “did not have to be an exact match,” but “there had to be some similarity to each major PWS element.” COS/MOL at 78. The agency asserts that because this “contract showed similarity to less than half of the PWS scope,” its determination that the contract was not relevant in scope was reasonable. *Id.*

The protester does not dispute that NTS proposed Atkins to be responsible for all PWS areas; nor does the protester disagree that the Atkins’s [DELETED] contract did not demonstrate similarity to all PWS elements. The protester, however, disagrees with the agency’s evaluation of scope, arguing that the contract did not have to demonstrate similarity to all major PWS elements to be “relevant.”

Based on our review, we find nothing unreasonable regarding the agency’s evaluation. The solicitation’s relevancy scheme provided that past performance assessments would be based on “relevant and recent past performance information obtained for the Offeror performing work similar in scope, size, and complexity to the portion of the PWS . . . that each entity is proposed to perform.” RFP at 391. As previously mentioned, NTS proposed Atkins to have responsibility for all PWS requirements. AR, Tab B.1, Final SEB Report at 433. The record reflects that the agency assessed the relevancy of Atkins’s contracts based on the extent to which each contract demonstrated similar scope and complexity to the entire scope of work for which Atkins was proposed--that is, all PWS requirements. The agency concluded that three of the contracts submitted for Atkins demonstrated similar scope of work for all PWS requirements and were relevant. Although the agency determined that the [DELETED] contract was “not relevant” because it demonstrated work that aligned with only a small subset of the WIPP PWS, the protester has not demonstrated that such a conclusion was inconsistent with the solicitation terms or otherwise unreasonable.¹⁰ We find no basis to sustain the protest.

¹⁰ Similarly, the protester disputes the agency’s evaluation of two contracts submitted for one of the awardee’s team members, BNI, as “not relevant.” The protester alleges

Exchanges

NTS alleges that exchanges between DOE and TBRS allowed TBRS to revise its price proposal, and that therefore, discussions took place. We disagree and conclude the agency engaged in clarifications rather than discussions.

Clarifications are “limited exchanges” between an agency and an offeror for the purpose of clarifying certain aspects of a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR 15.306(a)(2). Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *Highmark Medicare Servs., Inc. et al.*, B-401062.5 *et al.*, Oct. 29, 2010, 2010 CPD ¶ 285 at 11; see FAR 15.306(d). In situations where there is a dispute regarding whether an exchange between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

NTS asserts that DOE engaged in unequal discussions by permitting TBRS to furnish material “pricing information” that TBRS failed to include in its initial proposal. 2nd Supp. Protest at 5.

As relevant here, the solicitation instructed offerors to provide in volume I of the proposal their “offeror fill-in” items for the model contract. See RFP at 336. The solicitation included these “offeror fill-in” fields in various sections of the RFP, including in section B for Transition Cost, Anticipated Funding, and Total Available Performance Fee. *Id.* Section B included tables for the offerors to complete with their proposed cost and fee information. For example, section B included the following table for “Contract Transition Activities”:

CLIN	CLIN Title	Estimated Cost	Total Available Fee	Total
00001	Contractor Transition (PWS Section C.1)	\$ [offeror fill-in]	N/A	\$ [offeror fill-in]

that “[i]n those cases, BNI’s performance under the two contracts was poor,” but “because of the non-relevancy determination, DOE never considered the poor performance.” Comments at 57. While the protester disagrees with the agency’s determination that the scope of these two contracts were not relevant, the protester has failed to demonstrate that the agency’s evaluation in this regard was inconsistent with the RFP or otherwise unreasonable. Such disagreement, without more, fails to provide a basis upon which to sustain the protest. Further, to the extent the protester asserts that the agency engaged in disparate treatment, the record reflects that the agency evaluated the contracts of NTS’s and TBRS’s team members the same. As such, this protest ground is denied.

RFP 72-76. Section B also included Table B.1, for Total Available Performance Fee for the base period of the contract, option periods, and Capital Asset Projects. This table requested “offeror fill-in” information for the “total available performance fee.” *Id.* at 73. TBRS included in its volume III, cost/price proposal all of the required “offer fill-in” information using the same tabular format provided in section B of the solicitation and covering all of the same CLINs, contract periods and options. AR, Tab C.4, TBRS Cost Proposal at 15-17. In volume I of its proposal, TBRS did not include the section B tables in their entirety. Instead, TBRS’s proposal included the summary/total values it proposed, which were the same amounts derived from the complete tables. AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 14.

In an exchange with TBRS after it had already evaluated TBRS’s volume III, cost and fee proposal, the agency noted that TBRS had included the section B “offeror fill-in” information in volume III of its proposal, but did not also include the “offeror fill-in” information in volume I. AR, Tab E.4, Exchanges at 43 (“Although not included in Volume I, the information requested in Paragraph Section B, (i) Transition Cost, Anticipated Funding, and Total Available Performance Fee, was included in TBRS’ Volume III.”). The agency asked TBRS to clarify that the same “numerical sums” that TBRS used for the “offeror fill-in” fields in volume III should be used in volume I. *Id.* (“Please confirm that the information requested in Paragraph Section B, (i) Transition Cost, Anticipated Funding, and Total Available Performance Fee are the same numerical sums intended to be inserted into TBRS’ Volume I proposal.”). The agency invited TBRS to reply “with only a ‘Yes’ or ‘No’ response.” *Id.* TBRS responded “YES,” and provided no further response or information. *Id.* at 43.

Based on our review, we find that the exchange in question is properly categorized as clarifications, rather than discussions. The record reflects that TBRS was not invited, or permitted, to revise its proposal; rather, it was simply asked to verify and clarify with a yes or no response whether the same numerical sums that TBRS used for the “offeror fill-in fields” in volume III also applied to volume I. Despite the protester’s argument to the contrary, TBRS was not permitted to alter its proposal by submitting new or revised “offer fill-in” information. Moreover, the fact that clarifying information was required did not mean that volume I was noncompliant; DOE’s communication with TBRS was merely to confirm its understanding that the numerical sums in the “offeror fill-in” fields in TBRS’s volume III cost proposal, which DOE had evaluated, was intended to be the detailed information supporting the summary total values used in volume I. We find nothing unreasonable or improper regarding the agency’s actions here.

NTS also argues that exchanges conducted by the agency with the awardee concerning TBRS’s “Individual Small Business Subcontracting Plan” constituted improper and unequal discussions. As with regard to the preceding argument, we find no merit to this argument.

The solicitation required offerors to address small business subcontracting in two distinct parts of the proposal. In volume I, offerors were required to include their “Individual Small Business Subcontracting Plan,” pursuant to FAR clause 52.219-9. RFP at 341. The solicitation stated that “[t]he Individual Small Business Subcontracting

Plan is not a requirement for evaluation in source selection,” but instead the plan would be “a matter of responsibility, separate from the source selection evaluation, and will be incorporated into the resultant Contract.” *Id.* Offerors were cautioned that failure to “submit and/or negotiate a subcontracting plan” that addressed all required elements in adequate detail “may result in a negative responsibility determination.” *Id.* Separately, in volume II, offerors had to address under factor 3, management approach, their “approach to meet or exceed the small business subcontracting requirement of 20% of the total contract value.” *Id.* at 357. The solicitation stated that “[e]valuation of this factor is separate and distinct from the Small Business Subcontracting Plan.” *Id.*

The record shows that during its responsibility assessment, the agency identified potential errors in TBRS’s small business subcontracting plan in volume I of its proposal. AR, Tab E.2, Memo to File at 4-5. The agency asked TBRS to address two items related to the total dollars to be subcontracted and the calculation of the total planned subcontracting dollars, and to update the dollar threshold TBRS identified for which subcontractors would be required to comply with FAR clause 52.219-9. *Id.* TBRS’s response updated these items and corrected one other clerical error. AR, Tab E.4, Exchanges at 21-31; DOE Response to Document Request, Sept. 9, 2022, Attach. A, Changes to Small Business Subcontract Plan at 1-2 (summarizing changes). TBRS’s response was limited to the small business subcontracting plan that it submitted with volume I of its proposal; TBRS did not make any changes to the separate description of its small business participation approach under the management factor in volume II of its technical proposal. See AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 64; Tab E.4, Exchanges at 23-24.

As a general matter, our Office does not consider exchanges involving matters of responsibility to be discussions. See, e.g., *Cargo Transport Systems Co.*, B-411646.6, B-411646.7, Oct. 17, 2016, 2016 CPD ¶ 294 at 8 (“We have long held that the rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility. . . . [T]he fact that the agency requests information regarding responsibility matters from only one offeror, does not establish that the agency engaged in improper or unequal discussions.”); *Engility Corp.*, B-413202, Sept. 2, 2016, 2016 CPD ¶ 251 at 8 (“[T]he rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility. Simply stated, an agency’s exchanges with an offeror regarding matters of responsibility do not constitute discussions.”).

Here, the solicitation on its face clearly articulated that the “Individual Small Business Subcontracting Plan” was a matter of responsibility. RFP at 341. As previously referenced, the rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility.¹¹ See *Engility, supra*. In this

¹¹ Although the protester points to our decision in *Computer Sciences Corp. et al.*, B-298494.2 *et al.*, May 10, 2007, 2007 CPD ¶ 103, we find this case readily distinguishable from the instant procurement. *Computer Sciences Corp.* involved an evaluation scheme where the solicitation required the agency to evaluate the actual

regard, information concerning a bidder's responsibility may be provided and considered by the agency at any time prior to contract award. *ECI Constr., supra*. As such, there was nothing improper with TBRS submitting, and DOE considering, TBRS's updated information pertaining to the awardee's small business subcontracting plan.¹²

Evaluation of Awardee's Proposed Affiliate

NTS argues that DOE failed to reasonably consider inconsistencies in the awardee's proposal regarding the proposed role that TBRS's affiliate, Bantrel, would play in performance of the contract. The protester alleges that, based on information in TBRS's proposal, the agency should have concluded that Bantrel was either a teammate or teaming subcontractor of the awardee, rather than just a proposed affiliate. The protester maintains that the proper designation for Bantrel matters because the solicitation included requirements that were applicable to teammates and teaming subcontractors, but not applicable to affiliates. In the protester's view, the agency's failure to properly identify Bantrel as a teammate or teaming subcontractor meant that the agency did not properly evaluate whether Bantrel met the RFP's requirements for teammates/teaming subcontractors. The protester alleges that this failure resulted in an unreasonable evaluation of TBRS's proposal under all three technical factors.¹³

small business subcontracting plan (not just the approach to small business utilization) as part of the technical evaluation. *Id.* at 7. Here, the solicitation did not provide for evaluation of the small business subcontracting plan as part of the technical evaluation, but rather, as indicated above, advised that the plan was "not a requirement for evaluation in source selection," but would be "a matter of responsibility." RFP at 341.

¹² NTS also asserts that DOE's exchange with the awardee regarding the completion of clause DOE-H-2058, Designation and Consent of Teaming Subcontractors, constituted improper discussions. We disagree. According to the RFP, offerors were required to fill in information in both: (1) Clause DOE-H-2058, Designation and Consent of Teaming Subcontracts (Oct 2014) (Revised) and (2) Clause DOE-H-2058, Designation and Consent of Teaming Subcontracts – Alternate I (Oct 2014) (Revised) (Applies To Task Orders Only). RFP at 337. The record shows that TBRS included its teaming subcontractor, Los Alamos Technical Associates (LATA), in the "Alt I" version of the clause in its proposal, and after an inquiry from DOE, TBRS confirmed it also intended to insert LATA in DOE-H-2058. See AR, Tab E.2, Memo to File, TBRS Clarifications and Responsibility at 6. GAO has consistently stated that offeror representations and certifications generally pertain to matters of responsibility that GAO will not consider. See, e.g., *Language Select LLP, dba United Language Grp.*, B-415097, B-415097.2, Nov. 14, 2017, 2017 CPD ¶ 359 at 7 n.2; *McCann-Erickson USA, Inc.*, B-414787, Sept. 18, 2017, 2017 CPD ¶ 300 at 6 ("[T]o the extent that a firm's proposal (or its SAM database entry) did not include all of the required representations and certifications, such a lack of information relates to the responsibility of the firm rather than to the acceptability of its proposal."). This protest ground is denied.

¹³ For example, the protester alleges that if Bantrel is a team member or teaming subcontractor, then the agency's evaluation under the management approach factor

The agency and intervenor disagree with the protester's interpretation of TBRS's proposal. They maintain that TBRS's proposal did not propose TBRS's affiliate, Bantrel, as a teammate or subcontractor, but rather, offered to use loaned resources from Bantrel, as permitted by the RFP.

The RFP defined a teaming subcontractor as "any subcontractor that will perform work that is incorporated into the Offeror's Technical and Management Proposal and that the prime Offeror considers necessary to enhance its team's Technical and Management Proposal or ability to meet delivery requirements within the PWS (excluding Section C.8.0)." RFP at 330. The RFP advised that "Teaming Subcontractors are evaluated consistent with the terms of this solicitation and thus are not subject to post-award subcontract consent pursuant to FAR 52.244-2." *Id.* The RFP required offerors to include the names of teaming subcontractors in their proposals, but prohibited them from including the names of any non-teaming subcontractors in their technical proposals. RFP at 348 ("The Offeror shall not include the name(s) of any other specific subcontractor(s) (i.e., any non-Teaming Subcontractor(s)) within Volumes II and III.") The solicitation explained that "Non-Teaming Subcontractor(s) will be subject to post-award determination by the Contractor consistent with the Contractor's purchasing system and the requisite terms and conditions of the contract." *Id.*

In addition to teaming subcontractors, the solicitation contemplated that, for "newly formed entit[ies]," the offeror might rely upon the resources of a parent, member, or affiliated company to perform the contract. RFP at 353-354.

TBRS's proposal provided that TBRS is a newly formed entity devoted to competing for and executing the WIPP contract. See AR, Tab C.1, TBRS Vol. II, Tech. & Mgmt. Proposal at 3; Tab C.3, TBRS Vol. I, Offer & Other Documents at 106. It also explained that TBRS is a limited liability company (LLC) that is a wholly owned subsidiary of Bechtel National, Inc. (BNI). See AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 106. Further, the TBRS operating agreement included with TBRS's proposal clearly states that BNI is the only entity that has any ownership or control interest in TBRS. See *id.* (stating that BNI is the "sole Member" of the LLC); *id.* at 110, App. A, LLC Operating Agreement, Schedule of LLC Members (stating that BNI owns "100%" of the membership interests of the LLC); *id.* at 111-14, App. B, LLC Operating Agreement (providing that BNI has the sole authority to appoint and remove any manager(s) of TBRS, and to designate the Chair of the Board of Managers).

was unreasonable and should have resulted in the assignment of a weakness or significant weakness because "[t]here is risk in TBRS'[s] proposed reliance on Bantrel without any real defined role or existing contractual obligation for Bantrel." Comments at 22. In addition, the protester claims that, if Bantrel is a team member or teaming subcontractor, then the agency failed to evaluate or consider foreign ownership, control or influence (FOCI) issues involving Bantrel and the solicitation's organizational conflicts of interest (OCI) provisions. See, e.g., Supp. Protest at 3-16; 2nd Supp. Protest at 9-14, 17-18; Comments at 9, 25-27. As discussed herein, because we find reasonable the agency's decision not to treat TBRS's affiliate, Bantrel, as a subcontractor or teaming subcontractor, we do not address these arguments.

Volume II of TBRS's proposal stated that Bantrel has mining experience, that Bantrel was part of TBRS's "Optimal Team for WIPP Contract Execution," and that Bantrel was available to subcontract work from TBRS. See, e.g., AR, Tab C.1, TBRS Vol II, Tech. & Mgmt. Proposal at 14.

TBRS's proposal included the following documents in an appendix to its proposal: TBRS operating agreement; Bantrel agreement; and teaming agreement between BNI and LATA. The Bantrel agreement "provided for the assignment" of two key personnel: (i) TBRS's mining/underground operations manager; and (ii) TBRS's CAP manager. AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 115; Tab C.1, TBRS Vol. II, Tech. & Mgmt. Proposal at 18. According to the TBRS operating agreement, TBRS is authorized to enter into service agreements or loaned personnel agreements with BNI and BNI's affiliates, "pursuant to which the Member or such affiliate will provide services or will second personnel to the Company in furtherance of its business." AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 108.

DOE evaluated TBRS as being comprised of one member, Bechtel National, Inc. ("BNI"), and one teaming subcontractor, Los Alamos Technical Associates ("LATA"). AR, Tab B.1, Final SEB Report at 14; Tab B.2, SSDD at 17. In evaluating TBRS's proposal, the record confirms that the agency understood this ownership structure. For example, the SEB Report identifies BNI as TBRS's "LLC Member Company" and notes that BNI is the sole/member owner. AR, Tab B.1, Final SEB Report at 14 (noting that the "Ownership Percentage" is "100%"). In addition, BNI confirmed this ownership structure in exchanges with the contracting officer regarding the contracting officer's responsibility determination. AR, Tab E.2, Memo to File at 2 ("TBRS stated that Bechtel National, Inc., is the sole member of TBRS d/b/a SIMCO, which for a limited liability company is the equivalent of [the] 'parent company.'").

Based on our review, we find nothing unreasonable regarding the agency's evaluation. The record supports the agency's decision not to treat TBRS's affiliate, Bantrel, as a "subcontractor" or "Teaming Subcontractor."¹⁴ The solicitation permitted TBRS, as a

¹⁴ To the extent the protester asserts that, alternatively, the agency should have concluded that Bantrel was a joint venture partner or member of TBRS, we find that the record supports the agency's conclusion that BNI was the sole member of TBRS; thus, the agency's conclusion that Bantrel was proposed as an affiliate was reasonable. As noted above, the SEB report identifies BNI as TBRS's "LLC Member Company" and notes that BNI is the sole/member owner. AR, Tab B.1, Final SEB Report at 14 (noting that the "Ownership Percentage" is "100%"). In addition, BNI confirmed this ownership structure in exchanges with the contracting officer regarding the contracting officer's responsibility determination. AR, Tab E.2, Memo to File at 2 ("TBRS stated that Bechtel National, Inc., is the sole member of TBRS d/b/a SIMCO, which for a limited liability company is the equivalent of [the] 'parent company.'"). Further, the TBRS operating agreement included with TBRS's proposal clearly states that BNI is the only entity that has any ownership or control interest in TBRS. See AR, Tab C.3, TBRS Vol. I, Offer & Other Documents at 106 (stating that BNI is the "sole Member" of the LLC); *Id.* at 110,

newly formed entity, to utilize its affiliate's "material supplies, equipment, personnel, or other tangible assets," as well as its "expertise, best practices, lessons learned, or similar resources . . . to affect the performance of the [o]fferor." RFP at 353-354. TBRS's proposal clearly identified its plan to utilize affiliate resources from Bantrel. In the volume II technical and management proposal, TBRS explained that Bantrel had made available to TBRS two key personnel, plus "additional managerial personnel and know-how . . . provision of assets, personnel, corporate knowledge, technical and management expertise, best practices, and lessons learned" to support TBRS's successful contract performance. AR, Tab C.1, TBRS Vol. II, Tech. & Mgmt. Proposal at 60. In volume I of its proposal, TBRS provided further detail on how these resources would be furnished "on a loaned basis as part of reachback." AR, Tab C.3, TBRS Proposal, Vol. I, Offer & Other Documents at 88. TBRS included a copy of Bantrel's commitment letter, which echoed TBRS's description of the Bantrel affiliate resources that would be available to TBRS, and made it clear that the loaned personnel would be employed directly by TBRS. *Id.* at 115. Moreover, TBRS expressly disclaimed that it had any current plan to issue a subcontract to Bantrel, and stated that if future circumstances warranted issuing a subcontract to Bantrel, TBRS would first obtain contracting officer approvals to do so. *Id.* at 60, 88.

The protester essentially disagrees with the agency's interpretation of TBRS's proposal as offering Bantrel as an affiliate, rather than as a teaming subcontractor. While the protester presents several examples of language in TBRS's proposal which it views as demonstrating that TBRS's proposed affiliate met the solicitation's definition for teaming subcontractor, it has failed to demonstrate, or even argue, that the agency was prohibited from evaluating Bantrel as an affiliate.

For example, the protester points to language in TBRS's proposal referring to Bantrel as part of TBRS's "Optimal Team." Comments at 13 (citing AR, Tab C.1, TBRS Vol. II, Tech. & Mgmt. Proposal at 14, Figure 2-1. In addition, the protester points to references to Bantrel in TBRS's technical and management proposal. *Id.* at 12-14. The protester asserts that these references demonstrate that Bantrel will perform work "necessary to enhance [TBRS's] Technical and Management Proposal or its ability to meet delivery requirements in the PWS," which according to the protester, meets the RFP's definition of teaming subcontractor. Comments at 13. The protester therefore maintains that "by including Bantrel's name in volume II of its proposal more than 40 times (including a detailed discussion of Bantrel's past performance and references to other Bantrel capabilities and innovations)," TBRS was proffering Bantrel as a teaming subcontractor for the purposes of its proposal and evaluation. *Id.* at 14.

We disagree. While the RFP instructed offerors not to include the names of non-teaming subcontractors in their proposals, the solicitation does not include a similar prohibition on referencing or relying on the proposed resources of an affiliate. Rather,

App. A, LLC Operating Agreement, Schedule of LLC Members (stating that BNI owns "100%" of the membership interests of the LLC); *Id.* at 111-114, App. B, LLC Operating Agreement (providing that BNI has the sole authority to appoint and remove any manager(s) of TBRS, and to designate the chair of the board of managers).

as noted previously, the solicitation provided that, for “newly formed entities” the offeror may rely upon the resources of a parent, member, or affiliated company to perform the contract. RFP at 353. The record reflects that TBRS is a newly formed entity devoted to competing for and executing the WIPP contract and that it intends to rely, in part, on the resources of its affiliate in performance. See AR, Tab C.1, TBRS Vol. II, Tech. & Mgmt. Proposal at 3; Tab C.3, TBRS Vol. I, Offer & Other Documents at 106. As discussed above, we find no basis to conclude that this was inconsistent with the terms of the solicitation.

The protest is denied.

Edda Emmanuelli Perez
General Counsel