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Decision

Matter of: Merrill Company- d/b/a Mission Support

File: B-421082; B-421082.2; B-421083; B-421083.2; B-421084; B-421084.2

Date: December 21, 2022

Alan Grayson, Esq., for the protester.

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., and Timothy Laughlin, Esq., Schoonover & Moriarty LLC, for R&M Government Services, Inc., the intervenor.

Michael J. O'Farrell, Jr., Esq., Department of Defense, for the agency.

Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is not an interested party to challenge the award of two out of three contracts where the solicitations provided for award to the offerors that submitted the lowest-priced, technically acceptable proposals, and where the protester does not challenge the evaluations of intervening proposals that were found technically acceptable and lower-priced than the protester's proposals.
2. Protest that the agency unreasonably found the awardee's proposal technically acceptable is denied where the evaluation was consistent with the solicitation criteria.
3. Protest that the agency should have found the awardee's proposal ineligible for award because it violated the solicitation's limitation on subcontracting clause is denied where the proposal did not take exception to the clause.
4. Protest that the agency unreasonably evaluated the realism of the awardee's proposed price is denied where the agency reasonably found that the proposed price was realistic based on exchanges with the awardee.
5. Protest that the agency unreasonably evaluated the awardee's past performance is denied where the agency considered negative information identified by the protester and reasonably concluded that the awardee's proposal merited a rating of acceptable.

6. Protest that the agency unreasonably found the awardee a responsible offeror is dismissed because our Office does not review affirmative determinations of responsibility, apart from exceptions not applicable here.

7. Protest that the contracting officer unreasonable failed to file a protest with the Small Business Administration challenging the awardee's size status is dismissed as untimely where the protester failed to diligently pursue its grounds of protest.

DECISION

Merrill Company - d/b/a Mission Support, a small business, of Clearfield, Utah, challenges the award of three contracts to R&M Government Services, Inc., also a small business, of Las Cruces, New Mexico, by the Department of Defense, Defense Logistics Agency (DLA), under solicitation Nos. SPRHA4-22-R-0009, SPRHA1-22-R-7001, and SPRHA1-22-R-7002¹, which were issued for A-10 aircraft parts. The protester argues that the award was improper because the agency's evaluation of the awardee's proposal and the award decision were unreasonable with regard to technical acceptability, compliance with the small business limitation on subcontracting clause, past performance, price realism, and responsibility. The protester also argues that the contracting officer unreasonably failed to file a protest with the Small Business Administration (SBA) challenging R&M's small business status.

We deny in part and dismiss in part the protests.

BACKGROUND

DLA issued three solicitations for center nacelles and doors² for A-10 aircraft, which are operated by the Department of the Air Force. On February 18, 2022, the agency issued solicitation No. 0009, which sought 32 each of left-hand and right-hand center nacelles, and anticipated the award of a fixed-price contract. AR (B-421082) Tab 3, RFP No. 0009 at 1, 11-12. On March 17, the agency issued solicitation No. 7001, which sought right-hand inboard and outboard doors, and anticipated the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract with a 5-year ordering period and an anticipated/maximum ordering quantity of 285 of each part at a fixed price. AR (B-421084), Tab 2, RFP No. 7002 at 1, 4. Also on March 17, the agency issued

¹ Each of the RFPs will be referenced by the last four digits of its solicitation number. B-421082 concerns RFP 0009; B-421083 concerns RFP 7001; and B-421084 concerns RFP 7002. Citations to the parties' briefings are to filings made in B-421082, unless otherwise noted.

² As relevant to these solicitations, a "center nacelle" is a structural housing for an aircraft engine that attaches to the airframe, and "doors" are the coverings that attach to the center nacelles and provide access to the engines. Protest at 2; Agency Report (AR) (B-421082), Tab 2, Acquisition Plan for Solicitation No. 0009 at 7.

solicitation No. 7002, which sought left-hand inboard and outboard doors, and anticipated the award of an IDIQ contract with a 5-year ordering period and an anticipated/maximum ordering quantity of 285 of each part at a fixed price. AR (B-421084), Tab 2, RFP No. 7002 at 1, 4. Each of the solicitations was set aside for small businesses.

The solicitations provided for award to the offeror that submitted the lowest-priced proposal that received ratings of acceptable under the technical and past performance evaluation factors. RFP at 74-75.³ The technical evaluation factor stated that an acceptable rating would be assigned if the offeror is an “approved source” for the part “on the closing date of the solicitation OR [the] contractor is an approved distributor providing parts manufactured by an approved source . . . on the closing date of the solicitation.” *Id.* at 75-76. For the past performance factor, the solicitation provided for the following ratings:

Acceptable

Based on the offeror’s performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort, or the offeror’s performance record is unknown.

Unacceptable

Based on the offeror’s performance record, the Government does not have a reasonable expectation that the offeror will be able to successfully perform the required effort.

Id. at 75.

For solicitation No. 0009, DLA evaluated proposals as follows:

	MISSION SUPPORT	R&M	OFFEROR 3	OFFEROR 4
Technical	Acceptable	Acceptable	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable	Acceptable	Acceptable
Evaluated Price	\$19,594,703	\$12,747,502	\$31,272,963	\$24,280,000

AR (B-421082), Tab 24, Source Selection Decision Document (SSDD) at 1.

³ Subsequent citations to the RFP are to amendment 6 of solicitation No. 0009 and refer to identical provisions in all three solicitations, unless otherwise noted.

For solicitation No. 7001, DLA evaluated proposals as follows:

	MISSION SUPPORT	R&M	OFFEROR 3	OFFEROR 4
Technical	Acceptable	Acceptable	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable	Acceptable	Acceptable
Evaluated Price	\$112,364,478	\$34,981,407	\$41,462,395	\$78,510,000

AR (B-421083), Tab 15, SSDD at 3.

For solicitation No. 7002, DLA evaluated proposals as follows:

	MISSION SUPPORT	R&M	OFFEROR 3	OFFEROR 4
Technical	Acceptable	Acceptable	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable	Acceptable	Acceptable
Evaluated Price	\$107,241,054	\$33,235,467	\$39,087,385	\$73,830,000

AR (B-421084), Tab 15, SSDD at 3.⁴

The contracting officer for solicitation 0009, who was the source selection authority (SSA) for that procurement, selected R&M's proposal for award because it was the lowest-priced, technically acceptable offer. AR (B-421082), Tab 24, SSDD at 2. The contracting officer for solicitation Nos. 7001 and 7002, who was the SSA for those procurements, selected R&M's proposals for each award because they were the lowest-priced, technically acceptable offers. AR (B-421083), Tab 15, SSDD at 3-4; AR (B-421084), Tab 15, SSDD at 3-4. DLA advised Mission Support of the awards on September 13 and provided a debriefing on September 15. Protest at 8-9. These protests followed. On September 19, Mission Support filed size status protests with the contracting officers concerning each of the three awards, which challenged R&M's status as a small business. Contracting Officer's Statement & Memorandum of Law (COS/MOL) at 9. The contracting officer forwarded these protests to SBA. *Id.* The protester states that SBA's review of the size protests is stayed pending the outcome of the protests before our Office. Protester's Notice of Related Proceedings, Oct. 12, 2022, at 1.

DISCUSSION

Mission Support challenges DLA's award of the three contracts to R&M based on the following six arguments: (1) the agency unreasonably found R&M's proposals technically acceptable; (2) the agency should have found R&M's proposals ineligible for award because they violated the solicitation's limitation on subcontracting clause;

⁴ Offerors 3 and 4 are not the same firms in all three competitions.

(3) the agency unreasonably found R&M's past performance acceptable; (4) the agency failed to evaluate the realism of R&M's proposed prices; (5) the contracting officers unreasonably found R&M to be a responsible offeror; and (6) the contracting officers failed to file protests with SBA challenging R&M's status as a small business.⁵ For the reasons discussed below, we conclude that the protester is not an interested party to challenge the awards to R&M under solicitation No. 7001 for right-hand doors (B-421083, B-421083.2) and solicitation No. 7002 for left-hand doors (B-421084, B-421084.2), and therefore dismiss these protests. For the remaining protest challenging the award under solicitation 0009 for nacelles, we find no basis to sustain the protest.

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. *22nd Century Techs., Inc.*, B-413210, B-413210.2, Sept. 2, 2016, 2016 CPD ¶ 306 at 8. An offeror's disagreement with the agency's evaluation judgment, without more, is insufficient to establish that the agency acted unreasonably. See *Vectrus Sys. Corp.*, B-412581.3 *et al.*, Dec. 21, 2016, 2017 CPD ¶ 10 at 3.

Interested Party Status for Awards under Solicitation Nos. 7001 and 7002

R&M argues that Mission Support is not an interested party to challenge the awards under solicitation Nos. 7001 and 7002 because for each competition, there were other offerors who submitted technically acceptable proposals with lower prices than the protester's technically acceptable proposals. Intervenor's Comments (B-421083) at 1-2; Intervenor's Comments (B-421084) at 1-2. We agree and therefore dismiss the protester's challenges to the awards under these two solicitations.

In order for a protest to be considered by our Office, the protester must be an interested party. 4 C.F.R. § 21.0(a). Where an intervening offeror would be in line for award ahead of the protester if the protester's challenge to the award were sustained, the intervening offeror has a greater economic interest in the procurement than the protester, and we therefore generally consider the protester's interest to be too remote for it to qualify as an interested party. *IAP World Servs., Inc.*, B-418735.3, B-418735.4, Apr. 30, 2021, 2021 CPD ¶ 212 at 5; *NCI Info. Sys., Inc.*, B-417685, B-417685.2, Sept. 23, 2019, 2019 CPD ¶ 344 at 8.

In both the 7001 and 7002 solicitations, two offerors other than R&M submitted proposals that were found technically acceptable and offered lower prices than

⁵ Mission Support also raises additional collateral arguments. Although we do not address each argument, we have considered all of the protester's contentions and find that none provides a basis to sustain the protest.

Mission's Support's proposal. AR (B-421083), Tab 15, SSDD at 3; AR (B-421084), Tab 15, SSDD at 3. Although the agency reports for the protests challenging the awards under solicitations 7001 and 7002 included the award decisions and information about the other offerors, the protester did not challenge the evaluation of these other offerors' proposals.

Mission Support contends that it is an interested party to challenge the awards to R&M, even though other offerors' technically acceptable proposals would be in line for award over its own proposals under the 7001 and 7002 solicitations. Supp. Comments (B-421083) at 9-11; Supp. Comments (B-421084) at 9-11; Response to Questions from GAO, Nov. 22, 2022, at 1-2. In general, the protester contends that there is no requirement to challenge an intervening offeror's proposal until that offeror is the new awardee. The protester's position, however, ignores the definition of interested party in our regulations and abrogates our Office's longstanding principle that a protester does not have a direct economic interest to challenge the award of a contract if the result of the protester's successful argument would place a different party in line for award.

As a related matter, the protester argues that because DLA has not made award to any of the offerors in line for award ahead of Mission Support, the protester has not had an opportunity to file a size status protest with SBA concerning these other offerors. Our Office, however, does not consider size status protests. 4 C.F.R. § 21.5(b)(1). For this reason, the filing of a size protest with SBA--or the absence of an opportunity to file such a protest--does not affect a firm's interested party status under our Bid Protest Regulations.

Finally, Mission Support argues that although its outside counsel was provided information concerning the other offerors in the agency reports, the company itself was not provided this information because it was subject to the protective orders issued by our Office at the protester's request. The protester contends that because the company cannot access protected information and therefore does not know the identity of the other offerors, it cannot be found to lack interested party status. Our Office has explained that outside counsel for a protester stands in the shoes of the client where information in the record is covered by a protective order and counsel cannot obtain the benefit of his or her client's input. *Motorola Solutions, Inc.*, B-409148, B-409148.2, Jan. 28, 2014, 2014 CPD ¶ 59; *Columbia Research Corp.*, B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184. Because Mission Support's outside counsel had access to this information, we do not find that the protester is excused from the interested party provisions of our Bid Protest Regulations.

For these reasons, we find that even if the protester's challenges to the awards to R&M under solicitation Nos. 7001 and 7002 had merit, Offeror 3 and Offeror 4 would be in line for both awards ahead of Mission Support. We therefore conclude that Mission Support is not an interested party to challenge the awards to R&M under those two solicitations, and dismiss protests B-421083 and B-421084. The remainder of this decision concerns protest B-421082, which challenges DLA's award to R&M under solicitation No. 0009.

Technical Evaluation Factor

Mission Support argues that DLA improperly found R&M's proposal acceptable under the technical evaluation factor. For the reasons discussed below, we find no basis to sustain the protest.

The RFP advised that the technical factor would be evaluated on an acceptable/unacceptable basis. RFP at 74-75. The sole criterion for acceptability was whether an offeror was listed as an "approved source" for the nacelles by the Air Force Material Command (AFMC) prior to the solicitation closing date. *Id.* at 75.

RFP amendment No. 1 identified Mission Support as an approved source for the nacelles. AR, Tab 4, RFP amend. 1 at 2. Prior to the solicitation closing date, R&M submitted a source approval request (SAR) for the nacelles, which was approved by the Air Force. COS/MOL at 7. DLA issued an amended solicitation that listed R&M as an approved source for the nacelles. AR, Tab 5, RFP amend. 2 at 2. Based on Mission Support's and R&M's statuses as approved sources, the agency found both offerors' proposals technically acceptable. AR (B-421082), Tab 24, SSDD at 1.

Mission Support does not dispute that R&M was listed as an approved source for the nacelles by AFMC prior to the solicitation closing date. The protester contends, however, that R&M's proposal should not have been found technically acceptable because the firm does not have the capability to perform the work and is instead a "front" for its proposed subcontractor, Kaman Aerospace Corporation (Kaman), which is a large business that is not eligible for award under this small business set-aside solicitation. Protests at 8-9, 10-14; Comments & Supp. Protest at 1-13. These arguments relate to the awardee's compliance with the RFP's small business limitation on subcontracting clause and the contracting officer's affirmative determination of the awardee's responsibility, which we address separately below.

Aside from these arguments, any other challenge to the evaluation of the technical acceptability of proposals is untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals must be filed prior to receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). For example, the solicitation's technical factor did not provide for the evaluation of SARs, as the protester contends. Rather, the RFP provided that a proposal would be acceptable if the offeror was listed as an approved source by AFMC prior to the solicitation closing date. Thus, to the extent the protester believes that any other criteria should have been used to evaluate technical capability--such as an in-depth review of the offeror's SAR--such arguments are untimely and we dismiss them. *See id.*

Limitation on Subcontracting Clause

Mission Support contends that R&M lacks the manufacturing capability to perform the contract, and will rely on the facilities of its proposed subcontractor Kaman to perform the work. Protest at 7-8; Comments & Supp. Protest at 3-8. The protester argues that this reliance will cause the awardee to violate the solicitation's limitation on subcontracting clause, and that the agency should have rejected its proposal as unacceptable. For the reasons discussed below, we find no basis to sustain the protest.

The solicitation included the Federal Acquisition Regulation (FAR) limitation on subcontracting clause, which provides that for a contract for supplies under a small-business set-aside, the contractor must not "pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities." RFP at 35-36; FAR clause 52.219-14(e)(2).

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility. *Spectrum Sec. Servs., Inc.*, B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. A proposal need not affirmatively demonstrate compliance with the limitation on subcontracting clause. See *Dorado Servs., Inc.*, B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. Rather, such compliance is presumed unless specifically negated by other language in the proposal. See *Express Med. Transporters, Inc.*, B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability--a matter our Office does review. *TYBRIN Corp.*, B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

DLA did not identify any areas of R&M's proposal that expressly took exception to the limitation on subcontracting clause. See COS/MOL at 7. The agency nonetheless asked R&M in an Evaluation Notice (EN) to address whether it would comply with the limitation on subcontracting clause, as follows: "Please confirm R&M is performing work for at least 50% of the cost of manufacturing the supplies, NOT including the cost of materials." AR, Tab 18, R&M EN Response No. 4 at 1. The awardee responded as follows: "R&M confirms it will be performing work for at least 50% of the cost of manufacturing the A-10 center nacelle. This does not include the cost of materials." *Id.*

In another EN, the agency asked: "What percentage of this potential contract will R&M be doing?" AR, Tab 15, R&M EN Response No. 1 at 1. The awardee responded: "For this nacelle contract R&M would be performing approximately [DELETED]% of this potential contract. This includes [DELETED]." *Id.* The agency concluded that the awardee's proposal did not take exception to the limitation on subcontracting clause. See COS/MOL at 12; AR, Tab 23, Source Selection Evaluation Board Proposal Analysis Report (PAR) at 5.

Mission Support does not cite any part of the awardee's proposal that takes exception to the clause. Rather, the protester generally contends that the awardee will be unable to perform the contract without violating the clause. See Protest at 7-8; Comments & Supp. Protest at 3-8. For this reason, the protester argues that the agency should have disregarded the awardee's responses regarding the percentage of work it will perform. Comments & Supp. Protest at 3-8. On this record, we find that the protester's argument that the awardee's proposal took exception to the limitation on subcontracting clause has no merit, and therefore find no basis to sustain the protest. See *TYBRIN Corp.*, *supra*. To the extent the protester argues that the awardee will be unable to perform more than 50 percent of the work in the manner required by the clause, we view this as a matter of responsibility, which we address below.

Past Performance Evaluation

Mission Support argues that DLA unreasonably found R&M's past performance acceptable, and therefore its proposal eligible for award. For the reasons discussed below, we find no basis to sustain the protest.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the evaluation criteria, or undocumented. *Fox RPM Corp.*, B-409676.2, B-409676.3, Oct. 20, 2014, 2014 CPD ¶ 310 at 3. An offeror's disagreement with an agency's evaluation, without more, does not demonstrate that those judgments are unreasonable. *Cape Envtl. Mgmt., Inc.*, B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8.

The RFP provided for evaluation of past performance on an acceptable/unacceptable basis. RFP at 75-76. The solicitation stated that the agency would "evaluate the Offeror's demonstrated record of performance on present/past efforts," and defined relevant performance as "production of aircraft parts." *Id.* at 75. The evaluation was to consider offerors' proposed subcontractors that will have "a critical role or major role in the requirement." *Id.* at 76. The solicitation further advised that "[t]he Government may use a variety of sources," including "interviews with Government or private sector sources, Contractor Performance Assessment Report (CPAR) data, Shared Data Warehouse [(SDW)], Federal Awardee Performance and Integrity Information Systems (FAPIS), and/or other sources of available information." *Id.* at 75.

DLA reviewed information from various sources for R&M and its proposed subcontractor Kaman, including the Defense Contractor Review List (DCRL), the SDW, the Supplier Performance Risk System (SPRS), and the FAPIS. COS/MOL at 8-9; AR, Tab 23, PAR at 2. The agency concluded based on this review that R&M's past performance merited a rating of acceptable. AR, Tab 23, PAR at 4.

Mission Support primarily argues that R&M and Kaman have negative past performance records that should have merited a rating of unacceptable. Comments & Supp. Protest

at 13-15. In particular, the records reviewed by the agency show that R&M has 15 open orders and is delinquent on three, and that Kaman's SPRS report reflects a red risk score (lowest 5 percent of possible scores), with eight corrective action requests, one corrective action plan, and one product deficiency report. AR, Tab 28, R&M Contractor Information Summary at 1; Tab 29, Kaman SPRS Report at 1-2.

DLA states that it reviewed all of the relevant information cited by the protester and concluded that R&M's proposal merited a past performance rating of acceptable. See COS/MOL at 8-9, 16. The agency notes that during the evaluation, the contracting officer made a memo to the file regarding Kaman's red risk score, explaining: "Kaman received a Supplier Risk score in the red. However, when the Contracting Officer expanded the information and researched further the red risk score is related to minimal information. There is not enough information to warrant a negative rating for Kaman." AR, Tab 22, Contracting Officer (CO) Memorandum to File, June 14, 2022, at 1.

On this record, we do not agree with Mission Support that the information reviewed by DLA concerning R&M's past performance precluded the assignment of a rating of acceptable for past performance. Mission Support's arguments rely on the same information reviewed by the agency, and contend, in essence, that the agency could not have reasonably found the information to merit an acceptable rating. We conclude that Mission Support's disagreement with DLA's judgment does not provide a basis to sustain the protest. See *Cape Envtl. Mgmt., Inc.*, *supra*.

Price Evaluation

Mission Support argues that DLA failed to evaluate the realism of R&M's proposed price. DLA contends that the solicitation did not require a price realism evaluation, but also states that the agency in any event evaluated the realism of the awardee's price. For the reasons discussed below, we agree with the protester that the solicitation required a price realism evaluation, but agree with the agency that its evaluation reasonably found the awardee's price realistic.

When awarding a fixed-price contract, an agency is generally only required to determine whether the offered prices are fair and reasonable. FAR 15.402(a). An agency may, however, conduct a price realism analysis in awarding a fixed-price contract for the limited purpose of assessing whether an offeror's or vendor's low price reflects a lack of technical understanding or performance risk. *Id.*, FAR 15.404-1(d)(3); *Inquiries, Inc.*, B-417415.2, Dec. 30, 2019, 2020 CPD ¶ 54 at 16. Absent a solicitation provision advising offerors that the agency intends to conduct a price realism analysis for the award of a fixed-price contract, agencies are neither required nor permitted to conduct such an analysis. *Emergint Techs., Inc.*, B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6.

Even where a solicitation does not expressly require a price realism evaluation, we will conclude that such an evaluation is required where the solicitation states that the agency will review prices to determine whether they are so low that they reflect a lack of

technical understanding, and advises offerors that the agency could reject proposals or assign technical risk based on this evaluation. *NJVC, LLC*, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8; *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Where an agency is required to conduct a price realism evaluation, the manner and depth of that evaluation is a matter within the sound exercise of the agency's discretion and our review is limited to determining whether the evaluation was reasonable, consistent with the terms of the solicitation, and adequately documented. *GiaCare & MedTrust JV, LLC*, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321 at 7.

The RFP's price evaluation factor stated that the agency would evaluate prices for completeness, reasonableness, and balance. *Id.* at 76. Solicitation No. 0009, but not solicitation Nos. 7001 and 7002, also contained the following provision concerning unrealistic proposals:

1.3 Rejection of Unrealistic Offers

The Government may reject any proposal that is evaluated to be unrealistic in terms of program commitments, contract terms and conditions, or an unrealistically high/low price when compared to Government estimates, such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risks of the program.

Id. at 74.

When a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Constructure-Trison JV, LLC*, B-416741.2, Nov. 21, 2018, 2018 CPD ¶ 397 at 3. We begin our review of a dispute concerning the meaning of a solicitation term by examining the plain language. *Bluehorse Corp.*, B-414809, Aug. 18, 2017, 2017 CPD ¶ 262 at 5.

We agree with the protester that the plain language of the provision above concerning unrealistic offers required the agency to perform a price realism evaluation, as it stated that an "unrealistically high/low price" may be rejected. See *NJVC, LLC, supra*; *DynCorp Int'l LLC, supra*. Despite the agency's position in this protest that a price realism analysis was not required, the record shows that the price evaluation addressed R&M's ability to perform the work at the price it proposed.

DLA identified "concerns about [R&M] being able to perform the contract at the quoted price." AR, Tab 25, Price Negotiation Memorandum (PNG) at 3. Based on these concerns, the contracting officer issued an EN requesting that R&M address the following questions:

[Question] 1. Please briefly explain how the prices were developed for this effort

[Answer] R&M did a [DELETED] price estimate. In this effort [DELETED]. This [DELETED], and the complete price is calculated using the company overhead rates.

[Question] 2. Confirm the pricing submitted is accurate and that R&M is confident in the ability to provide these parts at the quoted unit prices.

[Answer] The pricing submitted by R&M is accurate and we are confident in R&M's ability to provide these parts at the quoted price. [DELETED]. R&M believes the only risk to the pricing is a price change of the forgings and the government has already stated that an economic price adjustment for this source would be allowed.

[Question] 3. Confirm the contractor understands pricing cannot be adjusted after contract award (with the exception of the [economic price adjustment] for forgings only).

[Answer] R&M understands that the pricing for this contract would be fixed and that only an economic adjustment for the forgings would be considered.

[Question] 4. Confirm the contractor has all of the data and drawings and fully understands this requirement.

[Answer] R&M confirms it has all the data and drawings and fully understands the requirements as stated in the solicitation for center Nacelle.

AR, Tab 17, R&M EN Response No. 3 at 1.

The agency concluded that R&M's responses addressed the concerns regarding its proposed price, as follows:

R&M sufficiently addressed all of the questions included in EN R-3. The way R&M built their pricing has solid evidence that the prices would be reasonable. R&M also confirmed they understand this effort and that the pricing cannot be adjusted after award. They also confirmed they have all the correct data and drawings for this effort.

AR, Tab 25, PNM at 3.

Mission Support does not dispute that the agency requested additional information from the awardee about its proposed price, nor does the protester specifically challenge the awardee's response. Instead, the protester contends that the agency could not have reasonably found the awardee's price of \$12,747,502 realistic because it was lower than the government estimate of \$33,559,300. Comments & Supp. Protest at 15. The protester argues that the agency's acceptance of the awardee's responses to its questions improperly "remove[d] the Independent Government Cost Estimate from the evaluation process." *Id.* at 17.

As our Office has explained, even where a solicitation provides for a price realism evaluation, there is no bar to an offeror proposing--and an agency accepting--a below-cost price. *Optex Sys., Inc.*, B-408591, Oct. 30, 2013, 2013 CPD ¶ 244 at 5-6. Moreover, agencies are not required to reject a proposed price as unrealistic solely because it is below the government estimate. *Engineering Constr. Servs., Inc.*, B-310311.2, Dec. 12, 2007, 2008 CPD ¶ 6 at 4. On this record, we conclude that the protester's disagreement with the manner in which the agency sought information about the realism of the awardee's proposed price, and the agency's conclusions regarding the awardee's responses, does not provide a basis to sustain the protest.⁶

Affirmative Determination of Responsibility

Mission Support argues that DLA improperly found R&M to be a responsible offeror because the agency did not reasonably assess the awardee's financial resources and capability to perform the work. For the reasons discussed below, we find no basis to sustain the protest.

The FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR 9.103(b). The areas for

⁶ Mission Support also argues that the agency failed to assess whether the awardee's proposal reflected a risk of buying-in, which is defined as "an improper business practice" that involves "submitting an offer below anticipated costs, expecting to- (1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or (2) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract." FAR 3.501-1. The FAR explains that "[b]uying-in may decrease competition or result in poor contract performance," and that contracting officers are required to "take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of- (1) Change orders; or (2) Follow-on contracts subject to cost analysis." *Id.* at 3.501-2. The protester does not explain why, in the absence of a specific solicitation provision, the FAR required the agency to evaluate proposals to address the risk of improper post-award modification or follow-on contract pricing. In any event, the agency's price realism evaluation clearly addressed the awardee's understanding that post-award price adjustments would not be permitted, absent specified exceptions. See AR, Tab 17, R&M EN Response No. 3 at 1; Tab 25, PNG at 3. We therefore find no basis to sustain the protester's arguments concerning the buy-in provisions of FAR section 3.501-1

consideration include whether a prospective awardee has adequate financial resources to perform the contract, or the ability to obtain them; has the ability to comply with the required schedule; a satisfactory performance record; has a satisfactory record of integrity and business ethics; has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and is otherwise qualified and eligible to receive an award under applicable laws and regulations. *Id.* at 9.104-1. As relevant here, DLA has issued a supplement to the FAR concerning responsibility, in the Defense Logistics Acquisition Directive (DLAD). See DLAD, www.acquisition.gov/dlad.

Determinations of responsibility involve subjective business judgments that are within the broad discretion of the contracting agency. *ExecuTech Strategic Consulting, LLC; TRI-COR Indus., Inc.*, B-410893 *et al.*, Mar. 9, 2015, 2015 CPD ¶ 103 at 11. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer failed to consider available relevant information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible, or otherwise violated statute or regulation. *Id.*; *FCi Fed., Inc.*, B-408558.4 *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308 at 7. Where the record shows that the contracting officer was aware of the facts or allegations identified by the protester, we will generally not review an allegation that the contracting officer should have found the awardee nonresponsible based on those facts or allegations. See *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 19-20.

Mission Support argues that the contracting officer improperly ignored information regarding R&M's financial resources, citing a report issued by Dun & Bradstreet (D&B)⁷ that the protester contends contains negative information regarding the awardee's finances and credit. Protest at 5; Protest exh. 1, D&B Report for R&M, Sept. 16, 2022. In particular, the protester notes that the D&B report cites a "Max. Credit Recommendation" of \$2,000 for the awardee. *Id.* Based on what Mission Support contends is a limit on R&M's ability to obtain credit, the protester argues that the awardee will be unable to finance the work and perform the contract.

The contracting officer states that she reviewed the following sources of information in assessing the awardee's financial resources, which were also consulted as part of the past performance review: DCRL, SPRS, FAPIIS, and SDW. Supp. Decl. of Contracting Officer, Nov. 22, 2022, at 1. With regard to the D&B report cited by the protester, the contracting officer states that it is "not a document that I would typically review in making" affirmative determinations of responsibility. *Id.* at 2. The agency and intervenor both note that the D&B report's recommendation of a \$2,000 credit limit for R&M is not in fact an actual credit limit imposed on the firm by any bank or financial

⁷ D&B is a commercial reporting service that makes its reports available to the public for evaluating the financial positions of companies.

institution. For this reason, the contracting officer states in response to the protest that “I do not consider the D&B Report’s “maximum credit recommendation” for R&M in the amount of \$2,000.00 to be a credible estimate of R&M’s available credit, credit worthiness, or financial capability.” Supp. Decl. of Contracting Officer, Nov. 22, 2022, at 2.

The record shows that the contracting officer considered the awardee’s financial resources by consulting a number of relevant sources of data. The protester does not demonstrate that the contracting officer was required to consider the D&B report, or that the report constitutes information that the contracting officer could not reasonably have failed to consider. We therefore find no basis to conclude that the contracting officer failed to consider significant information relevant to R&M’s responsibility. To the extent the protester disagrees with the conclusions drawn by the contracting officer based on the information she reviewed, this is not a matter our Office considers. See 4 C.F.R. § 21.5(c); *DynCorp Int’l LLC, supra*.

Next, Mission Support argues that the contracting officer failed to follow the responsibility provisions of DLAD subpart 9.1, which address guidance for evaluating prospective awardees in connection with the DCRL. Comments & Supp. Protest at 9-13. The DLAD states the following regarding the DCRL:

The Defense Contractor Review List (DCRL) is an enterprise-wide tool for use by contracting officers to identify and communicate contractor performance, capability, and integrity issues for making determinations of responsibility and the effective administration of contracts. The DCRL has Special Attention Reason Codes that describe the basis for being on the list and Treatment Codes that provide recommended actions to contracting officers for mitigating risk. The DCRL includes contractors identified in [the System for Award Management (SAM)] as debarred, suspended, proposed for debarment, or otherwise ineligible for award. SAM data takes precedence over DCRL data.

DLAD 9.100.

The protester argues that the DLAD provisions are a “higher set of standards for the responsibility determination” than the standards set forth in FAR subpart 9.1. Comments & Supp. Protest at 9. The protester contends that the contracting officer’s responsibility determination was not reasonable in light of what the protester maintains are heightened standards set forth under the DLAD and DCRL regarding the evaluation of a prospective awardee’s financial resources and the circumstances under which preaward surveys are required. *Id.* at 11-12.

The contracting officer states that she considered information from the DCRL in determining R&M’s responsibility, and the record also shows that the agency reviewed the DCRL in finding the awardee’s past performance acceptable. See COS/MOL at 8-9. Apart from these assessments, however, the agency disputes what the DLAD requires

and whether the actions the protester contend are required under the DLAD. Supp. COS/MOL at 3-4.

We conclude that the protester's arguments do not provide a basis for our Office to review this matter. To the extent the protester contends that the DLAD responsibility provisions set forth higher or more specific requirements for a responsibility determination as compared to the FAR, such assessments nonetheless concern offeror responsibility and are therefore not matters that our Office reviews, as the protester has not demonstrated that the agency failed to consider the information on the DCRL. See 4 C.F.R. § 21.5(c). We therefore dismiss the protester's arguments regarding the agency's affirmative determination of responsibility for R&M.

Failure to File a Size Status Protest

Finally, Mission Support argues that the contracting officer unreasonably failed to file a protest with SBA challenging R&M's small business size status. Comments & Supp. Protest at 18-20. We dismiss this argument as untimely.

DLA advised Mission Support of the award to R&M on September 13, and provided a debriefing on September 15. Protest at 8-9. Mission Support filed a size protest with the contracting officer on September 19 challenging R&M's status as a small business and its eligibility to receive the award, and the contracting officer forwarded the size protest to SBA. COS/MOL at 9.

DLA filed its report responding to the protest filed with our Office on October 20. On October 31, Mission Support filed its comments and a supplemental protest arguing that the contracting officer unreasonably failed to file a size protest with SBA. Comments & Supp. Protest at 18-21. The protester argues that the supplemental argument is timely because it was filed within 10 days of receipt of the agency report, which the protester contends "disclosed" the basis for the protest. *Id.* at 10. In response to questions from our Office, however, the protester acknowledges that the agency report did not specifically state that the contracting officer had not filed a size status protest. Protester's Response to GAO Questions, Nov. 28, 2022, at 2. In other words, the protester did not learn any new information between its debriefing on September 15 and the filing of its supplemental protest on October 31.

Our Bid Protest Regulations provide that a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of its basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). A protester may not passively await information that supports its protest. Rather, a protester has an affirmative obligation to diligently pursue such information and a protester's failure to utilize the most expeditious information-gathering approach under the circumstances may constitute a failure to meet its obligation. *Bannum, Inc.*, B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 5; *Automated Med. Prods. Corp.*, B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3. Further, a protest must "[s]et forth all information establishing the timeliness" of its arguments. 4 C.F.R. § 21.1(c)(6).

Here, Mission Support clearly knew of its grounds for challenging R&M's small business size status as of September 19, when it filed its size protest with the contracting officer. The protester did not seek information as to whether the contracting officer had independently filed a protest with SBA challenging R&M's small business size status, prior to the filing of its supplemental protest with our Office on October 31. We find that the protester failed to diligently pursue information that could have supported its supplemental protest argument, and that the argument was filed more than 10 days after the protester knew or should have known of its basis. We therefore dismiss this supplemental argument.⁸

The protests are denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

⁸ Because we find this argument untimely, we need not address the agency's and intervenor's arguments that the contracting officer did not have an obligation to file a size protest under the circumstances here, and that the protester in any event could not have been prejudiced by the contracting officer's failure to file a size protest with SBA in light of the fact that Mission Support already filed its own size protest with SBA.