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Decision

Matter of: BC Site Services, LLC

File: B-420797.4; B-420797.5

Date: March 21, 2023

Robert J. Symon, Esq., and Lisa A. Markman, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Clark Bartee, Esq., Department of the Army, for the agency.

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DIGEST

1. Protest that the agency treated offerors unfairly in selecting which offerors were invited to participate in second phase of the competition is denied where the agency's treatment of offerors was reasonable and consistent with the solicitation.
 2. Protest challenging the agency's exchanges with offerors is sustained where the record shows that the agency engaged in discussions, but the agency's discussions with the protester were not meaningful.
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DECISION

BC Site Services, LLC (BCSS), a small disadvantaged business of Carrollton, Georgia, protests its exclusion from consideration for award under request for proposals (RFP) No. W912HY21R0012, issued by the Department of the Army, Corps of Engineers (Corps) for horizontal construction in the Corps's Galveston District and Southwestern Division. The protester challenges the agency's failure to include BCSS as one of the most highly rated offerors invited to the second phase of the competition, as well as the agency's evaluation of its proposal and conduct of exchanges with offerors.

We sustain the protest.

BACKGROUND

The Corps issued the RFP on an unrestricted basis, with a portion of the awards reserved for small businesses, on March 21, 2022, providing that offerors would "be

evaluated under the Two-Phase Design Build Process.”¹ Agency Report (AR), Exh. 4, RFP at 5, 20.² The solicitation contemplated award of indefinite-delivery, indefinite-quantity (IDIQ), multiple-award task order contracts (MATOCs) for 8-year terms to the offerors whose proposals were determined to represent the overall best value to the government, using a tradeoff process. *Id.* at 20-21. The RFP stated that the Corps intended to award “a target of 15” MATOCs “with the target of five (5) awards to Small Businesses for the Small Business Reserve[.]” *Id.* at 20. Task orders would be competed among the IDIQ contract holders, with the total value up to \$7 billion for the entire pool of contracts. *Id.* at 20-21.

For phase one of the competition, offerors were required to submit proposals to address the following evaluation factors, listed in descending order of importance: (1) past performance; (2) construction execution approach; and (3) organization / management team. *Id.* at 21-22. These evaluation criteria were the same for both unrestricted and small business reserve offerors, but the solicitation identified some different standards under the criteria for the small business reserve. *See, e.g., id.* at 29 (establishing the required bonding capacity of \$350 million for the unrestricted offerors, but reduced to \$50 million for the small business reserve). Small businesses were to be evaluated under the small business reserve standards unless offerors specifically opted, “as part of the proposal data/ acknowledgement sheet[.] a request to be evaluated by Unrestricted criteria standards and demonstrate[d] the capability to bond at least” \$350 million (*i.e.*, the required bonding capacity for unrestricted offerors).³ *Id.* at 20.

Although offerors were “cautioned to put forth their best efforts” in phase one and instructed not to “assume that they will have an opportunity to clarify or correct anything in their proposal after submitting,” the agency reserved “the right to allow proposal revisions in accordance with FAR 15.306(d)(5) Exchanges with Offerors After Receipt of Proposals, if deemed necessary to determine the most highly qualified Offerors.” *Id.* at 30. Based on the evaluation of phase one proposals, the Corps would select the most highly qualified offerors and invite them to submit phase two proposals, with “a target” of 13 unrestricted and 7 small business offerors. *Id.* at 20.

The agency received 36 phase one proposals, including one submitted by BCSS--which competed under the small business reserve standards--by the April 21, deadline for

¹ Federal Acquisition Regulation (FAR) subpart 36.3 sets forth two-phase design-build selection procedures authorized for contracts for particular construction and architect-engineer services. FAR 36.300.

² Citations to the RFP are to the final amended version included at exhibit 4 to the agency report. Citations to the record refer to the documents’ Adobe PDF pagination.

³ According to the RFP, small businesses that opted to be evaluated under the unrestricted criteria would be evaluated under both the unrestricted and small business reserve standards “to determine the most highly qualified firms to be selected for Phase Two proposals,” but the small business would only be eligible for award of one MATOC. RFP at 29.

receipt of proposals. Contracting Officer's Statement (COS) at 3. From April 28 to May 4, the agency contacted nine of the offerors, including BCSS, providing them with "Evaluation Notices" for the offerors to address. AR, Exh. 7, Phase One Down Select Document at 73-76. After receiving the offerors' responses to the evaluation notices, the source selection evaluation board (SSEB) finalized its phase one evaluation and briefed the source selection authority (SSA). COS at 4. On May 24, the SSA identified 10 unrestricted offerors and 9 small business reserve offerors as the most highly rated, and invited only those 19 offerors to submit phase two proposals. AR, Exh. 7, Phase One Down Select Document at 82-83.

On June 3, BCSS filed a protest with our Office challenging the agency's evaluation and exclusion of BCSS from phase two of the competition. Protest at 11. The agency advised that it would take corrective action by conducting "a new evaluation of the protester's proposal based on the issues raised in the protest and consistent with the requirements in the solicitation." *BC Site Servs., LLC*, B-420797, B-420797.3, July 8, 2022 (unpublished decision). We dismissed the protest as academic. *Id.*

The agency subsequently conducted a new evaluation of BCSS's proposal and made a new down select decision. AR, Exh. 10, SSEB Report Addendum at 4-13; AR, Exh. 11, Phase One Down Select Document Addendum at 26. The SSA again did not include BCSS in the most highly rated offerors invited to phase two. AR, Exh. 11, Phase One Down Select Document Addendum at 24-26. This protest followed.

DISCUSSION

The protester challenges multiple aspects of the agency's evaluation of proposals, exchanges with offerors, and selection of offerors for the next phase of the competition. Although we do not specifically address all of BCSS's arguments, we have fully considered all of them and find that, except for the agency's conduct of discussions as discussed below, we find no other basis on which to sustain the protest.

Selection of Offerors to Participate in Phase Two

The protester argues first that, even accepting the agency's evaluation of proposals, it was unfair and inconsistent with the solicitation to exclude BCSS from proceeding to phase two of the competition. Supp. Protest at 2-9; Supp. Comments at 2-7. Specifically, the protester asserts that the agency was obligated to include BCSS in the next phase because the agency included an unrestricted offeror that, according to BCSS, had "the same overall [adjectival] ratings as BCSS [but] actually had a worse evaluation" because the agency had assigned more strengths and fewer weaknesses to BCSS, which competed under the small business standards. Supp. Protest at 3-4.

The agency responds that the solicitation provided for proposals to be evaluated under different standards, and that the evaluation of BCSS's proposal was reasonable in this regard. Supp. Memorandum of Law (MOL) at 2-3. We agree. In conducting procurements, agencies generally may not engage in conduct that amounts to unfair or

disparate treatment of competing vendors. *Arc Aspicio, LLC et al.*, B-412612 *et al.*, Apr. 11, 2016, 2016 CPD ¶ 117 at 13. It is a fundamental principle of federal procurement law that a contracting agency must treat offerors fairly and equitably and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *UltiSat, Inc.*, B-416809 *et al.*, Dec. 18, 2018, 2019 CPD ¶ 6 at 9. Agencies properly may, however, distinguish between offerors that are not "similarly situated" when the differentiation is reasonable and consistent with the solicitation and applicable regulations. *See, e.g., ADNET Sys., Inc. et al.*, B-408685.3 *et al.*, June 9, 2014, 2014 CPD ¶ 173 at 16 (denying protest alleging unfair treatment despite the agency conducting exchanges with only some offerors when the protester and other offerors were not "similarly situated").

Here, the solicitation provided that unrestricted offerors and offerors for the small business reserve would be evaluated separately and under different standards. RFP at 29 (describing the evaluation procedures for small business standards and unrestricted standards). The RFP was issued on an unrestricted basis with a small business reserve, and identified a target of 13 unrestricted offerors and 7 small business reserve offerors to proceed to phase two, and an ultimate target of 10 unrestricted and 5 small business reserve awards. RFP at 5, 20. Although the solicitation established the same three evaluation criteria for the unrestricted and small business reserve offerors, as the protester concedes, the RFP "did provide certain lower standards for the small business reserve" under the past performance and organization/management team evaluation factors. Supp. Protest at 2. The RFP was clear that small businesses like BCSS, which did not opt into the unrestricted standards, would "be evaluated under the Small Business Reserve standards," and that competition would be divided into offerors that were most highly rated according to the unrestricted standards and the small business reserve standards. RFP at 20, 29.

It is uncontested that the small business standards were "lower" than the unrestricted standards. *See* Supp. Protest at 2. As such, we find no merit in the protester's assertion that BCSS had an equivalent, or possibly superior, proposal based on a comparison of adjectival ratings and the number of strengths and weaknesses with an offeror being evaluated under the slightly different unrestricted standards. *See* Supp. Protest at 2. Nor do we find anything inherently unfair or inconsistent regarding the solicitation evaluation scheme differentiating between unrestricted offerors and small business reserve offerors.⁴ Ultimately, the protester disagrees with the agency's judgment regarding which offerors were the most highly rated, but the protester's disagreement with the agency's judgment, without more, does not establish that the agency's selection of offerors to continue in the competition was unreasonable or

⁴ To the extent that BCSS is challenging the propriety of evaluating offerors under the two different standards, this allegation is clearly untimely. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *AmaTerra Env't Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

otherwise improper. *Sterling Med. Assocs., Inc.*, B-418674, B-418674.2, July 23, 2020, 2020 CPD ¶ 255 at 8. Accordingly, there is no basis to sustain the protester's complaint that it should have been invited to phase two of the competition based on a comparison of the agency's evaluation of an offeror that was evaluated under different standards than the protester.

Exchanges Were Discussions

Turning to challenges to the agency's underlying evaluation, BCSS argues that the agency failed to engage in equal, meaningful discussions with the firm. Supp. Protest at 9-13; Supp. Comments at 7-22. As noted above, the record shows that the agency engaged in exchanges with the offerors. The protester asserts that these exchanges constituted discussions under FAR part 15, thereby triggering the requirement that those discussions be equal and meaningful. Supp. Protest at 9-13; Supp. Comments at 7-22. According to the protester, the agency's discussions with BCSS were neither fair nor meaningful because the agency failed to discuss all areas of BCSS's proposal requiring "modification, amplification, or explanation" and did not provide BCSS with an opportunity to revise its proposal. Supp. Protest at 12-13; Supp. Comments at 18-19.

In response, the agency asserts that FAR part 15 is inapplicable under phase one of the procurement. Supp. MOL at 4-5. The Corps argues that the solicitation was issued as a two-phase design-build selection under FAR subpart 36.3, and generally, "[o]nly phase two of the procurement is to be conducted in accordance with FAR part 15[.]" *Id.*; see also COS at 6; FAR 36.303-2. According to the agency, there were no limitations on the Corps's prerogative during phase one "to talk with, and obtain revised submissions from, some portion of the offerors to determine which should be included in the second phase of the competition." Supp. MOL at 4.

The protester contests that the procurement was conducted under FAR subpart 36.3. BCSS contends that "nowhere in the Solicitation did the Agency indicate that the procurement was to be conducted in accordance with FAR [sub]part 36.3" and instead referred repeatedly to FAR part 15. Supp. Comments at 8-9. We disagree. As our Office has explained, neither errors in terminology nor the inclusion of some FAR part 15 procedures transforms a solicitation so completely as to negate the nature of the procurement or render inapplicable the relevant procurement regulations. See *iTility, L.L.C.*, B-415274.3, Apr. 2, 2018, 2018 CPD ¶ 134 at 4-5 (concluding that the procedures of FAR subpart 8.4 applied to a procurement that sought to establish blanket purchase agreements and was restricted to Federal Supply Schedule contract holders even though the solicitation was called a request for proposals and incorporated various FAR part 15 competitive procedures). Here, the RFP sought to award MATOCs for horizontal construction using two-phase design-build selection procedures; those procedures that are wholly consistent with part 36 of the FAR, which "prescribes policies and procedures peculiar to contracting for construction and architect-engineer services." FAR 36.000. As such, we find that the solicitation was issued under--and the procurement was conducted pursuant to--FAR subpart 36.3. This, however, does not end our inquiry.

In asserting that FAR part 15 procedures do not apply to phase one of a procurement conducted under FAR subpart 36.3, the Corps relies on our decision in *Linc Government Services, LLC*, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128. In that decision, our Office acknowledged that “[t]here is nothing in the regulations concerning Phase [one] of the Design-Build Selection Procedures, FAR § 36.303-1, or the authorizing statute for these procedures, 10 U.S.C. § 2305a, that makes the discussions requirements of FAR part 15 applicable to the first phase of a FAR subpart 36.3 procurement,” and explained that we would “not import these requirements--absent a provision in the solicitation that does so.” *Linc, supra* at 7.

Here, unlike in *Linc*, there are multiple provisions in the solicitation that import the procedures of FAR part 15 into the procurement, such as the explanation that the Corps intends to award the MATOCs “through FAR Part 15, Two-Phase Design Build Process utilizing Best-Value Trade-Off Source Selection.”⁵ RFP at 103. Most importantly, under the description of the phase one evaluation, the solicitation advised offerors of the following:

9.1.5 The Government reserves the right to allow proposal revisions in accordance with FAR 15.306(d)(5) Exchanges with Offerors After Receipt of Proposals, if deemed necessary to determine the most highly qualified Offerors.

9.1.6 If the Government decides to hold discussions, a Competitive Range, a subjective determination of the most highly rated proposals, will be established and discussions will be held with only those Offerors in the competitive range. The Government will engage with each Offeror in the competitive range, in accordance with FAR 15.306 (d).

9.1.7 Upon conclusion of discussions, those Offerors considered the most highly rated, will be afforded an opportunity to submit Phase One proposal revisions for final evaluation.

Id. at 30. Given those solicitation provisions, which expressly import the discussions provisions of FAR part 15 to the agency’s phase one evaluation process, our analysis of the exchanges between the agency and offerors must therefore turn on the discussions standards applicable to negotiated procurements under FAR part 15.⁶ See *Academy*

⁵ See also RFP at 12 (incorporating by reference FAR provision 52.215-1, Instructions to Offerors--Competitive Acquisition); *id.* at 23, 27 (providing past performance submissions would be evaluated in “accordance with FAR 15.305(a)(2)”).

⁶ We note also that our decision in *Linc* does not support--as the Corps argues--the proposition that an agency’s prerogative to conduct exchanges with offerors during phase one is entirely unbounded. Supp. MOL at 4. In *Linc*, we did not object to the agency’s decision to exclude, from discussions, offerors that had been evaluated with a

Leadership, LLC, B-419705.2, Sept. 30, 2021, 2021 CPD ¶ 133 at 4-7 (analyzing communications under FAR part 15 where agency exercised discretion to conduct discussions in procurement conducted under simplified acquisition procedures for evaluation of commercial items); *Digital Sys. Grp., Inc.*, B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 5 (analyzing protest “by the standard applied to negotiated procurements” based on the solicitation’s reliance on the procedures of negotiated procurements).

Indeed, arguing in the alternative, the agency asserts that the exchanges the Corps conducted with the offerors did not constitute discussions, even if FAR part 15 procedures applied during phase one. Supp. MOL at 3-5. Rather, the Corps contends that the exchanges were “communications letters with specific purposes to address issues such as ambiguities in the proposals or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes) [allowed] by and generally consistent with FAR 15.306(b)(3)[.]”⁷ *Id.* at 4-5. According to the agency, the communications letters “clearly indicat[ed] that the type of exchange being conducted was ‘communications,’ not discussions,” and did not rise to the level of discussions because the Corps did not establish a competitive range or allow offerors to revise their proposals. *Id.* at 4-5.

The FAR describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated procurements. FAR 15.306. Section 15.306(b)(2) of the FAR permits communications with offerors prior to the establishment of a competitive range that enable the government to obtain information necessary to enhance the government’s understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the government’s evaluation process. This same FAR section also states that such communications may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal or otherwise revise the proposal. *Id.*

rating of marginal or lower on an evaluation factor. *Linc, supra* at 7. Although, “no provision in 10 U.S.C. § 2305a or FAR subpart 36.3” specifically limits an agency’s ability, during phase one, to communicate with, and obtain revised submissions from, offerors “to determine which should be included in the second phase of the competition,” *id.*, an agency must always treat all competitors equitably and fairly. *UltiSat, Inc., supra* at 9.

⁷ Section 15.306(b)(3) of the FAR explains that *if a competitive range is to be established*, these types of communications are “for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range,” and that such communications “shall not provide an opportunity for the offeror to revise its proposal. . . .” FAR 15.306(b)(3). The agency does not explain--nor is it apparent to us--why this provision would support its arguments because, as discussed below, it is the agency’s position that it never established, nor intended to establish, a competitive range.

Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *Tipton Textile Rental, Inc.*, B-406372, May 9, 2012, 2012 CPD ¶ 156 at 12; *Alliant Enter. JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5; see FAR 15.306(d). It is the actions of the parties that determines whether discussions have been held and not merely the characterization of the communications by the agency. *Tipton Textile Rental, Inc.*, *supra*. In situations where there is a dispute regarding whether communications 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. *Ranger Am. of the Virgin Islands, Inc.*, B-418539, B-418539.2, June 11, 2020, 2020 CPD ¶ 194 at 9.

Here, the record shows that the RFP's instructions included a variety of required submissions. In addition, the RFP expressly advised offerors that "[f]ailure to include all required information may cause the proposal to be considered non-responsive and not considered further for award." RFP at 10. Among other requirements, offerors were instructed to submit "a letter of commitment from your insurance company or surety, signed by an authorized agency of that firm that identifies your surety, and bonding capacity to include both the dollar magnitude and the maximum duration of any single project/task order to be issued under the contract." *Id.* at 29.

The record shows that, while it was still evaluating proposals in phase one, the agency contacted nine of the offerors, including BCSS, with "Evaluation Notices" (ENs) for the offerors to address. AR, Exh. 7, Phase One Down Select Document at 73-76. For example, regarding the solicitation's minimum bonding requirement, the Corps requested a letter of commitment in an EN for one small business offeror:

1. RFP AND PROPOSAL REFERENCES

a. RFP: section 00 22 10 para 8.1.2 states "Submit a letter of commitment from your insurance company or surety, signed by an authorized agent of that firm that identifies your surety, and bonding capacity to include both the dollar magnitude and the maximum duration of any single project/task order to be issued under the contract."

b. PROPOSAL: Volume 1, TAB D, and page 2 of 132 the Table of Contents

2. REASON FOR SUBMISSION:

In reviewing your proposal, the evaluators saw on page 2 of 132 the Table of Contents which stated "TAB D – Factor 3 – Organization / Management Team - ...D.2 Bonding Capacity Letter". However, there is no letter of commitment that specifies the bonding capacity as required.

3. STATEMENT FOR CLARIFICATION:

Please provide the letter of commitment verifying your bonding capacity.

Supp. AR, Tab C, [DELETED] Evaluation Notice. In response, the offeror submitted the required bonding capacity letter, and the small business offeror was then evaluated with a rating of acceptable under the organization / management team evaluation factor.⁸ Supp. AR, Tab C, [DELETED] Response; AR, Exh. 7, Phase One Down Select Decision at 74, 78. After this exchange, the agency identified the offeror's bonding capacity as a strength in the offeror's proposal. AR, Exh. 7, Phase One Down Select Decision at 57.

In short, the record demonstrates that the agency asked a small business reserve offeror to provide essential information necessary for the agency to determine the acceptability of the offeror's proposal. Although the agency denies that it conducted discussions because offerors were not permitted to revise their proposals, the record demonstrates otherwise. In this regard, certain offerors were provided with an opportunity to revise proposals by submitting additional material information for inclusion in their proposals in order to make their proposals acceptable. Accordingly, we conclude that the agency engaged in discussions here.⁹ *Global Language Ctr.*, B-413503.8, June 1, 2017, 2017 CPD ¶ 238 at 6 (sustaining protest alleging unequal discussions where agency allowed one offeror to submit required pricing information).

⁸ The agency also issued ENs to small business offerors about their cost accounting systems. Although the solicitation required unrestricted firms to have certified cost accounting systems, this requirement was optional for small business offerors. See AR, Exh. 7, Phase One Down Selection Phase One Down Select Document at 73-74; RFP at 22-23. For example, with regards to one small business offeror, the agency quoted the RFP's definition of acceptable evidence of a certified cost accounting system and noted that, although the offeror's proposal referred to "separately attached Accounting Supplemental Documents," no documents were provided. Supp. AR, Tab C, [DELETED] Evaluation Notice at 1. The small business offeror responded, describing its accounting system and attaching the missing audit report. Supp. AR, Tab C, [DELETED] Response at 1-2. The agency subsequently concluded that the small business offeror "provided the required documentation . . . including an adequate accounting system." AR, Exh. 7, Phase One Down Selection Document at 71, 74.

⁹ The agency's insistence that it did not create a competitive range does not affect our conclusion in this regard. See Supp. MOL at 3-5. The failure to establish a competitive range before conducting discussions is not dispositive on the inquiry into whether the agency's exchanges constituted discussions; it simply means that any discussions must be conducted with all offerors. See *Rice Sols., LLC*, B-420475, Apr. 25, 2022, 2022 CPD ¶ 102 at 10 ("Because no competitive range had been established, the agency was required to conduct discussions with all offerors.").

Discussions With BCSS Were Not Meaningful

Because, as discussed above, the agency conducted discussions, availing itself of negotiated procedures under FAR part 15, the agency was obligated to afford all offerors remaining in the competition an opportunity to engage in meaningful discussions. *International Waste Indus.*, B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5; *ERIE Strayer Co.*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4. To be meaningful, discussions must lead the offeror into those areas of its proposal that require modification, amplification, or explanation. *DynCorp Int'l LLC*, B-409874.2, B-409874.3, May 13, 2015, 2015 CPD ¶ 348 at 6. At a minimum, the agency must discuss all deficiencies, significant weaknesses and adverse past performance information to which the offeror has not had an opportunity to respond.¹⁰ FAR 15.306(d)(3); *Sunglim Eng'g & Constr. Co., Ltd.*, B-419067.3, Aug. 6, 2021, 2021 CPD ¶ 278 at 5. In connection with the requirement that discussions be meaningful, offerors may not be treated unequally and discussions must be tailored to each offeror's proposal. *DynCorp Int'l LLC*, *supra* at 9.

Here, the agency did issue an EN to BCSS, but that EN was limited to asking BCSS to confirm its corporate organization as a limited liability company and to submit the associated articles of organization and operating agreement; BCSS confirmed and addressed the agency's stated concerns. Resp. to Req. for Documents, Jan. 11, 2023, at 800-01; AR, Exh. 7, Phase One Down Select Document at 75-76. The agency does not contend that this EN met its obligation to conduct meaningful discussions with BCSS; to the contrary, the agency steadfastly denies conducting discussions. Supp. COS at 4-5; Supp. MOL at 4-5. Because the agency conducted discussions with one offeror, allowing that offeror to revise its proposal by submitting the letter of commitment necessary to meet the solicitation's minimum bonding requirement, but did not conduct discussions with BCSS or allow BCSS to submit a revised proposal, the agency's conduct of discussions was unequal and therefore improper. *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 6. We therefore sustain this aspect of BCSS's protest. See *AECOM Mgmt. Servs., Inc.*, B-418828.4 *et al.*, Mar. 17, 2021, 2021 CPD ¶ 152 at 6 (sustaining protest of conduct of discussions where one offeror "was provided with a significantly greater opportunity to enhance its proposal"); *Language Select LLP, dba United Language Grp.*, B-415097, B-415097.2, Nov. 14, 2017, 2017 CPD ¶ 359 at 9 (sustaining protest of conduct of discussions where the agency failed "to afford an equivalent opportunity" to address concerns to the awardee and the protester).

¹⁰ The RFP defined deficiency as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level" and significant weakness as "a flaw in the proposal that appreciably increases the risk of unsuccessful contract performance." RFP at 31.

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *YWCA of Greater Los Angeles*, *supra* at 6. Moreover, in the case of unequal discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. *Id.*; *SRA Int'l Inc.*, B-410973, B-410973.2, Apr. 8, 2015, 2016 CPD ¶ 32 at 5 n.6. Where, as here, an agency fails to properly conduct discussions, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester. *YWCA of Greater Los Angeles*, *supra*; *Delfasco, LLC*, B 409514.3, March 2, 2015, 2016 CPD ¶ 192 at 7. A reasonable possibility of prejudice is a sufficient basis for sustaining the protest.

As discussed above, the agency conducted discussions with certain offerors by identifying information missing from their proposals and allowing those offerors to revise their proposals by supplying that missing information. For example, the agency notified one offeror that its proposal did not include a letter of commitment required to demonstrate its bonding capacity. For another offeror, the agency notified it that its proposal referred to, but failed to include, an audit report necessary to demonstrate a certified cost accounting system--even though a certified cost accounting system was not a mandatory requirement, but an optional one for small business offerors. See AR, Exh. 7, Phase One Down Selection Phase One Down Select Document at 73-74, 78.

The record also reveals that the agency identified information missing from BCSS's proposal, which the agency did not raise in an EN with BCSS. See AR, Exh. 10, SSEB Report Addendum at 8-11. Under the most important evaluation factor, past performance, offerors were required to "submit up to six (6) examples of recent, relevant construction or design-build projects" with, as relevant here, a past performance questionnaire (PPQ). RFP at 23-34. The evaluators concluded that four of the six projects BCSS submitted did not include a PPQ that was "completed and signed by the client establishing the overall quality of the past performance in accordance with 6.2.3 [of the RFP]," and, thus, "the quality of performance could not be determined." *Id.* at 9.

As a result, when evaluating the six projects that BCSS submitted, the agency did not consider the quality of BCSS's performance under four of those projects. Based on a review of the remaining two projects, the agency assigned the firm a past performance rating of satisfactory confidence. *Id.* The Corps subsequently invited seven other small business reserve offerors assigned a higher rating of "substantial confidence" under the past performance factor to phase two of the competition on the strength of those firms' past performance evaluation ratings alone. AR, Exh. 11, Phase One Down Select Document Addendum at 26.

The protester argues that, had the missing information been brought to its attention during the agency's discussions, it could have addressed the unsigned PPQs--including by submitting a PPQ for one project where the PPQ "had otherwise been completed but the signature had apparently been stripped off the PDF" inadvertently--and otherwise meaningfully improved its proposal. Supp. Protest at 13.

The Corps does not argue that the protester was not prejudiced by a lack of meaningful discussions. Nor does the agency argue that its concerns about the information missing from BCSS's proposal--which caused it to discount four of BCSS's six projects under the most important evaluation factor--did not rise to the level of a significant weakness or deficiency as those were defined under this solicitation. To the contrary, defending the reasonableness of its evaluation, the agency states that it "had complete information on only two projects to support a meaningful review of BCSS's past performance." MOL at 7-8. On this record, we conclude that the agency failed to engage in meaningful discussions with BCSS and there is a reasonable possibility of prejudice.

Finally, because we sustain the protest challenging the agency's conduct of discussions during the phase one evaluation, which will necessarily lead to conducting discussions with all offerors and the submission of proposal revisions, we need not address the remainder of BCSS's protest allegations related to the agency's evaluation of proposals and selection of offerors for phase two. In this regard, since the agency will need to reevaluate revised proposals, our resolution of the remaining concerns related to the current proposals is academic. See, e.g., *YWCA of Greater Los Angeles, supra* at 3 n.5; *SRA Int'l Inc., supra* at 5 n.6.

RECOMMENDATION

Because the agency conducted discussions with some, but not all offerors, we recommend that the agency engage in meaningful discussions with all phase one offerors, including providing an opportunity for proposal revisions, consistent with the discussion above. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). BCSS should submit its claim for costs, detailing and certifying the time expended and costs incurred, to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel