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# Decision

**Matter of:** Thalle Construction Company, Inc.

**File:** B-421345; B-421345.2; B-421345.3

**Date:** March 27, 2023

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Jacob W. Scott, Esq., Lochlin B. Samples, Esq., and Alexander Gorelik, Esq., Smith, Currie & Hancock, LLP, for the protester.

Casey McKinnon, Esq., and Michael Payne, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for Forgen-Odin JV, the intervenor.

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Michelle E. Litteken, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest of agency's technical evaluation is denied where the evaluation was reasonable and consistent with the solicitation, and to the extent any errors occurred, the protester has not demonstrated competitive prejudice.

2. Challenge to agency's past performance evaluation is denied where the evaluation was reasonable and consistent with the solicitation, and to the extent any errors occurred, the protester has not demonstrated competitive prejudice.

3. Challenge to agency's evaluation of the awardee's proposal under the small business participation factor is denied where the evaluation was reasonable and consistent with the solicitation.

4. Protest of agency's best-value tradeoff decision is denied where the protester has not established that the underlying evaluation was unreasonable.

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## DECISION

Thalle Construction Company, Inc., of Hillsborough, North Carolina, protests the award of a contract to Forgen-Odin JV<sup>1</sup> (FO JV), of Rocklin, California, under request for proposals (RFP) No. W912EP-22-R-0005, issued by the Department of the Army, Army Corps of Engineers (Corps), for work related to the foundation and cutoff wall of the central Everglades planning project Everglades agricultural area (CEPP EAA) reservoir located in Palm Beach County, Florida. The protester challenges the agency's evaluation of proposals under the RFP's non-price factors and the best-value tradeoff decision.

We deny the protest.

## BACKGROUND

As part of the Comprehensive Everglades Restoration Plan,<sup>2</sup> the Corps intends to change how excess water levels on Lake Okeechobee are managed through a series of projects. Memorandum of Law (MOL) at 4. One of those projects is the CEPP EAA phase reservoir. *Id.* The above-ground reservoir will store excess water from Lake Okeechobee, and the excess water will be directed south, to the Everglades, as opposed to the Atlantic Ocean or the Gulf of Mexico, where excess water is currently discharged. Contracting Officer's Statement (COS) ¶ 9. The reservoir is being constructed in two phases, and the Corps is procuring the work for the first phase under this solicitation. MOL at 5.

The Corps issued the solicitation on June 10, 2022.<sup>3</sup> Agency Report (AR), Tab 3, RFP at 1. The solicitation sought a contractor to install a below-ground cutoff wall and

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<sup>1</sup> Forgen-Odin JV is a joint venture comprised of Forgen, LLC and Odin Construction Solutions, LLC (Odin).

<sup>2</sup> Congress approved the Comprehensive Everglades Restoration Plan in the Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572. The Comprehensive Everglades Restoration Plan is a framework under which the federal government, with the state of Florida, is attempting to restore the Everglades and improve the timing, distribution, and quality of the water flowing south from Lake Okeechobee to the Everglades. See 33 C.F.R. § 385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.

<sup>3</sup> The Corps issued three amendments to the RFP. COS ¶ 12. In this decision, citations of the RFP refer to the amended RFP provided at tab 3 of the agency report. The RFP is not paginated; citations to the RFP refer to the Adobe PDF page numbers.

perform foundation work for the reservoir.<sup>4</sup> MOL at 5. The scope of work included clearing, grubbing, de-mucking, blasting, foundation preparation, installation of a seepage cutoff wall, canal backfilling, and all incidental work to prepare approximately 15.3 miles of foundation for a 17.3-mile embankment dam. COS ¶ 8. The contractor would complete demonstration sections for phases of the work, during which the Corps would verify the means and methods used before the contractor would transition to production. AR, Tab 4, Summary of Work at 3; COS ¶ 71.

The solicitation established that award would be made to a responsible offeror on a best-value tradeoff basis, considering the following four factors, listed in descending order of importance: (1) technical merit, (2) past performance, (3) small business participation, and (4) price. RFP at 14-15. The non-price factors, when combined, were stated to be significantly more important than price. *Id.* at 14. A proposal that received a rating of unacceptable for either the technical merit factor or the small business participation factor, or a less-than-neutral rating for past performance, would be ineligible for award. *Id.*

The Corps received proposals from Thalle, FO JV, and one other offeror by the closing date for receipt of initial proposals of July 28, 2022. COS ¶ 13. The evaluators determined that none of the proposals was awardable as submitted, and the agency opened discussions with the three offerors. MOL at 6. The agency received three timely final proposal revisions<sup>5</sup>, and the source selection evaluation board (SSEB) evaluated Thalle's and FO JV's final proposal revisions as follows:

	Thalle	FO JV
<b>Technical Merit</b>	Good	Outstanding
<b>Past Performance</b>	Satisfactory Confidence	Substantial Confidence
<b>Small Business Participation</b>	Acceptable	Acceptable
<b>Price</b>	\$495,256,789	\$492,335,680

AR, Tab 5, Source Selection Decision (SSD) at 49. The source selection advisory council (SSAC) reviewed the evaluation reports for each factor and recommended that award be made to FO JV. *Id.* at 49-50. The SSEB chairperson, the SSAC chairperson, and the contracting officer briefed the source selection authority (SSA) on the results of the evaluation. The SSA states that he exercised his independent judgment and concurred with the evaluation. The SSA also reviewed the SSAC Report and its award

<sup>4</sup> The agency states that the embankment wall will be procured under a later contract. MOL at 5. When both contracts are done, the above-ground reservoir will be capable of holding 387,190,000 cubic yards of water. *Id.*

<sup>5</sup> The third offeror was not further considered because its proposed price was outside of the awardable range. AR, Tab 5, SSD at 51.

recommendation to determine which proposal offered the best value. *Id.* at 50-51. In making this determination, the SSA noted the SSEB and SSAC rated FO JV's proposal as outstanding under the technical merit factor with no weaknesses, no deficiencies, and 13 strengths. *Id.* at 51. The SSA also recognized that Thalle's proposal was rated as good under the technical merit factor with one significant weakness,<sup>6</sup> no deficiencies, and nine strengths. *Id.* The SSA concluded that FO JV's proposal, with its higher rating under both the technical merit factor and the past performance factor--the two most important non-price factors--and its lower price, offered the best value, and selected FO JV for award.

On September 28, 2022, the Corps notified Thalle that its proposal had not been selected for award. COS ¶ 4. After receiving a written debriefing, Thalle filed this protest with our Office.<sup>7</sup>

## DISCUSSION

Thalle challenges the agency's evaluation of the offerors' proposals under all of the non-price factors, as well as the Corps's best-value tradeoff decision. Although we do not address each and every argument raised by the protester, we have considered them all and conclude that none provides a basis to sustain the protest.

### Technical Evaluation

Thalle contends that the agency's evaluation of the protester's proposal under the technical merit factor was unreasonable because the Corps assessed a significant weakness and failed to recognize multiple strengths in Thalle's construction sequence and turnover plan, as well as the construction schedule. Supp. Protest at 25, 46. Additionally, the protester argues that the agency failed to recognize significant weaknesses and deficiencies in FO JV's technical proposal volume. Comments & 2nd Supp. Protest at 17-28.

In reviewing protests challenging the evaluation of an offeror's proposal, it is not our role to reevaluate proposals; rather, our Office examines the record to determine whether the agency's judgment was reasonable, and in accordance with solicitation criteria and applicable procurement statutes and regulations. *Patriot Def. Grp., LLC*, B-418720.3,

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<sup>6</sup> The SSEB assessed the significant weakness after finding that Thalle's proposed construction schedule lacked detail. AR, Tab 6, SSEB Report at 30.

<sup>7</sup> Thalle filed its initial protest on December 23. Before the Corps filed its agency report, the protester filed a supplemental protest on December 29, which included the two protest grounds from its initial protest and added two additional protest grounds. Because the supplemental protest incorporated the protester's initial protest grounds, this decision does not cite the initial protest. After the Corps filed its agency report, Thalle filed a second supplemental protest.

Aug. 5, 2020, 2020 CPD ¶ 265 at 7. A protester's disagreement with the agency's judgment, or with the agency's determination as to the relative merits of the competing proposals, does not establish that the evaluation or source selection decision were unreasonable. *The Ginn Grp., Inc.*, B-420165, B-420165.2, Dec. 22, 2021, 2022 CPD ¶ 17 at 9; *Innovative Mgmt. Concepts, Inc.*, B-408070.2, Dec. 4, 2013, 2014 CPD ¶ 49 at 3.

The technical merit factor consisted of two elements: (1) the construction sequence and turnover plan and (2) the construction schedule. RFP at 15. For the construction sequence and turnover plan, the solicitation instructed offerors to describe their proposal to approach, sequence, and execute the work from start to completion. *Id.* at 16. The RFP identified seven items that offerors were required to address in the construction sequence and turnover plan, and it listed 15 items for which an offeror could receive additional consideration. RFP at 16-17.

The solicitation also required offerors to submit a construction schedule depicting the start and completion dates, interdependence of activities, and scheduling factors for all the items of work in the construction sequence and turnover plan. RFP at 17. The solicitation identified 11 mandatory items that offerors were required to include in the construction schedule, as well as the interdependence, start, and completion dates.<sup>8</sup> *Id.* The solicitation provided that an offeror might receive additional consideration if the offeror confirmed its intent to use Primavera P6 scheduling software or identify long lead procurement activities. *Id.* The solicitation stated: "Failure to provide clear and comprehensive detail to any of the minimum requirements for the Construction Schedule may be noted as a significant weakness or weakness." *Id.* The solicitation provided that the Corps would assess a schedule with a duration of fewer than 2,044 days as unacceptable. *Id.* at 18.

The solicitation provided that the agency would evaluate the construction sequence turnover plan and the construction schedule to determine whether the proposal met the requirements, as well as the feasibility of the proposed approach. RFP at 18. The solicitation continued:

The feasibility of the proposed Construction Sequence and Turnover Plan and Construction Schedule will measure how well the means and methods proposed provide the Government with confidence of the offeror[']s understanding of the project and potential for successful project completion in accordance with the solicitation requirements and within the

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<sup>8</sup> The 11 items consisted of the following: (1) mobilization and demobilization of all work items; (2) critical path activities; (3) clearing and grubbing within the construction footprint; (4) surface and subsurface water management system(s); (5) rock foundation preparation demonstration section; (6) rock foundation preparation; (7) cutoff wall demonstration section; (8) wall construction; (9) submittals and permits; (10) contingency time; and (11) start and end of project activities. RFP at 17.

required contract schedule. The Construction Schedule must be corroborated by the Construction Sequence and Turnover Plan.

*Id.* The solicitation also stated that evaluating the technical merit factor would include considering how well the construction sequence and turnover plan and the construction schedule support each other. *Id.*

### Significant Weakness

The SSEB assessed a significant weakness to Thalle's initial proposal after finding that the construction schedule was insufficiently detailed. AR, Tab 6, SSEB Report at 30. Thalle was notified of this significant weakness during discussions.<sup>9</sup> COS ¶ 44; AR, Tab 12, Thalle Discussions Letter at 2. When the SSEB evaluated Thalle's final proposal revision, the evaluators found that Thalle had not resolved the significant weakness and explained their finding as follows:

This significant weakness remains. Although some additional details were provided in the revised proposal, it does not demonstrate a thorough understanding of the requirements of the project that is the subject of this solicitation. As examples of the lack of detail in the schedule, the schedule provides no activities related to completion, acceptance and turn-over of portions of the work during construction. This is an important section of the technical approach, and it is not included in the schedule. Additionally, the schedule does not provide detail of the transition from demonstration sections to the production work to show an understanding of the relationship of these activities to the overall workflow. Overall, the lack of detail in the construction schedule makes it difficult to evaluate and corroborate the feasibility of the proposed approach. As stated in the solicitation, the Construction Schedule must be corroborated by the Construction Sequence and Turnover Plan. This lack of corroboration

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<sup>9</sup> The discussions letter described the significant weakness as follows:

The proposal's overall schedule exhibits significant weakness in the substantial lack of detail. The schedule included in the proposal does not contain the level of detail that would represent a thorough understanding of the requirements of the project that is the subject of this solicitation. Lack of detail leads to an inability to confirm agreement and coordination between the technical narrative and the schedule. It does not instill confidence that the offeror thoroughly understands the requirements of the solicitation. While the provided schedule contains flaws, the main issue is with the lack of detail. The individual flaws are not noted separately, because correction of the flaws only would not change the significant weakness of the schedule due to its lack of detail.

AR, Tab 12, Thalle Discussions Letter at 2.

does not provide confidence that the Offeror has a thorough understanding of the project requirements and how these requirements will impact the flow of work through the schedule.

AR, Tab 6, SSEB Report at 30.

The protester contends that the agency applied unstated evaluation criteria in assessing the significant weakness because details related to completion, acceptance, turnover, and transition from demonstration to production were not included within the list of 11 mandatory items to be included in the construction schedule. Supp. Protest at 28. The agency does not dispute that the solicitation did not expressly require the construction schedule to include completion, acceptance, and turnover. MOL at 17. The Corps states that if those items were express requirements, then Thalle's proposal would have been assessed a deficiency--as opposed to a significant weakness--for failing to include them. *Id.* The agency argues that it properly assessed the significant weakness because the lack of details pertaining to significant aspects of the work increased the risk of unsuccessful performance. *Id.*

As a general matter, when evaluating proposals an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. *Synaptek*, B-410898.6, Feb. 29, 2016, 2016 CPD ¶ 78 at 9; *Open Sys. Sci. of Va., Inc.*, B 410572, B-410572.2, Jan. 14, 2015, 2015 CPD ¶ 37 at 11. To be reasonable, there must be a clear nexus between the stated and unstated criteria. *PAE Nat. Sec. Sols., LLC*, B-419207.2 *et al.*, May 19, 2021, 2021 CPD ¶ 205 at 3; *Raytheon Co.*, B-404998, July 25, 2011, 2011 CPD ¶ 232 at 15-16.

We find that the evaluation criteria reasonably encompassed the requirement to provide details regarding completion, acceptance, turnover, and transition from demonstration to production within the construction schedule. As an initial matter, the solicitation provided that the agency would evaluate the construction schedule to determine whether the offeror demonstrated a reasonable understanding. RFP at 18. As noted above, the work would begin with a demonstration phase, and production could not begin without first receiving agency approval. AR, Tab 4, Summary of Work at 3; COS ¶ 71. As such, providing details about completion, acceptance, turnover, and transition to production is reasonably related to demonstrating an understanding of the requirements.

We have reviewed the record and see no basis to question the agency's assessment of a significant weakness. The Corps identified several aspects of Thalle's construction schedule where the lack of detail was problematic. For example, the agency noted that Thalle's construction schedule included only two activities in the demonstration phase for [REDACTED]. MOL at 18 (*citing* AR, Tab 8, Thalle Technical Proposal at 114). For the production phase for the same work, Thalle included at least nine different activities. MOL at 19 (*citing* AR, Tab 8, Thalle Technical Proposal at 114). Additionally, the protester's construction schedule included no references to completion, acceptance, or

turnover. *Id.* at 16. The agency viewed the lack of detail as problematic because it was unclear whether Thalle understood that acceptance and turnover of demonstration sections was required prior to production. *Id.* at 19. An agency is not required to infer that a proposal meets certain requirements where the proposal lacks the level of detail the solicitation requires. *Aerospace Training Sys. Partners, LLC*, B-419668, B-419668.2, June 22, 2021, 2021 CPD ¶ 243 at 7; *SOS Interpreting, Ltd.*, B-287505, June 12, 2001, 2001 CPD ¶ 104 at 11-12. The protester has not shown that the assessment of a significant weakness was inconsistent with the solicitation or otherwise unreasonable.

### Additional Strengths

Thalle also contends that the evaluation was unreasonable because the Corps failed to recognize eight additional strengths in Thalle's proposal.<sup>10</sup> Supp. Protest at 34. The protester contends that it is entitled to the additional strengths because its proposal addressed the 17 elements listed in the solicitation for which a proposal could receive additional consideration, and the Corps credited Thalle for only nine of those items. *Id.* The agency responds that Thalle's proposal properly received strengths for addressing nine of the items, but Thalle's proposal did not receive more strengths because Thalle's proposal did not adequately address the other eight items. MOL at 24; COS ¶¶ 90-93.

An agency's judgment that the features identified in a proposal do not significantly exceed the requirements of the solicitation or provide advantages to the government--and thus do not warrant the assessment of unique strengths--is a matter within the agency's discretion and one that we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable. *Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2019 CPD ¶ 33 at 8 n.4.

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<sup>10</sup> Thalle also argues that the agency engaged in disparate treatment in its assessment of strengths. Comments & 2nd Supp. Protest at 12-15. For example, the protester alleges that the agency treated the offerors unequally in its assessment of strengths (one strength for FO JV's proposal, in comparison to no strengths for Thalle's proposal) for proposing a data management plan. *Id.* at 12. The Corps responds that the difference in the assessments reflected differences in the offerors' proposals: Thalle's proposal did not warrant a strength because the data management plan it submitted was limited to the [REDACTED] and did not address other aspects of construction. Supp. MOL at 9-10. In contrast, the agency identified a strength in FO JV's proposal because FO JV's data management plan addressed all of the work elements. *Id.* at 10. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the proposals. *Nexant Inc.*, B-417421, B-417421.2, June 26, 2019, 2019 CPD ¶ 242 at 10. Thalle has not met that burden for each of the challenged strengths, and accordingly, this protest ground is denied.



With regard to its assertion that the agency should have recognized additional strengths, Thalle contends, for example, that its proposal should have received a strength because its construction sequences and turnover plan addressed how Thalle would coordinate the [REDACTED]. Comments & 2nd Supp. Protest at 8-9. This item is identified as element no. 11 on the list of features in the construction sequence and turnover plan for which an offeror could receive additional consideration. RFP at 16. The protester states that “Thalle’s proposal expressly identified coordination [REDACTED] as a necessary element of its water management plan.” Comments & 2nd Supp. Protest at 9.

However, as the agency points out, the section of Thalle’s proposal pertaining to element no. 11 does not mention coordinating [REDACTED]. Supp. MOL at 8; Supp. COS ¶ 10. Instead, Thalle referred to coordinating [REDACTED] in the section of its proposal that provided a plan to manage surface and subsurface water, which was a minimum requirement.<sup>11</sup> Supp. MOL at 8; AR, Tab 8, Thalle Technical Proposal at 52. Agencies are not required to piece together general statements and disparate parts of a protester’s proposal to determine the protester’s intent. See, e.g., *Undercover Training, LLC*, B-418170, Jan. 9, 2020, 2020 CPD ¶ 25 at 4. Thalle has not shown that this aspect of the evaluation was unreasonable.

As an additional example, the protester complains that the agency failed to assess a strength for Thalle’s proposed construction schedule, asserting that it proposed to use Primavera P6 scheduling software, and the solicitation identified this as an item for which an offeror could receive additional consideration. Comments & 2nd Supp. Protest at 16. Thalle contends that because its proposal included a schedule prepared using the software, “[t]he only conclusion that [the Corps] could have drawn from reviewing Thalle’s schedule is that Thalle intends to continue its use of P6.” *Id.* The agency disagrees and responds that Thalle’s proposal did not merit a strength because Thalle’s proposal did not expressly commit to using the software. Supp. MOL at 9-10. The Corps notes that the solicitation provided: “The Government will not make assumptions concerning intent, capabilities, or experiences. Clear identification of proposal details shall be the sole responsibility of the offeror.” *Id.* at 10 (*quoting* RFP at 15). Our review of the record confirms the Corps’s assertion that Thalle did not expressly commit in its proposal to using Primavera P6 scheduling software. Again, we see no basis to disagree with the agency’s determination that Thalle’s proposal did not warrant a strength for this element.<sup>12</sup>

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<sup>11</sup> Additionally, the Corps found that Thalle did not discuss how it would coordinate [REDACTED]; Thalle merely paraphrased the solicitation language about the need to coordinate. Supp. COS ¶ 10.

<sup>12</sup> Thalle contends that the agency’s explanations as to why the protester’s proposal did not warrant additional strengths are not supported by the contemporaneous record. Comments & 2nd Supp. Protest at 13-14. However, an agency is not required to document ‘determinations of adequacy’ or explain in the evaluation record why it did not assess a strength, weakness, or deficiency for a particular item. *Verizon Bus. Network* (continued...)

## Evaluation of FO JV's Technical Proposal

The protester alleges that the Corps failed to identify multiple significant weaknesses and deficiencies in FO JV's proposal that would have rendered the proposal ineligible for award. Comments & 2nd Supp. Protest at 2. We have reviewed all of Thalle's arguments and discuss below two representative examples of Thalle's assertions, the agency's responses, and our conclusions. Based on our review, we find no basis to sustain this aspect of Thalle's protest.

Thalle argues that the agency should have rejected FO JV's proposal because FO JV's proposed schedule had a duration of [REDACTED] calendar days--a shorter duration than the solicitation's minimum of 2,044 calendar days. Comments & 2nd Supp. Protest at 17-18. To support this allegation, the protester points to a statement in the SSEB report, citing a sequence and timing-of-operations table in FO JV's final proposal revision to conclude that FO JV had resolved a weakness identified in its initial proposal for proposing an insufficient schedule duration. AR, Tab 6, SSEB Report at 19. The sequence and timing-of-operations table in FO JV's final proposal revision depicts a shorter duration than the RFP's minimum. The agency responds that the relevant portion of FO JV's final proposal revision is the construction schedule--and not the erroneously cited sequence and timing-of-operations table. Supp. MOL at 12-13.

The protester's contention that the awardee's proposed schedule failed to meet the solicitation requirements is without merit. As the agency explains, the relevant section of the awardee's proposal--the construction schedule in FO JV's final proposal revision--identified [REDACTED], as the date for the notice to proceed and [REDACTED], as the completion date--a duration of 2,044 calendar days. AR, Tab 10, FO JV Technical Proposal at 232-253. Additionally, the section of FO JV's proposal that addressed the construction schedule stated: "[w]e adjusted the number of calendar days between [notice to proceed] 1 and Final Completion to be equal to 2,044 calendar days." *Id.* at 232. Accordingly, the record does not support the protester's assertion; FO JV's schedule met the minimum duration requirement. See *Excellus Sols., Inc.*, B-410959.3, July 24, 2015, 2015 CPD ¶ 214 at 4 n.3 (stating that the overriding concern in the evaluation process is that the final rating assigned accurately reflects the actual merits of the proposals).

As an additional example, the protester contends that the Corps should have rejected FO JV's proposal because a letter of commitment from a proposed major subcontractor in the proposal was addressed to Odin instead of the joint venture.<sup>13</sup> Comments & 2nd

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(...continued)

*Servs., LLC*, B-420945.2, B-420945.4, Nov. 17, 2022, 2022 CPD ¶ 302 at 8; *Booz Allen Hamilton, Inc.*, B-417418, *et al.*, Jul. 3, 2019, 2019 CPD ¶ 246 at 17.

<sup>13</sup> The protester argues that the agency should have assessed a deficiency, which would have made FO JV's proposal ineligible for award. Comments & 2nd Supp. Protest at 23.

Supp. Protest at 23; Supp. Comments at 3. Under the technical merit factor, offerors were required, among other things, to submit a letter of commitment from each proposed major subcontractor that would perform certain elements of the project, including the placement of controlled low strength material. RFP at 15. The solicitation provided that the commitment letter must be on company letterhead, be addressed to the offeror as the prime contractor, identify the work the subcontractor intends to perform, and state that the subcontractor is willing to be bound to perform the identified work if the offeror is awarded a contract. *Id.* at 15-16.

The agency does not dispute that the letter was addressed to Odin or that the subcontractor was required to submit a letter of commitment. Supp. MOL at 15. The agency states that the letter included the mailing address for FO JV, referenced the correct solicitation, identified the work to be performed, and committed the subcontractor to performing that work. *Id.* The Corps explains that the purpose of requiring the letters was for the contracting officer to have confidence that the major subcontractor is in place, and the misaddressed letter satisfied that objective. Supp. COS ¶ 39; Supp. MOL at 15. The agency further states that even if a proposal were to be downgraded for including a misaddressed letter of commitment, the proposal would be assessed a weakness--not a deficiency. Supp. COS ¶ 40.

We have reviewed the record and find no merit to this contention. As an initial matter, we have no basis to question the agency's representation concerning the purpose of the letter of commitment and whether the letter in FO JV's proposal served that purpose. Additionally, the Corps's position that the misaddressed letter would have resulted in a weakness, and not a deficiency, is consistent with the record. When the agency evaluated the offerors' initial proposals, the Corps identified concerns related to letters of commitment and assessed weaknesses--not deficiencies.<sup>14</sup> AR, Tab 6, SSEB Report at 17, 29. Even assuming the agency improperly failed to assess a weakness, we conclude that the protester's claim also fails due to a lack of competitive prejudice. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest irrespective of whether a defect in the procurement is found. *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12. Thalle has not shown that FO JV's proposal would have received a lower rating--or that the relative merits of the offerors' proposals would have changed--if the agency had assessed a weakness for the misaddressed letter. As such, Thalle has not demonstrated prejudice, and we deny this aspect of the protest.

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<sup>14</sup> For example, the SSEB assessed a weakness to FO JV's initial proposal because one of the commitment letters was unclear with respect to the subcontractor's scope of work. AR, Tab 6, SSEB Report at 17. Similarly, the SSEB assessed a weakness to the protester's initial proposal after finding it did not include a letter of commitment from a major subcontractor to perform [REDACTED] tasks, and it was unclear if the work would be self-performed. *Id.* at 29.

## Past Performance Evaluation

The protester challenges various aspects of the Corps's evaluation of Thalle's and FO JV's proposals under the past performance factor. We have considered Thalle's arguments and find none provides a basis to sustain the protest.<sup>15</sup> We discuss representative examples below.

For the past performance factor, the solicitation required offerors to submit at least three, but no more than five, examples of projects that demonstrated experience. Specifically, the solicitation required the following: (1) constructing a cementitious cutoff wall with a width not less than 18 inches and total depth not less than 40 feet below ground surface; (2) managing surface and subsurface water within a construction site in a sub-tropical climate, where the subsurface is highly permeable, and groundwater level is at or near ground surface; and (3) removing overburden a minimum of five feet in depth and managing excavated material to avoid excessive handling.<sup>16</sup> RFP at 19-20. Projects must have been completed within the last 10 years or been at least 50 percent completed within the last 3 years. *Id.* at 20. The solicitation provided that for joint venture offerors, the experience of each joint venture partner could be submitted for the joint venture entity. *Id.* at 20. The solicitation stated that there were two aspects of the past performance evaluation: relevance and how well the contractor performed. *Id.* at 21. Based on these two considerations, the evaluators would assign a past performance confidence rating. *Id.*

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<sup>15</sup> For example, the protester alleges that the agency deviated from the solicitation by evaluating the quality of the past performance projects when such an evaluation was not contemplated in the solicitation. Comments & 2nd Supp. Protest at 42; Supp. Comments at 22-23. However, as the protester recognizes, the solicitation established that under the past performance factor the agency would evaluate "how well the contractor performed the experiences submitted" by reviewing past performance questionnaires (PPQs), contractor performance assessment reporting system (CPARS) reports, or other performance evaluations. RFP at 21; see *also* Supp. Comments at 23 (quoting the RFP). The assessment of how well an offeror performed a prior contract necessarily involves an assessment of the quality of the offeror's performance. Accordingly, the agency's evaluation of the quality of an offeror's past performance--how well the offeror performed on a prior contract--was consistent with the terms of the solicitation.

The record demonstrates that the Corps reviewed the PPQs and CPARS reports for each past performance project and considered the information in those assessments in the past performance evaluation. AR, Tab 7, Past Performance Evaluation at 2-3, 13; Supp. MOL at 20. The agency did not deviate from the solicitation by considering the quality of performance.

<sup>16</sup> The solicitation also identified 13 project features for which an offeror could receive additional consideration. RFP at 19-20.

Thalle contends that FO JV's proposal should not have received a rating of substantial confidence under the past performance factor. Supp. Protest at 55-57. The protester argues that the Corps credited FO JV with the performance of other entities and also improperly credited FO JV for an incomplete project. Comments & 2nd Supp. Protest at 47-52; Supp. Comments at 16-21. The agency responds that it properly credited FO JV with each project after considering information in FO JV's proposal. Supp. MOL at 24-27. We discuss two representative arguments as examples below.

FO JV included a "[REDACTED]" contract as one of its past performance projects. AR, Tab 11, FO JV Past Performance Proposal at 11-15. Thalle argues that the Corps should not have credited FO JV with this project because in one place in the PPQ for the project, the PPQ identified the contractor as "Odin Construction Solutions (formerly Magnus Pacific)." Comments & 2nd Supp. Protest at 49 (*quoting* AR, Tab 11, FO JV Past Performance Proposal at 39-40). The protester contends that it was unreasonable for the agency to credit FO JV with this project because the proposal did not include any information concerning Magnus Pacific or its relationship with the members of FO JV.<sup>17</sup> *Id.* Thalle also asserts that the Corps improperly attributed performance of the [REDACTED] contract to Forgen when the proposal did not provide any information about Forgen's involvement and instead simply stated that the work elements were performed by "Principals of Forgen **and** Odin." *Id.* (*quoting* AR, Tab 11, FO JV Past Performance Proposal at 11-12).

The Corps responds that it reasonably credited FO JV with performance of the [REDACTED] contract because the work was reasonably attributed to performance by both Odin and Forgen. Odin's proposal states that it used to be named Magnus Pacific; the first page of the PPQ identified the contractor as Odin; the contact information on the PPQ corresponded with the contact information for Odin in the other PPQs and the joint venture agreement; and because the Commercial and Government Entity (CAGE) code listed on the PPQ matches the CAGE code for Odin on the System for Award Management website (SAM.gov).<sup>18</sup> Supp. MOL at 25; Supp. COS at ¶ 53. The agency asserts, in summary, that there is "nothing to indicate that [Magnus Pacific] is other than a previous name for the same company, Odin Construction Solutions." Supp. MOL at 25.

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<sup>17</sup> The protester also contends that it was unreasonable for the agency to credit FO JV with the [REDACTED] project because the "proposal did not indicate that the resources of Magnus Pacific would be substantially involved in contract performance." Supp. Comment at 17. This, however, is the standard that applies for the consideration of the experience of a parent or affiliated company. See, e.g., *Eagle Eye Electric, LLC*, B-415562, B-415562.3, Jan. 18, 2018, 2018 CPD ¶ 33 at 3. FO JV's proposal stated that Magnus Pacific was a predecessor entity--not an affiliate.

<sup>18</sup> CAGE codes are assigned to discrete business entities for a variety of purposes (e.g., facility clearances, pre-award surveys, among others) to dispositively establish the identity of a legal entity for contractual purposes. *United Valve Co.*, B-416277, B-416277.2, July 27, 2018, 2018 CPD ¶ 268 at 6.

The evaluation of an offeror's past performance is within the discretion of the contracting agency. *Lintech Glob., Inc.*, B-419107, Dec. 10, 2020, 2021 CPD ¶ 5 at 7. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance. *Rotech Healthcare, Inc.*, B-413024 *et al.*, Aug. 17, 2016, 2016 CPD ¶ 225 at 5-6. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings. *ProSecure LLC*, B-418397, B-418397.2, Apr. 15, 2020, 2020 CPD ¶ 156 at 6. A protester's disagreement with the agency's judgment does not establish that an evaluation was improper. *AT & T Corp.*, B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 19.

We have reviewed the record and find that the agency's decision to credit FO JV with the [REDACTED] project was reasonable. We have consistently stated that, absent solicitation language to the contrary, an agency properly may consider the relevant experience and past performance of key individuals and predecessor companies because such experience and past performance may be useful in predicting success in future contract performance. See, e.g., *Raven Operations, LLC*, B-419372, Jan. 25, 2021, 2021 CPD ¶ 34 at 4; *Normandeau Assocs., Inc.*, B-417136, Feb. 6, 2019, 2019 CPD ¶ 76 at 4; *Harbor Servs., Inc.*, B-408325, Aug. 23, 2013, 2013 CPD ¶ 214 at 4. The key consideration is whether the experience evaluated reasonably can be considered predictive of the offeror's performance under the contemplated contract. *MLU Servs., Inc.*, B-414555.3, B-414555.6, July 17, 2017, 2017 CPD ¶ 225 at 9; *Choctaw Staffing Sols.*, B-413434, Oct. 24, 2016, 2016 CPD ¶ 298 at 4. Here, FO JV's proposal stated that Magnus Pacific was a predecessor entity to Odin. AR, Tab 11, FO JV Past Performance Proposal at 37, 39. As such, the [REDACTED] project could reasonably be considered predictive of Odin's performance under the CEPP EAA contract. Additionally, the solicitation permitted each member to submit past performance projects for the joint venture entity. RFP at 20.

We also see no basis to question the agency's decision to credit both Forgen and Odin with the [REDACTED] project. As noted above, FO JV's proposal stated that principals of Forgen and Odin were involved in the performance. AR, Tab 11, FO JV Past Performance Proposal at 11-12, 14. Thalle complains that the agency "took Forgen-Odin at its word" even though the proposal "made no mention of Forgen's involvement." Comments & 2nd Supp. Protest at 49. However, FO JV's proposal stated: "Principals of Forgen and Odin served as Prime Contractor during their tenure with a predecessor firm" and also stated that they self-performed the following elements of the project: [REDACTED]. AR, Tab 11, FO JV Past Performance Proposal at 14. The protester's position presumes that there was a legal requirement for the Corps to question the veracity of the information in FO JV's proposal, and we have stated that an agency may rely on information from a past performance reference "unless there is a clear reason to question the validity of the information." *James J. Dean, doing business as Dean's Paving*, B-412454.2, Feb. 8, 2016, 2016 CPD ¶ 56 at 5 (*quoting Rod Robertson Enters., Inc.*, B-404476, Jan. 31, 2011, 2011 CPD ¶ 129 at 3). The protester has not offered any

reason why the agency should have questioned the validity of the information in FO JV's proposal.

FO JV also included a "[REDACTED]" contract as a past performance project. AR, Tab 11, FO JV Past Performance Proposal at 21-23. The proposal stated that the anticipated completion date for the contract was [REDACTED]. *Id.* at 21. Thalle offers several reasons why the agency should not have credited FO JV with this project, including the fact that FO JV did not provide the documentation required by the solicitation for incomplete projects. Comments & 2nd Supp. Protest at 50-51. Specifically, for any projects that were not completed, offerors were required to explain which elements were completed and provide supporting documentation from the client. RFP at 20. The agency responds that FO JV satisfied the requirements because the narrative in FO JV's proposal stated that the [REDACTED] was completed in three phases. Supp. MOL at 26. The agency also asserts that FO JV satisfied the requirement to provide documentation from the client by submitting a PPQ for the project, which indicated that the [REDACTED] for the project was complete. *Id.*; Supp. COS ¶ 56.

Again, we disagree with the protester's view that the record does not support the agency's conclusions. As an initial matter, FO JV's proposal identified the elements of the project that the contractor performed ([REDACTED]), and the narrative describes how the project was performed in the past tense--meaning the work being discussed was complete. AR, Tab 11, FO JV Past Performance Proposal at 21-23. Additionally, the record shows that the Corps relied on information in the PPQ that was prepared by the customer concerning the status of the project, and the PPQ represented the status of the [REDACTED] for the project as complete. As noted above, an agency is generally not required to question the veracity of information presented in a past performance reference, and Thalle has not offered any reason why the agency should not have relied on the information in FO JV's proposal concerning the status of the project.<sup>19</sup>

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<sup>19</sup> In any event, even if the protester were correct and the agency should not have considered the [REDACTED] contract, the protester was not competitively prejudiced. The solicitation required offerors to submit a minimum of three projects demonstrating experience with contracts similar to the CEPP EAA reservoir project. RFP at 20-21. FO JV submitted five projects, three of which were rated relevant, and two that were rated somewhat relevant. AR, Tab 7, Past Performance Report at 3. The [REDACTED] contract was rated as somewhat relevant. *Id.* As such, even if the Corps had not considered the [REDACTED] contract, FO JV's proposal would have included three relevant projects and one somewhat relevant project--as opposed to the protester's two relevant projects and three somewhat relevant projects. *Id.* at 13. On this record, the protester has not demonstrated competitive prejudice. *UltiSat, Inc.*, B-418769.2, B-418769.3, Feb. 26, 2021, 2021 CPD ¶ 110 at 7 (competitive prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester  
(continued...)

The same reasoning applies to the protester's challenges to the other three past performance projects in FO JV's proposal. Although the protester complains that the agency conducted a "surface-level evaluation" (Comments & 2nd Supp. at 51) and unreasonably accepted FO JV's representations concerning the members' corporate predecessors, the protester has not put forth any information that should have triggered an obligation for the agency to dig deeper. Accordingly, we deny this protest ground.

#### Small Business Participation Factor

Thalle challenges the agency's evaluation of FO JV's proposal under the small business participation factor. Comments & 2nd Supp. Protest at 54-58; Supp. Comments at 26-29. The protester asserts that the Corps improperly relaxed the requirement to provide evidence of small business utilization by accepting documents that pertained to contracts that were not performed by FO JV or the joint venture members.<sup>20</sup> Supp. Comments at 28. The agency responds that Thalle misunderstands the requirements and asserts that FO JV's proposal was acceptable. Supp. MOL at 27-28.

For the small business participation factor, the solicitation required offerors to submit (1) a small business subcontracting plan, and (2) evidence of past utilization of small business concerns. RFP at 22-23. The solicitation identified two types of documentation that could be used to demonstrate evidence of past utilization of small business concerns. If the offeror's prior contract required a subcontracting plan, then the offeror would submit an individual subcontracting report. *Id.* at 23. If the contract did not require a subcontracting plan, then the offeror would submit a data collection sheet. *Id.* If a joint venture offeror lacked subcontracting past performance, each member was required to submit its most recent subcontracting past performance. *Id.* Additionally, the solicitation stated that if the offeror had not performed a contract that included FAR provision 52.219-8, Utilization of Small Business Participation, the evaluation would be based solely on the offeror's proposed small business participation plan for the CEPP EAA contract. *Id.* at 24. Regarding the evaluation method for this factor, the RFP advised that offerors would be evaluated on the level of small business

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(...continued)

demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award.)

<sup>20</sup> The protester also contends that the Corps unreasonably rated FO JV's proposal as acceptable because FO JV failed to document obstacles in meeting goals or to provide evidence of good faith effort, as required by the solicitation. Supp. Comments at 28-29; RFP at 24. The record demonstrates that the SSEB found FO JV could have provided more detail to ensure a good faith effort, but nonetheless concluded that FO JV's proposal warranted a rating of acceptable. AR, Tab 6, SSEB Report at 21. Thalle's argument in this regard constitutes disagreement with the agency's reasonable determinations and does not provide a basis to sustain this protest.



commitment they demonstrated for the proposed acquisition and their prior level of commitment to using small businesses in performing previous contracts. *Id.* at 23-24.

FO JV submitted information on behalf of each of its members. *See generally* AR, Tab 14, FO JV Small Business Proposal. As relevant here, FO JV provided three individual subcontracting reports on behalf of Forgen. *Id.* at 10-15. One of the individual subcontracting reports was for a contract performed by Forgen. *Id.* at 10-11. The second individual subcontracting report was for a contract performed by Raito/Great Lakes E&I Joint Venture, and the third report was for a contract performed by Great Lakes Environmental & Infrastructure. *Id.* at 12-15. In addition, FO JV submitted three data collection sheets for contracts performed by Odin, each of which stated that Odin was a small business at the time of performance. The evaluators rated FO JV's proposal as acceptable under the small business participation factor. AR, Tab 6, SSEB Report at 21.

We find the agency's evaluation to be reasonable. FO JV's proposal stated that Forgen used to be known as Great Lakes Environmental and Infrastructure. AR, Tab 10, FO JV Technical Proposal at 10. As such, it was reasonable for the Corps to consider the individual subcontracting report for the contract performed by Great Lakes Environmental & Infrastructure. *See Raven Operations, LLC*, *supra*. It was also reasonable for the Corps to consider the individual subcontracting report for the contract performed by Raito/Great Lakes E&I Joint Venture. Forgen's predecessor--Great Lakes Environmental & Infrastructure--was a member of the joint venture, and our Office has stated that an agency properly may consider the relevant experience of individual joint venture members, provided doing so is not expressly prohibited by the terms of the solicitation. *Gunnison Consulting Grp., Inc.*, B-418876 *et al.*, Oct. 5, 2020, 2020 CPD ¶ 344 at 6; *Carolina Linkages, Inc. d/b/a Safe Ports, Inc.*, B-417079, Jan. 24, 2019, 2019 CPD ¶ 28 at 2.

Here, the solicitation expressly stated that if the joint venture lacked small business subcontracting experience, each member should submit the required information. RFP at 23. The fact that Forgen's predecessor gained the experience as a member of another joint venture does not change the analysis. *See AlliantCorps, LLC*, B-417126 *et al.*, Feb. 27, 2019, 2019 CPD ¶ 98 at 6 (agency reasonably credited offeror with contract performed as a member of a joint venture, where the protester failed to demonstrate that the agency's evaluators had an obligation to further investigate); *Alliant Enter. JV, LLC*, B-410352.5, B-410352.6, July 1, 2015, 2015 CPD ¶ 209 (same); *Innovative Test Asset Sols., LLC*, B-411687 *et al.*, Oct. 2, 2015, 2015 CPD ¶ 68 at 13 (same). Accordingly, we deny this protest ground.

## Best-Value Tradeoff

Thalle argues that because the underlying evaluation was flawed, the agency's best-value determination was unreasonable.<sup>21</sup> Supp. Protest at 57. This allegation is derivative of the protester's challenges to the agency's evaluation, all of which we have denied as set forth above. Thus, we dismiss this allegation because derivative allegations do not establish an independent basis of protest. *Advanced Alliant Solutions Team, LLC*, B-417334, Apr. 10, 2019, 2019 CPD ¶ 144 at 6.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>21</sup> The protester argues that in addition to the underlying evaluation errors, the best-value tradeoff decision was flawed because the SSA "failed to properly compare the merits of the proposals or look beyond the adjectival ratings." Supp. Comments at 32. We disagree. The SSD demonstrates that the SSA was aware of and compared the strengths and weaknesses assessed to each proposal. AR, Tab 5, SSD at 51-52. For example, the SSA observed that FO JV's proposal received strengths for detailing the external influences on the construction area, the establishment of an on-site batch plant, and the mobile or stationary equipment necessary for rock crushing or processing of excavated material. *Id.* The SSA compared these strengths to the strengths Thalle's proposal received and determined the benefits in FO JV's proposal were more advantageous to the agency. *Id.* The record shows that the SSA considered and compared the merits of each proposal.