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## Decision

**Matter of:** Skyward IT Solutions, LLC

**File:** B-421105.2

**Date:** April 27, 2023

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### DIGEST

1. Protest that the awardee had an unfair competitive advantage and a disqualifying organizational conflict of interest based on a consulting agreement with a former government official is denied where the record does not support the allegation.
  2. Protest challenging the agency's failure to evaluate the awardee's professional compensation plan for realism in accordance with Federal Acquisition Regulation (FAR) provision 52.222-46 is denied where the protester cannot show competitive prejudice from the agency's improper omission of FAR provision 52.222-46 from the solicitation, where the solicitation did not otherwise require firms to submit compensation plans, and where no firms submitted compensation plan information.
  3. Protest arguing that the agency should have performed a price realism analysis is denied when the agency was not required, nor permitted, to perform a price realism evaluation where the solicitation did not provide for that assessment.
  4. Protest challenging exchanges conducted solely with the awardee as unreasonable is denied where the exchanges were conducted in accordance with the terms of the solicitation.
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### DECISION

Skyward IT Solutions, LLC (Skyward), a small business located in Gaithersburg, Maryland, protests the issuance of a task order to eSimplicity, Inc., a small business located in Silver Spring, Maryland, under request for quotations (RFQ)

No. CMS-2022-220723, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), for professional information technology (IT) design, development, and implementation services. The protester alleges that the awardee had an unfair competitive advantage stemming from its engagement of a former agency official as a consultant to assist in preparing its quotation. Skyward also challenges various aspects of the agency's evaluation and best-value determination as unreasonable.

We deny the protest.

## BACKGROUND

The RFQ, which was issued to vendors holding contracts under General Services Administration (GSA) Multiple Award Schedule (MAS) special item number (SIN) 54151S, for IT professional services, seeks a contractor to “to lead the product development, security, operations, data analysis, and technical assistance for the Transformed Medicaid Statistical Information System (T-MSIS).”<sup>1</sup> Agency Report (AR), Tab 2A, Revised Statement of Objectives (SOO) at 11; AR, Tab 3, RFQ amend. 2 at 1.<sup>2</sup> T-MSIS is “a data ingestion and reporting tool that collects Medicaid and Children’s Health Insurance Program (CHIP) data from U.S. states, territories and the District of Columbia, into the largest national resource of beneficiary information.” AR, Tab 2A, Revised SOO at 5. The solicitation contemplated issuance of a single time-and-materials task order for a 1-year base period, three option years, and a 3-month transition-out period. AR, Tab 3, RFQ amend. 2 at 1, 25-27.

The solicitation advised vendors that the task order would be issued on a “fair opportunity basis pursuant to the Federal Acquisition Regulation (FAR) 8.405-3 ordering procedures, the applicable terms and conditions of the [GSA MAS SIN 54151S contract] . . . , and the specific requirements of this RFQ.” *Id.* at 1. The solicitation contemplated that the agency would issue the task order to the “best-value contractor” without engaging in exchanges with the vendors. *Id.* at 4. The RFQ provided that the procurement would be conducted in phases to limit “development and presentation costs” for vendors having little to no likelihood of being issued the task order. *Id.* at 5.

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<sup>1</sup> While the solicitation is identified as an RFQ, various documents in the agency report use the terms quotation and proposal interchangeably. The distinction between the terms has no bearing on our analysis of the issues presented; we use both terms consistent with the record.

<sup>2</sup> Citations to the record use the Adobe PDF or Microsoft Word pagination of documents provided by the parties. Furthermore, the RFQ was amended twice, neither of which are relevant to this issues here; all references to the RFQ are to the final conformed version set forth in amendment 2 and all references to the SOO are to the final conformed version in amendment 1, unless otherwise noted.

The RFQ provided that CMS would evaluate quotations considering price and the following non-price factors: (1) corporate experience; (2) performance work statement (PWS) and quality assurance surveillance plan (QASP); (3) solutioning exercise; and (4) section 508.<sup>3</sup> *Id.* at 4. When combined, the non-price factors were significantly more important than price. *Id.* at 5. In phase 1, CMS would evaluate quotations under the corporate experience factor. *Id.* In phase 2, which would follow a “down-select” determination, quotations would be evaluated under the remaining factors. *Id.* The corporate experience factor was significantly more important, and the section 508 factor was significantly less important, than the other non-price factors; the remaining non-price factors were equally important. *Id.* at 4. The solicitation contemplated that CMS would assign a rating of high, some, or little confidence to the vendors’ quotations under each of the non-price factors. *Id.*

The solicitation provided that the agency would evaluate price quotations for reasonableness. The RFQ advised vendors that they “should ensure that the types and quantities of labor, material and/or [other direct costs (ODCs)] included in the price volume are consistent with those in other parts of the quote (e.g., the PWS), as CMS may compare those parts in order to test for performance risk.” *Id.* at 16-17.

CMS received 17 timely quotations in response to the solicitation, including quotations from Skyward and eSimplicity. AR, Tab 11, Award Decision at 6-7. After evaluating quotations under the corporate experience factor, the agency recommended that the vendors assessed with high confidence for this factor continue to phase 2 of the procurement. *Id.* at 7. Three vendors, Skyward, eSimplicity, and Vendor A, submitted timely phase 2 quotations. Following initial phase 2 evaluations, the agency entered into exchanges with the vendors to resolve issues with and address weaknesses and deficiencies in the quotations. *Id.* at 11. After exchanges, CMS evaluated the quotations as follows:

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<sup>3</sup> Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) requires agencies developing, procuring, maintaining or using electronic and information technology, to ensure that federal employees with disabilities and members of the public with disabilities seeking information from the agencies “have access to and use of information and data that is comparable” to federal employees and members of the public without disabilities. RFQ amend. 2 at 17. Under the section 508 factor, vendors were evaluated on their understanding and compliance with the established accessibility standards. *Id.* at 18.

	Skyward	eSimplicity	Vendor A
<b>Corporate Experience</b>	High Confidence	High Confidence	High Confidence
<b>PWS &amp; QASP</b>	High Confidence	High Confidence	Some Confidence
<b>Solutioning Exercise</b>	Some Confidence	High Confidence	Some Confidence
<b>Section 508</b>	High Confidence	Some Confidence	High Confidence
<b>Revised Price</b>	\$76,547,103	\$62,282,341 <sup>4</sup>	\$54,543,840.

*Id.* at 12.

The contracting officer, who was the source selection authority, determined that eSimplicity was the apparent successful contractor and engaged in a second round of exchanges with eSimplicity alone to resolve remaining issues with its business proposal.<sup>5</sup> *Id.* at 116. Neither Skyward nor Vendor A were included in the second round of exchanges because, in the agency's view, neither vendor's quotation was reasonably capable of becoming the best value. *Id.* On September 16, 2022, CMS issued the task order to eSimplicity for \$66,431,794. AR, Tab 12, Task Order at 1, 5.

Following the agency's brief explanation of its award decision provided in accordance with FAR section 8.405-2(d), Skyward filed a protest with our Office on September 26, 2022. Contracting Officer's Statement (COS) at 3. In its protest, Skyward argued, among other things, that eSimplicity gained an unfair competitive advantage through access to, and use of, nonpublic, competitively useful information, as a result of a consulting agreement between eSimplicity and a former CMS official (whom we refer to as X). *Id.* CMS notified our Office that it would take corrective action by investigating Skyward's allegations and on October 26, we dismissed the protest. *Skyward IT Sols., LLC, B-421105, Oct. 26, 2022* (unpublished decision).

On January 10, 2023, CMS notified Skyward that it had completed its investigation and had decided to reissue the task order to eSimplicity. AR, Tab 21B, Award Notice, Jan. 10, 2023 at 1. CMS explained that the contracting officer determined there was no unfair competitive advantage because the information to which X had access while X was employed at CMS was either publicly available or was outdated after the solicitation was issued. AR, Tab 21A, Brief Explanation of Award Decision, Jan. 10, 2023 at 2. This protest followed.

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<sup>4</sup> Note this is not the final awarded contract price.

<sup>5</sup> As discussed in greater detail later in this decision, the RFQ provided that after the government determined the apparent successful vendor, it could communicate with only that vendor to address remaining issues and finalize a task order. RFQ amend. 2 at 4.

## DISCUSSION

Skyward challenges the award of the task order to eSimplicity based on five primary arguments: (1) eSimplicity gained an unfair competitive advantage and an unmitigatable biased ground rules organizational conflict of interest (OCI) from engaging a former CMS official as a consultant to assist eSimplicity in preparing its quotation; (2) the agency failed to conduct meaningful discussions; (3) the agency failed to perform an adequate professional compensation realism analysis; (4) the agency was required to perform a price realism evaluation, which it failed to do; and (5) and the agency failed to perform a reasonable best-value tradeoff analysis. For the reasons discussed below, we conclude that the protester's arguments do not provide a basis to sustain the protest.<sup>6</sup>

### Unfair Competitive Advantage and Biased Ground Rules OCI

Skyward argues that eSimplicity gained an unfair competitive advantage through its engagement of a former CMS official, X, for consulting services. The protester contends that eSimplicity's engagement of X gave eSimplicity access to nonpublic, competitively useful information because X was formerly the director of the Data Systems Group (DSG) in the Center for Medicaid and CHIP Services and oversaw the T-MSIS program, and X assisted eSimplicity in preparing its quotation shortly after X resigned from CMS. Protest at 8-9. For example, the protester contends that X had access to the independent government cost estimate (IGCE), which was not publicly available, and that X leveraged nonpublic, competitive information about T-MSIS in advising eSimplicity about its approach to delivering pilots to the states. *Id.* at 12; Comments at 8-11. The protester maintains that CMS unreasonably determined that the nonpublic information to which X had access was not competitively useful. The protester further contends that eSimplicity's engagement of X created an unmitigatable biased ground rules OCI because X was involved in developing the solicitation. We first address the protester's allegation of unfair competitive advantage.

#### Unfair Competitive Advantage

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR 3.101-1; *Perspecta Enter. Sols.*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 7. Where a firm may have gained an unfair competitive advantage through its hiring<sup>7</sup> of a former government official, the firm can be disqualified

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<sup>6</sup> Skyward raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

<sup>7</sup> We note that although the facts here involve a consultant agreement executed between eSimplicity and X, rather than eSimplicity's direct employment of X. This is a distinction without a difference in our review of the protester's unfair competitive

from a competition based on the appearance of impropriety that results.<sup>8</sup> *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29. This is true even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on hard facts and not mere innuendo or suspicion. *Northrop Grumman Sys. Corp.--Mission Sys.*, B-419560.3 *et al.*, Aug. 18, 2021, 2021 CPD ¶ 305 at 7-10. A person's familiarity with the type of work required, resulting from the person's prior position in the government, however, is not, by itself, evidence of an unfair competitive advantage. *Perspecta Enter. Sols.*, *supra*.

In determining whether a firm obtained an unfair competitive advantage by hiring a former government official with knowledge of nonpublic information, our Office has considered a variety of factors, including whether the nonpublic information was in fact available to the firm, whether the nonpublic information was proprietary information, and whether the nonpublic information was competitively useful. *Sigmatech, Inc.*, B-415028.3, B-415028.4, Sept. 11, 2018, 2018 CPD ¶ 336 at 9; *see also* FAR 9.505(b), 9.505-4. Whether the appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances of each case, and, ultimately, the responsibility for determining whether an appearance of impropriety exists, and whether a vendor should be allowed to continue to compete, is a matter for the contracting agency, and we will not disturb the contracting agency's determination in this regard unless it is shown to be unreasonable. *Science Applications Int'l Corp.*, B-419961.3, B-419961.4, Feb. 10, 2022, 2022 CPD ¶ 59 at 6-7.

As noted above, in response to Skyward's earlier protest, the contracting officer conducted an investigation into whether eSimplicity had gained an unfair competitive advantage through its engagement of X as a consultant. The contracting officer sent written questionnaires to X, eSimplicity, and several current and former CMS employees. AR, Tab 19, OCI Determination & Findings at 6-7.

In response to the contracting officer's questions, X confirmed that she was formerly the director of DSG, holding the position between April 2018 and January 2022, before starting her own consulting firm in January 2022. *See* AR, Tab 14C attach. 1, X's Responses to OCI Questions at 1. As director of DSG, X supervised several divisions, including the Division of Information Services (DIS). *See* AR, Tab 16, DIS Deputy Director Resp. to OCI Investigation at 1. In this role, X had access to solicitation

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advantage allegations. For consistency with our previous decisions, however, we use language that refers to the hiring of a former government official where appropriate.

<sup>8</sup> The standard for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee is virtually indistinguishable from the standard for evaluating whether a firm has an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest under FAR subpart 9.5. *Health Net Fed. Servs.*, *supra* at 28 n.15.

documents in SharePoint<sup>9</sup> and “reviewed and provided comments on draft versions of the SOO and some parts of the acquisition plan”; however, according to X, she “did not draft or edit the documents,” and CMS did not finalize the solicitation documents until after X left the agency. AR, Tab 14C attach. 1, X’s Responses to OCI Questions at 1. X also asserts that her reviews of the acquisition documents ended in December 2021. *Id.* at 1. Additionally, X represented that while she participated in regular meetings that discussed all of DSG’s active and future procurements, including schedules, potential contract vehicles, and status of solicitation documents, X did not recall specific information because X was “frequently multi-tasking during these meetings.” *Id.* at 2. X also asserted that she left “[s]pecific contract strategy and decisions about contract vehicles . . . in the hands of the contracting officer.” *Id.*

The record also contains responses from the individual who prepared the acquisition package for the T-MSIS solicitation through March 2022, when she left the agency. AR, Tab 15, Former CMS Employee Resp. to OCI Investigation. This individual was the former director of the DIS, which was under DSG; DIS was responsible for drafting the SOO, IGCE, and the acquisition plan. *Id.* at 2; see AR, Tab 16, DIS Deputy Director Resp. to OCI Investigation at 1. The former director of DIS explained that she kept X, who was her supervisor, apprised of the T-MSIS procurement as a part of her routine duties, but that she, the deputy director of DIS, and the contracting officer’s representative “created the bulk of the documentation” for the procurement. Tab 15, Former CMS Employee Resp. to OCI Investigation at 1. The former director of DIS also explained that the solicitation draft went through significant edits between January and March 2022, and that she had no contact with X, except when X attended the former director’s “going away” party. *Id.* at 2. The current DIS deputy director also confirmed that the solicitation was finalized after X’s departure from the agency and that specific decisions pertaining to the solicitation were made at the division level by DIS. AR, Tab 16, DIS Deputy Director Resp. to OCI Investigation at 2.

The contracting officer found that X had access to nonpublic pre-solicitation information but that this information was not competitively useful because the information had either become public or was “changed/revised/implemented” after X left. AR, Tab 19, OCI Determination & Findings at 9-10. In this regard, the contracting officer found that the pre-solicitation information had been made public when the RFQ was issued or was outdated because the solicitation documents were changed after X left the agency in January 2022. Specifically, the IGCE was finalized after January 2022, and the solutioning exercise was added to the solicitation in May 2022. *Id.* at 9; see AR, Tab 2, RFQ amend. 1 at 6.

We note at the outset that X’s access to nonpublic, proprietary or source selection information is not in dispute because X had access to draft solicitation documents. The

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<sup>9</sup> SharePoint is a web-based application and collaborative platform that, among other things, allows teams to “[s]hare files, data, news, and resources.” SharePoint, Microsoft 365, <https://www.microsoft.com/en-us/microsoft-365/sharepoint/collaboration> (last visited Apr. 27, 2023).

issue here centers on the competitive usefulness of the information. Based on our review of this record, we find no basis to conclude that eSimplicity gained an unfair competitive advantage from engaging X as a consultant because X did not have access to any nonpublic, competitively useful information related to the T-MSIS procurement. We discuss the protester's primary contention below.

Skyward specifically argues that X used nonpublic, competitively useful information about the "inner workings" of the T-MSIS program when X advised eSimplicity about its approach to delivering pilots for T-MSIS Optional Task Area 4 - Interoperability Development. Comments at 8-10. The SOO explains that "[t]his optional task is to deliver pilots which adopt and implement interoperability standards[ ]in T-MSIS Federal and State systems, starting with an exploration of existing implementations within the agency and across state Medicaid and CHIP agencies." AR, Tab 2A, Revised SOO at 26. In notes on eSimplicity's revised quotation, X commented, "When I was still at CMS, and we talked about this pilot, the idea was that we'd work with a small number of states, like 1-3, to research." Comments at 9. Skyward contends that this was nonpublic information because the SOO does not provide any guidance about the size of pilots, and that it was competitively useful because the evaluators deemed eSimplicity's approach of using "mini-pilots" to be an extra benefit to the government when comparing its quotation to Skyward's. Comments at 10 (citing AR, Tab 11, Award Decision at 129).

In response, the agency maintains that X's information about mini-pilots is generally known and reflects basic IT practices. Supp. Memorandum of Law (MOL) Resp. to Comments at 2-3; Supp. Contracting Officer (CO) Resp. to Comments at 5. In particular, the contracting officer observed that X's "comment seems to stem from a general lay person understanding of the T-MSIS program as opposed to being the result of [X] having some confidential non-public information regarding T-MSIS which was only known to her because of her past position with CMS." Supp. CO Resp. to Comments at 5. The contracting officer noted that the requirement specifically identifies pilots and "conducting mini pilots is one generally known way to deliver a crude prototype which [X] would likely have known based on her general expertise in Information Technology regardless of her previous position with CMS." *Id.* The contracting officer concluded that X's comment did not provide eSimplicity with an unfair competitive advantage because X's comment was not the result of nonpublic, competitively useful information. On this record, we find the contracting officer's conclusion reasonable.

In sum, we find the contracting officer performed a meaningful investigation and reasonably concluded that X did not have access to nonpublic, competitively useful information. In this regard, the contracting officer found that any nonpublic pre-solicitation information to which X had access was either publically available or was outdated and stale once the solicitation was issued and before the deadline for receipt of quotations. GAO affords substantial deference to an agency's findings and we will not substitute our judgment for the agency's when the agency's conclusions are reasonable. See *Sigmattech, Inc., supra*. We therefore find no basis on which to sustain this protest ground.



## Biased Ground Rules OCI

Skyward also contends that eSimplicity has an unmitigatable biased ground rules OCI as a result of its engagement of X and that the contracting officer's investigation is unreasonable. Protest at 13-14. In this regard, the protester argues that X "helped prepare the ground rules of the competition by commenting on or otherwise directing subordinates to modify the contents of the draft solicitation documents." Comments at 13. As discussed below, we find no basis to sustain this protest ground.

As relevant here, a biased ground rules OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work. FAR 9.505-1, 9.505-2; see e.g., *Northrup Grumman Sys. Corp.--Mission Sys.*, supra at 7. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. *Operational Res. Consultants, Inc.*, B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 6. We review an OCI investigation for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4

Based upon our review of the record, we conclude that the evidence does not support a finding of a biased ground rules OCI on the part of eSimplicity. The contracting officer found that X had "input on a high level into the procurement" but that the solicitation was not finalized until after X left the agency; among other things, the IGCE was not finalized until March 2022 and the solutioning exercise was not added to the solicitation until May 2022. AR, Tab 19, OCI Determination & Findings at 8-9; see AR, Tab 2, RFQ amend. 1 at 6. The contracting officer determined that the solicitation was "changed/revised/implemented" after X's departure and that there was no OCI. AR, Tab 19, OCI Determination & Findings at 10-11. Even though X oversaw the T-MSIS solution at a high level and provided comments on drafts of some solicitation documents as a supervisor, other individuals in the agency made decisions about, drafted, and edited the solicitation documents, and X did not have substantive contact with these individuals after leaving. Moreover, the solicitation was not finalized until after X's departure from the agency, and was amended twice after the final solicitation was issued. On this record, we find no basis to conclude that the allegations here constitute hard facts that X participated in activities which give rise to a biased ground rules OCI, or that the contracting officer's review of the protester's allegations was unreasonable. Accordingly, we deny this protest ground.

## Misleading Discussions

Next, Skyward protests the agency's exchanges with the firm, arguing that CMS should have told Skyward that its price was "uncompetitively high" and that "[t]he vast majority

of the CMS's discussion questions regarding Skyward's business quotation related to items that would increase Skyward's price, not reduce it." Protest at 15. Skyward also asserts that it was unfair for the agency not to notify Skyward of its concerns with Skyward's price when the agency's exchanges with eSimplicity related to the fact that eSimplicity's price was too low. Protest at 17-18. Based upon our review of the record, we find no basis to sustain this protest ground.

Where, as here, a competition is conducted among Federal Supply Schedule vendors pursuant to FAR subpart 8.4, there is no requirement for agencies to conduct discussions in accordance with FAR section 15.306.<sup>10</sup> *VariQ Corp.*, B-409114 *et al.*, Jan. 27, 2014, 2014 CPD ¶ 58 at 13. However, when the agency conducts exchanges with vendors in a FAR subpart 8.4 procurement, those communications like all other aspects of such a procurement must be fair and equitable. *Innovative Mgmt. & Tech. Approaches, Inc.*, B-418823.3, B-418823.4, Jan. 8, 2021, 2021 CPD ¶ 18 at 8. Our Office looks to the standards in FAR part 15, and the decisions interpreting that part, for guidance in determining whether exchanges with vendors under a FAR subpart 8.4 procurement were fair and equitable. *USGC, Inc.*, B-400184.2 *et al.*, Dec. 24, 2008, 2009 CPD ¶ 9 at 3.

Under FAR part 15, although discussions with firms must address deficiencies and significant weaknesses, the precise content of discussions is largely a matter of the contracting officer's judgment. FAR 15.306(d)(3); *American States Utils. Servs., Inc.*, B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 6. Procuring agencies are not permitted, however, to engage in conduct that favors one firm over another. FAR 15.306(e)(1). For discussions to be meaningful they must lead a firm to areas of the agency's concern. See *Lockheed Martin Corp.* B-293679 *et al.*, May 27, 2004, 2004 CPD ¶ 115 at 7. As a general matter, if a firm's price is high in comparison to competitors' prices, but not so high as to be unreasonable and unacceptable for contract award, an agency may, but is not required to, to address the matter during discussions. *DeTekion Security Sys., Inc.*, B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 15.

Here, we find nothing improper about the agency's exchanges with Skyward. The record reflects that the agency disclosed to each vendor the agency's concerns with the firm's technical and business proposals and permitted the vendors to revise their quotations.<sup>11</sup> COS at 3. As relevant here, the agency identified four areas of concern in

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<sup>10</sup> We note the RFQ expressly informed vendors that the agency would not use any evaluation techniques, including discussions, set forth in FAR subpart 15.3. RFQ amend. 2 at 4.

<sup>11</sup> In the award decision, the agency refers to vendors' price volumes as their business proposals, and we will do so as well for consistency with the record. The price volume includes a pricing spreadsheet and a narrative portion that discusses the vendor's basis of estimate and describes the methodology used to develop the price, such as labor

Skyward's technical proposal and eight areas of concern in its business proposal. AR, Tab 7A, Skyward Discussion Letter, Aug. 18, 2022. Skyward submitted a revised quotation, which the agency concluded resolved its concerns so that CMS "had no additional technical questions to ask" Skyward. AR, Tab 11, Award Decision at 116. The agency also noted that Skyward had revised its business proposal and reduced its price by approximately \$17 million. *Id.* at 14. Even though Skyward's price was higher than the awardee's price, its price was lower than the IGCE of \$94,557,622, and the agency found that Skyward's price was "in line with the median and average of competing quotes." *Id.* at 37. In this context, the agency did not conclude that Skyward's price was unreasonably high triggering a requirement for the agency to notify Skyward of such a conclusion during discussions. On this record, we find that the agency's exchanges with Skyward were meaningful. Accordingly, we see no basis to conclude that these exchanges were unfair to Skyward and we deny this protest ground.

### Professional Compensation Plan Analysis

Next, Skyward asserts that the agency was required to perform a "professional compensation realism analysis" and maintains that such an assessment would have revealed that eSimplicity's labor rates "were too low to retain or attract" sufficient professional employees to perform the task order. Protest at 18, 20. In this regard, Skyward refers to FAR provision 52.222-46, Evaluation of Compensation for Professional Employees, which is part of the relevant MAS contract, and asserts that this provision was incorporated into the RFQ. *Id.* at 18-19. Skyward argues that the provision anticipates a price realism evaluation regarding an offeror's proposed compensation. *Id.* at 19.

The agency responds that the solicitation for this procurement did not contain a provision that required, or permitted, the agency to perform a price realism analysis. MOL at 12. The agency further points out that the solicitation did not include FAR provision 52.222-46 and argues that the provision does not "flow[ ]down to the task order level in FAR 8.4 procurements." *Id.* at 13. The agency notes the solicitation did not require vendors to submit compensation plans and that no vendor did; the firms' quotations reflected only fully burdened labor rates which, the agency argues, do not provide a valid basis for a professional compensation realism analysis. *Id.* at 13-14. For the reasons discussed below, we find no basis to sustain this ground of protest.

FAR provision 52.222-46 requires an agency to evaluate whether firms will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether firms understand the nature of the work to be performed. *MicroTechnologies, LLC*, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 8. In the context of fixed-price contracts, our Office has explained that this FAR provision anticipates an

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categories, materials (e.g. computer software), and other direct costs (ODCs). RFQ amend. 2 at 8, 15-16.

evaluation of whether an awardee understands the contract requirements, and has proposed a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding a firm's proposed compensation.<sup>12</sup> *Apptis Inc.*, B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9.

As an initial matter, there is no dispute that the RFQ itself does not include FAR provision 52.222-46. The RFQ advised vendors, however, that the task order would be issued pursuant to "the applicable terms and conditions" of the GSA MAS SIN 54151S contract vehicle. RFQ amend. 2 at 1. As a procurement for IT professional services for a substantial number of professional employees, FAR provision 52.222-46 is applicable to the GSA MAS contract here and all three vendors evaluated in phase 2 have FAR provision 52.222-46 included in their contract terms for GSA MAS SIN 54151S.<sup>13</sup>

Here, the agency does not argue that it performed the analyses required by FAR provision 52.222-46.<sup>14</sup> Rather, CMS argues that it was not required to analyze compensation plans because the provision was not included in the solicitation and the solicitation did not require vendors to submit compensation plans in their quotations. MOL at 12-15. The agency also asserts FAR provision 52.222-46 is not incorporated by reference, and it does not flow down, to task orders issued under FAR subpart 8.4 procedures. *Id.* at 13-14 (citing *Jefferson Consulting Grp., LLC*, B-417555, B-417555.2, Aug. 16, 2019, 2019 CPD ¶ 293.)

We disagree with the agency to the extent it argues FAR provision 52.222-46 was not incorporated into the RFQ. It is a well-established principle of contract law that when an item is incorporated by reference into a contract or other document, it is not necessary

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<sup>12</sup> We note that although the contract here is a time-and-materials contract, it has elements of both fixed-price and cost-type contracts. The contract price is fixed to the extent that vendors were required to propose fully burdened labor rates for each of the labor categories involved in performance. *See, e.g., Research Mgmt. Corp.*, B-237865, Apr. 3, 1990, 90-1 CPD ¶ 352 at 5-6.

<sup>13</sup> *See, e.g.,* List of Clauses of eSimplicity's MAS Contract, Contracts Online View Clauses, <https://www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?busIndicator=all&scheduleNumber=MAS&specialItemNumber=54151S&subcategoryCode=&executeQuery=YES&filter=YES&flag=&catguideDisrec=false&searchType=tcsearch&tcSearchText=esimplicity&goButton1.x=16&goButton1.y=8> (last visited Apr. 26, 2023); List of Clauses of Skyward's MAS Contract, Contracts Online View Clauses, <https://www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?busIndicator=all&scheduleNumber=MAS&specialItemNumber=54151S&subcategoryCode=&executeQuery=YES&filter=YES&flag=&catguideDisrec=false&searchType=tcsearch&tcSearchText=skyward&goButton1.x=14&goButton1.y=10> (last visited Apr. 26, 2023).

<sup>14</sup> The contracting officer confirmed that he did not conduct a price analysis in accordance with FAR provision 52.222-46 as part of his award decision because "compensation plans were not required and [he] did not believe that FAR 52.222-46 was applicable." Supp. CO Resp. to Comments at 6.

to bodily insert the text of the item itself into the contract or document. *Richcon Fed. Contractors, Inc.*, B-403223, Aug. 12, 2010, 2010 CPD ¶ 192 at 2; see also *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1343-46 (Fed. Cir. 2008) (providing a lengthy explanation of incorporation by reference in government contracts).

The agency misconstrues our decision in *Jefferson Consulting Group, LLC, supra*, as finding that FAR provision 52.222-46 never flows down to the task order level. In *Jefferson Consulting Group*, the protester argued that FAR provision 52.222-46 was incorporated into the solicitation but did not explain why or how this was so, and therefore, we declined to conclude the agency should have conducted a price realism analysis under the provision. Conversely, here, the RFQ provides that the task order will be issued pursuant to applicable terms from the GSA MAS contract, which includes FAR provision 52.222-46. Accordingly, we find that the agency should have evaluated quotations in accordance with FAR provision 52.222-46 because it was part of the vendors' MAS contracts and incorporated into the solicitation.

Despite finding that the agency should have evaluated quotations under FAR provision 52.222-46, we cannot conclude that the agency's error caused Skyward to suffer any competitive prejudice. Competitive prejudice is an essential element of every viable protest, and we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Engility Servs., LLC*, B-416588.3, B-416588.4, Mar. 20, 2020, 2020 CPD ¶ 110 at 6. As the agency notes, the RFQ did not expressly require vendors to submit compensation plan information.<sup>15</sup> Moreover, none of the vendors, including Skyward, submitted compensation plans. Because none of the vendors, including the protester anticipated compensation plan information would be evaluated, notwithstanding the GSA MAS SIN 54151S contract terms, we do not think that the agency's failure to evaluate compensation plans resulted in competitive prejudice. Accordingly, we conclude that the protester cannot demonstrate that the agency unreasonably failed to evaluate professional compensation plans, and we therefore find no basis to sustain the protest.

### Price Realism

Skyward also argues that the RFQ's evaluation criteria require a price realism analysis and that the agency actually performed a flawed one. The protester contends that the evaluation criteria for the price quotation indicate that the agency intends to conduct a price realism analysis. Comments at 33-34. Moreover, the protest asserts that because the agency found eSimplicity and Skyward's labor rates "to be reasonable and realistic," the agency conducted a price realism analysis that it failed to document. *Id.* at 34-35. Based upon our review of the record, we find no basis to sustain this ground of protest.

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<sup>15</sup> Instead, the solicitation required vendors to submit fixed, fully burdened labor rates. RFQ amend 2 at 16; AR, Tab 2B, RFQ amend. 1, attach. 3, Revised Pricing Template.

Where, as here, a solicitation anticipates award of a time-and-materials task order with fixed-price, fully burdened labor rates, there is no requirement that an agency conduct a price or cost realism analysis, in the absence of a solicitation provision requiring such an analysis. *Arrington Dixon & Assocs., Inc.*, B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 6. Our Office has consistently stated that, in the absence of an express price realism provision, we will conclude that a solicitation contemplates a price realism evaluation only where it expressly states that the agency will review prices to assess the firm's understanding of the requirements, and where the solicitation states that a firm's submission may be rejected on the basis of its low price. *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9.

As discussed above, the RFQ advised that the agency would evaluate price for reasonableness alone. The RFQ further provided that vendors "should ensure that the types and quantities of labor, material and/or [other direct costs] included in the price volume are consistent with those in other parts of the quote (e.g., the PWS), as CMS may compare those parts in order to test for performance risk. Inconsistencies may result in a quote being evaluated unfavorably or removed from consideration for award." RFQ amend. 2 at 17. The agency contends therefore that the RFQ "is silent regarding price realism." MOL at 13; COS at 4.

We agree. The RFQ here, which identified various components the agency would review as part of the price evaluation, did not provide for an evaluation of the realism of the vendor's proposed prices. We disagree with the protester that CMS was required to conduct a price realism analysis based on general solicitation language in which the agency indicates it will evaluate vendors' price volumes for consistency with other parts of its quotation to test for performance risk, or that inconsistencies could result in an unfavorable evaluation. The RFQ here does not advise vendors that the agency will review prices to assess vendors' understanding of the requirements or inform vendors that quotations can be rejected because of a low price. Given that the solicitation did not provide that the agency would conduct a price realism evaluation, or would otherwise consider whether prices were unrealistically low, the agency's alleged failure to do so provides no basis to sustain the protest. See *Jefferson Consulting Grp., LLC*, *supra* at 12 (finding no obligation for the agency to have conducted a price realism analysis where the RFQ did not expressly state that agency would conduct such an analysis).

Furthermore, we do not find that the contracting officer's statement in the award decision that he found the labor rates "to be reasonable and realistic" to indicate that he actually performed a price realism analysis. The contracting officer admitted that he used the term "realistic" in the award decision, but asserted he used the term "realistic" to mean "appropriate or sufficient" with regard to the labor categories needed to successfully perform the contract. Supp. CO Resp. to Comments at 6. That is, the contracting officer maintains he used the term in a different context. Given that the agency has consistently maintained that it was not required to perform a price realism analysis and that it did not perform one, the contracting officer's ill-advised word choice

here does not indicate that he performed a price realism analysis and provides no basis to sustain the protest.<sup>16</sup>

## Best-Value Determination and Post-Selection Exchanges

Finally, the protester also challenges the agency's best-value determination and decision to conduct a second round of exchanges with eSimplicity, which followed its selection as the "best valued." Comments at 36-37. In this respect, the solicitation contained the following provision:

2. Exchanges. The [g]overnment anticipates selecting the best-value contractor from initial responses to this solicitation, without engaging in exchanges with respondents. . . . Once the government determines the respondent that is the best valued (*i.e.* the apparent successful contractor), the government reserves the right to communicate with only that respondent to address any remaining issues, if necessary, and finalize a task order. These issues may include technical and/or price matters. If the parties cannot successfully address any remaining issues, as determined pertinent at the sole discretion of the government, the government reserves the right to communicate with the next best valued respondent based on the original analysis and address any remaining issues.

RFQ amend. 2 at 4.

Following the agency's selection of eSimplicity as the best-value contractor, CMS engaged in another round of exchanges with eSimplicity to resolve outstanding issues with its business proposal. AR, Tab 11, Award Decision at 15. The agency's concerns arose from issues related to the skillsets and number of full-time equivalents (FTEs) proposed. *Id.*; AR, Tab 9, eSimplicity Second Discussion Letter at 1. CMS requested that eSimplicity propose an additional 3.5 FTEs with specific expertise to ensure that there are sufficient specialized technical assistants and full-time dedicated product managers for specific teams. *Id.* In response, eSimplicity added the requested FTEs; specifically, two subject matter experts and increased three team leaders from 0.5 FTE to 1 FTE for each. AR, Tab 10A, eSimplicity Resp. to Second Discussion Letter. These responses did not change eSimplicity's technical proposal.

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<sup>16</sup> While Skyward requests that we give the contracting officer's supplemental statement "no weight" because it contradicts the award decision, we reject that request. Protester Resp. to Agency Resp. to Comments at 16. The contracting officer's supplemental statement provides additional details about his use of the word "realistic." In light of the entire contemporaneous record, in which there are no price realism evaluation documents, the contracting officer's supplemental statement is consistent with the agency's assertion that it did not conduct a price realism analysis.

The protester contends that the agency's determination that eSimplicity was the best value was unreasonable, and therefore, the agency also unreasonably conducted a second round of exchanges solely with eSimplicity. In this respect, Skyward asserts that at the time CMS selected eSimplicity as the presumptive awardee, eSimplicity's proposal was unawardable because the agency informed eSimplicity that its proposed FTEs were "insufficient" and more FTEs were "necessary for success." Comments at 35-36 (quoting AR, Tab 9, Second Discussion Letter at 1).

Here, we find that the agency's determination that eSimplicity presented the best value was unobjectionable and that the agency's exchanges with eSimplicity alone were reasonable. While CMS requested more FTEs based on its review of eSimplicity's business proposal, we disagree with the protester that eSimplicity's proposal was otherwise unacceptable. The agency found that eSimplicity's technical proposal was superior to Skyward's proposal and that eSimplicity's price was fair and reasonable. AR, Tab 11, Award Decision at 15. The agency also concluded that even with negotiations, Skyward's proposal would not be the best value because the agency had no technical questions for Skyward and price negotiations were unlikely to lower Skyward's price below eSimplicity's price.<sup>17</sup> *Id.* We therefore do not agree with the protester's contention that eSimplicity's business proposal was unacceptable or that the agency unreasonably determined that eSimplicity was the best-valued contractor and conducted a second round of exchanges with it alone. See *Gunnison Consulting Grp., Inc.*, B-418876 *et al.*, Oct. 5, 2020, 2020 CPD ¶ 344 at 14 (denying protest ground challenging post-selection exchanges with the firm determined to be the best value when the solicitation permits such exchanges and the exchanges are limited).

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>17</sup> The agency also concluded that no negotiations could improve Vendor A's quotation because it was technically inferior to eSimplicity and its price was lower than eSimplicity's so that any negotiations would likely require a price increase. The agency found that eSimplicity's technical superiority merited the price premium over Vendor A's quotation. AR, Tab 11, Award Decision at 15.