



# Decision

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**Matter of:** MPZA, LLC

**File:** B-421568; B-421568.2

**Date:** July 3, 2023

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Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging agency’s price evaluation is sustained where agency’s price analysis is inadequately documented such that we are unable to review the evaluation to determine whether it was reasonable.
  2. Protest challenging agency’s determination that the awardee did not have a disqualifying organizational conflict of interest is denied where protester fails to present hard facts indicating the existence of a conflict where the contracting officer reasonably found that no conflict existed.
  3. Protest that awardee had unfair competitive advantage stemming from hiring of a former agency employee is denied where the employee was not involved in the development of either the solicitation or the awardee’s proposal in response to the solicitation.
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## DECISION

MPZA, LLC,<sup>1</sup> a small disadvantaged business of Gaithersburg, Maryland, protests the award of a contract to Eagle Harbor, LLC, a small disadvantaged business of Anchorage, Alaska, under request for proposals (RFP) No. 155A00021R00000101, issued by the Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) for information technology (IT) support services. The protester

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<sup>1</sup> Various members of MPZA’s team and proposed subcontractors are performing the incumbent contract. Protest at 3-4. For ease of reference, we refer to MPZA, itself, as the incumbent contractor, rather than delineating the various team member and subcontractor relationships, which are not relevant to our discussion of issues.

challenges the agency's price evaluation and resulting best-value tradeoff. The protester also alleges Eagle Harbor had an unequal access to information organizational conflict of interest (OCI), and that the awardee gained an unfair competitive advantage from the hiring of a former agency employee.

We sustain the protest in part, deny it in part, and dismiss it in part.

## BACKGROUND

On May 27, 2022, using the procedures of Federal Acquisition Regulation (FAR) part 15, the agency issued the solicitation as a set-aside for small disadvantaged businesses through the Small Business Administration's (SBA's) 8(a) program.<sup>2</sup> Contracting Officer's Statement (COS) at 1; Agency Report (AR), Exh. 7a, RFP at 1.<sup>3</sup> The solicitation sought proposals for the provision of staff to perform data entry, imaging, indexing, IT, and related support services to five ATF divisions. *Id.* at 13; AR, Exh. 7b, Performance Work Statement (PWS) at 4. The RFP contemplated award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract with fixed-price labor rates, a minimum guarantee of \$1,000, a 1-year base period, and four 1-year option periods. RFP at 13.

The solicitation advised that award would be made on a best-value tradeoff basis, considering price and the following non-price factors, listed in descending order of importance: (1) technical/managerial approach; (2) key personnel; (3) past performance; and (4) transition plan. AR, Exh. 7g, RFP §§ L-M at 8. The non-price factors, when combined, were significantly more important than price. *Id.* Except for past performance, all non-price factors would be evaluated and assigned one of the following adjectival ratings: exceptional, good, acceptable, or marginal. AR, Exh. 7g, RFP §§ L-M at 13. Offerors' past performance would be "evaluated to determine the extent to which their performance demonstrates the likelihood of successful performance in providing requirements *similar in size, scope, and complexity,*" to the solicitation and assigned an adjectival rating of: very relevant, relevant, somewhat relevant, not relevant, or neutral. *Id.* at 12, 14.

The agency received nine proposals, including those submitted by the protester, MPZA, and the awardee, Eagle Harbor. COS at 1. Proposals were evaluated as follows:

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<sup>2</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the "8(a) program."

<sup>3</sup> Unless otherwise noted, our citations refer to the Adobe PDF page numbers.

	MPZA	Eagle Harbor
<b>Technical/Managerial Approach</b>	Exceptional	Exceptional
<b>Key Personnel</b>	Exceptional	Exceptional
<b>Past Performance</b>	Very Relevant	Relevant
<b>Transition Plan</b>	Exceptional	Exceptional
<b>Price</b>	\$183,095,103	\$178,580,961

AR, Exh. 4, Best-Value Decision Document (BVDD) at 3-4. The contracting officer, who served as the source selection authority (SSA), compared the proposals for MPZA and Eagle Harbor and acknowledged that MPZA’s proposal received a higher rating under the past performance factor, but found that “both vendors have shown significant past performance with similar type contracts.” *Id.* at 5. The SSA concluded that payment of MPZA’s price premium of approximately 2.5 percent “for the minor technical difference of a Past Performance rating of Very Relevant compared to Relevant [was] not in the best interest of the Government,” and selected Eagle Harbor’s proposal for award “based on their lower price and their proposal reaching technical equality with MPZA.” *Id.*

Following notification of the award decision and receipt of a debriefing, MPZA filed this protest on March 27, 2023.

## DISCUSSION

The protester challenges numerous aspects of the agency’s evaluation of proposed prices, and contends the flawed price evaluation resulted in a flawed best-value tradeoff. Additionally, MPZA alleges the awardee had an unequal access to information OCI stemming from an employee of the awardee’s unauthorized review of multiple reports from an internal agency database. Finally, the protester contends that Eagle Harbor gained an unfair competitive advantage from the hiring of a former agency employee. While we do not discuss every argument, or permutation thereof, we have considered all of the protester’s allegations and find that, other than those discussed herein, none provides a basis to sustain the protest.

### Dismissed and Abandoned Allegations

As a preliminary matter, the protester raises a number of challenges that we do not address on the merits. For example, MPZA argues that its proposal “offered several technology and process improvements that would reduce ATF’s costs well below Eagle Harbor’s proposed price,” but that “ATF did not consider these costs savings in conducting its price realism analysis.” Protest at 5-6. The protester contends that had the agency considered these savings “MPZA’s price would have been less than Eagle Harbor’s price, and ATF would have awarded the contract to MPZA.” *Id.* at 6.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of a protest, and that those grounds be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide,

at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 322 at 3. In this regard, a protester's unsupported allegations which amount to mere speculation are insufficient to form a basis for protest. *Perspecta Enter. Solutions, LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 6 n.11, 24.

Here, MPZA does not identify anywhere in its proposal what specific technology and process improvements to which this "cost savings" argument refers, nor, for that matter, does the protester explain the purported savings in any way. Rather, the quoted sentences cited above constitute the entirety of MPZA's cost savings argument. See Protest at 5-6. MPZA's general contention of unconsidered cost savings without further support "amounts to a naked conclusion" that fails to set forth a factually sufficient basis of protest. *Eagle Techs., Inc.*, B-420135.2 *et al.*, June 22, 2022, 2022 CPD ¶ 198 at 7. Accordingly, we dismiss this protest argument.

Similarly, the protester asserts that the agency "was warned during the [question and answer (Q&A)] process that incumbent personnel would need more insurance costs than required by the SCLS [Service Contract Labor Standards],"<sup>4</sup> and that it proposed "the actual insurance costs" while "Eagle Harbor did not." Protest at 5, *citing* AR, Exh. 8, RFP amend. 2, Q&A at 48, Q. No. 202. Other than the difference between its own proposed price and Eagle Harbor's proposed price, MPZA provides no support for its claim that the awardee did not propose appropriate insurance costs. Instead, the statement that "Eagle Harbor did not" comprises the entirety of the protester's argument. Protest at 5. MPZA's unsupported allegation amounts to speculation and is insufficient to form a basis for protest.<sup>5</sup> See *e.g.*, *Chags Health Information Technology, LLC*, B-420940.3 *et al.*, Dec. 14, 2022, 2022 CPD ¶ 315 at 5-6 (dismissing protester's arguments that relied solely on the protester's speculation); *Systems Implementers, Inc.*; *Transcend Technological Systems, LLC*, B-418963.5 *et al.*, June 1, 2022, 2022

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<sup>4</sup> The Service Contract Act is now known as the Service Contract Labor Standards.

<sup>5</sup> To the extent MPZA offers additional support for its cost savings or health insurance cost arguments in its supplemental protest and comments responding to the agency report, we dismiss these later-raised allegations as untimely. See Comments & Supp. Protest at 7. As we have explained, our regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175 at 6. Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. See *e.g.*, *American Roll-On Roll-Off Carrier Group, Inc.*, B-418266.9 *et al.*, Mar. 3, 2022, 2022 CPD ¶ 72 at 11 n.12 (dismissing as untimely protester's challenges to responsibility determination raised for the first time in protester's comments on the supplemental agency report because they constituted "new alternate legal arguments" involving facts that were available to the protester in the agency's initial report).

CPD ¶ 138 at 21 n.9 (dismissing allegation that awardee's price was unbalanced where it was based only on unsupported speculation regarding awardee's rates and yearly price balancing).

Next, as part of its OCI allegations, the protester represented that, on February 9, 2022, MPZA presented information related to its work on the incumbent contract to ATF, and that an employee of Eagle Harbor attended the presentation--suggesting that this employee gained competitively useful non-public information from the presentation which was used by Eagle Harbor in preparing its proposal. Protest at 3-4. In its report to our Office responding to the protest, the agency specifically responded to these arguments. See COS at 4-6; Memorandum of Law (MOL) at 14-19. The protester, however, failed to rebut or otherwise address the agency's responses. Consequently, we consider these arguments abandoned and we will not consider them further. *Olgoonik Global Security, LLC*, B-414762, B-414762.2, Sept. 8, 2017, 2017 CPD ¶ 282 at 3-4 n.2.

### Price Evaluation

With regard to the remaining allegations, the protester contends that the agency failed to perform a proper price comparison between proposals and that the awardee's proposed price is unrealistic. The agency responds that it "evaluated price proposals on an equal basis in accordance with the evaluation criteria and applicable procurement law." MOL at 5.

Our Office has explained that price reasonableness concerns whether a price is unreasonably high, while price realism relates to whether or not a price is too low. See *Systems Plus, Inc.*, B-415559, B-415559.2, Jan. 12, 2018, 2018 CPD ¶ 27 at 6; FAR 15.404-1(b), 15.404-1(d). As a general matter, when an agency seeks to award a fixed-price contract, it is only required to determine whether proposed prices are fair and reasonable. FAR 15.402(a). Price realism need not necessarily be considered in evaluating proposals for the award of a fixed-price contract, because such contracts place the risk of loss on the contractor rather than the government. *Patronus Systems, Inc.*, B-418784, B-418784.2, Sept. 3, 2020, 2020 CPD ¶ 291 at 4. An agency, however, may include in a solicitation, as it did here, a provision that provides for a price realism evaluation, for the purpose of assessing whether an offeror's low price reflects a lack of understanding of the contract requirements or the risk inherent in the offeror's proposal. *Id.* Our review of a price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation. *Logistics 2020, Inc.*, B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 8. Where an agency fails to document its price evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. *Valor Healthcare, Inc.*, B-412960, B-412960.2, July 15, 2016, 2016 CPD ¶ 206 at 6.

Here, the solicitation established an estimated number of 1,912 labor hours per full-time equivalent (FTE) and provided estimates of the number of FTEs needed in various labor

categories, requiring offerors to propose fixed hourly, fully burdened labor rates for FTEs in each labor category. PWS at 44-53; AR, Exh. 7g, RFP §§ L-M at 7; see *generally*, Exh. 7e, RFP attach. D, Estimated Personnel Labor Rates Template. The solicitation permitted offerors to “submit proposals outside of the estimated amount of personnel based on performance measures,” but provided that the agency would evaluate such proposals to determine “whether the proposed level of effort and labor mix are appropriate for the requirements of the PWS to ensure successful performance and whether the proposed rates per hour are reasonable.” AR, Exh. 7g, RFP §§ L-M at 7. Additionally, the agency “reserve[d] the right to perform a price realism [analysis] to ensure whether proposed prices are realistic, not too low, and mitigate any risk of poor performance on the contract.” *Id.* at 13.

Pertinent to the solicitation’s allowance for offerors to propose a labor mix other than the one included in the solicitation, the solicitation explained that the PWS provided “workload estimates [for] Full Time Equivalents (FTEs) contractor employees,” and that these estimates did “not constitute guaranteed work minimums,” nor were they meant “to establish a required contractor estimate.” PWS at 44; see *also* AR, Exh. 8, RFP amend. 2, Q&A at 57, Q. No. 237. Rather, the solicitation’s labor mix was provided “only for information as to the Government estimate of work requirements from historical information.” *Id.*

With regard to hourly labor rates, the solicitation required that “[a]ll proposed/submitted pricing must be compliant with the [Service Contract Labor Standards] using *Attachment B Wage Determination 2015-4297 where applicable* for the Martinsburg, [West Virginia] area,” and provided that the agency would evaluate proposed prices for reasonableness “by reviewing the [Service Contract Labor Standards] for the Martinsburg, [West Virginia] area.” AR, Exh. 7g, RFP §§ L-M at 6, 12. During the solicitation’s Q&A period, the agency received a question regarding the wage determination applicable to two specific labor categories--research assistant I and research assistant II. AR, Exh. 8, RFP amend. 2, Q&A at 47-48, Q. No. 201. Specifically, an offeror asked:

It is our understanding that DOL [Department of Labor] has determined that the Research Assistant I and Research Assistant II positions are non-professional positions and, therefore, are covered by the Wage Determinations. Further, it is our understanding DOL has approved conformed [wage determination] rates for these two positions. Will the Government please provide the conformed rates based upon Attachment C and the current average pay rates for the Research Assistant I and Research Assistant II?

*Id.* The agency responded to this question by stating: “Per Department of Labor (DOL), an approved conformance for classifications is only applicable to the contract for which they were approved. New contracts require new conformance requests to DOL for any classification not listed on the [wage determination].” *Id.*

The protester argues that the agency failed to perform a proper price comparison between proposals. Specifically, MPZA contends that as the incumbent contractor operating under a wage conformance issued by DOL, the firm was required to propose labor rates for the research assistant I and II labor categories at or above those currently being paid pursuant to the Service Contract Labor Standards, while the awardee “was able to underprice” these labor categories. Protest at 4. Further, MPZA represents that these two labor categories account for 115 out of 499 of the RFP’s projected staff. *Id.* at 5. As a result, the protester contends that “a comparison of Eagle Harbor’s price and MPZA’s price was apples to oranges,” as the agency failed to normalize prices, and thus did not evaluate offers on an equal basis. Protest at 5; Comments & Supp. Protest at 4.

### Wage Conformance

With respect to MPZA’s claim that the firm was obligated to propose at or above the DOL wage conformance rates applicable to the incumbent contract while Eagle Harbor was not so obligated, the record does not support this contention. Rather, as acknowledged by the protester, during the solicitation’s Q&A period, the agency told offerors that the DOL wage conformance was “only applicable to the contract for which they were approved”—*i.e.*, the current incumbent contract—and that “*new contracts* require new conformance requests.” See Protest at 5, *citing* AR, Exh. 8, RFP amend. 2, Q&A at 47-48, Q. No. 201 (emphasis added). Regardless of whether the successful offeror under the solicitation here was the incumbent contractor (MPZA) or a non-incumbent offeror, the resulting award would be a *new contract*. The agency put offerors on notice that the current DOL wage conformance would not apply to the contract award resulting from the solicitation, as a new conformance request would have to be made to DOL by the awardee. Thus, MPZA’s insistence that it was obligated to propose at one price level while competing offerors were permitted to propose at a lower price level, is based on MPZA’s misreading of the solicitation.<sup>6</sup>

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<sup>6</sup> To the extent MPZA’s argument implies that all offerors were, or should have been, required to propose labor rates in accordance with the wage conformance applicable to MPZA’s current incumbent contract, we dismiss such a contention as an untimely challenge to the terms of the solicitation. Our regulations contain strict rules for the timely submission of protests, and specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial submissions be filed before that time. 4 C.F.R. § 21.2(a)(1). Here, prior to the solicitation’s closing, ATF put offerors on notice of the agency’s position that the DOL wage conformance was applicable only to the current incumbent contract and would not apply to the new contract award resulting from the solicitation. The protester, however, waited until after award to object to the agency’s position. Having so waited, to the extent MPZA is now challenging the agency’s position on the wage conformance, such a challenge is untimely. See *e.g.*, *Adams and Assocs., Inc.*, B-417120, B-417125, Jan. 16, 2019, 2019 CPD ¶ 21 at 3 (dismissing protester’s argument that proposed

Further, the record provides no support for MPZA's assertion that Eagle Harbor "was able to underbid MPZA by avoiding Wage Determination compliance." Comments & Supp. Protest at 6. The agency explains--and the record confirms--"a direct comparison [of] MPZA and Eagle Harbor's prices in [the research assistant I and research assistant II] positions reveals that the hourly rates submitted by Eagle Harbor were actually *higher* than the hourly rates submitted by MPZA." MOL at 7, *citing* AR, Exh. 2h, MPZA Labor Rates Template; Exh. 3g, Eagle Harbor Labor Rates Template. In sum, we find unavailing the protester's arguments that offerors were starting from an unequal playing field due to the wage conformance in place for MPZA's incumbent contract, and that this unequal playing field improperly allowed Eagle Harbor to underbid MPZA. Accordingly, we deny these challenges to the agency's price evaluation. See *e.g.*, *C&T Techs.*, B-418313, Mar. 2, 2020, 2020 CPD ¶ 79 at 4 (denying protester's challenge to awardee's pricing where record did not support protester's contention factually).

### Normalizing Prices

Next, we turn to MPZA's argument that the agency failed to "normalize" prices, and, thus, evaluated offerors on an unequal basis. The agency responds that, in accordance with the solicitation's instructions, "each offeror submit[ed] pricing breakdowns that were specific enough to alleviate the need for the Agency to make assumptions about how pricing was calculated by each offeror," thus, permitting the agency to assess offerors' pricing assumptions and to make "a meaningful and fair comparison of prices." MOL at 6-7. The agency argues that normalizing prices, as suggested by the protester, would have required ATF to adjust offerors' proposed prices, which is not appropriate where, as here, a solicitation contemplates award of a fixed-price contract and provides for a price realism analysis, rather than a cost realism analysis where the agency adjusts costs to the most probable cost of performance. *Id.* at 9; see also FAR 15.404-1(d). Similarly, Eagle Harbor, the intervenor, asserts that "MPZA is really arguing for a *de facto* upward price adjustment [to Eagle Harbor's propose price] as if the Solicitation called for a cost realism analysis." Intervenor Comments at 6.

Our Office has explained that normalization of prices involves the adjustment of offers to the same standard or baseline where there is no logical basis for a difference in approach or where there is insufficient information provided with the proposals. *Information Ventures, Inc.*, B-297276.2 *et al.*, Mar. 1, 2006, 2006 CPD ¶ 45 at 9. Normalization is not proper, however, where varying costs between competing proposals result from different technical approaches that are permitted by the solicitation. *AXIS Mgmt. Group LLC*, B-408575, Nov. 13, 2013, 2013 CPD ¶ 247 at 5.

Here, the solicitation established an estimated number of labor hours in various labor categories that offerors could, but were not required to, use to propose their fixed hourly fully burdened labor rates. AR, Exh. 7g, RFP §§ L-M at 7; see *generally* Exh. 7e, RFP attach. D, Estimated Personnel Labor Rates Template. Specifically, the solicitation

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prices were not evaluated on a common basis as an untimely challenge to the solicitation).



permitted offerors to “submit proposals outside of the estimated amount of personnel based on performance measures.” AR, Exh. 7g, RFP §§ L-M at 7. Further, under the technical/managerial approach factor, offerors were required to “describe [their] technical/approach for meeting and understanding the PWS requirements,” to include submission of a staffing plan. *Id.* at 4. Accordingly, under the circumstances of the solicitation here, we find that the agency was not required to normalize prices in the manner asserted by the protester.<sup>7</sup> See e.g., *AXIS Mgmt. Group LLC, supra* at 6-7 (sustaining protest challenging agency’s price evaluation where solicitation gave offerors discretion to propose a technical approach to satisfy requirements, and agency improperly normalized labor hours and labor mix in its price evaluation, which had the effect of ignoring the protester’s unique technical approach to satisfying the agency’s requirements).

#### Documentation of Price Realism Analysis

Related to its other price challenges, MPZA also claims (1) the agency did not “evaluate whether the [awardee’s] proposed level of effort and labor mix are appropriate for the requirements of the PWS to ensure successful performance and whether the proposed rates per hour are reasonable,” as required by the solicitation; (2) that “there is no price realism analysis in the record”; and (3) that the awardee’s price is unrealistic. Comments & Supp. Protest at 2, 5-6, *citing* AR, Exh. 7g, RFP §§ L-M at 7. Here, the record reflects that, as permitted by the solicitation, Eagle Harbor proposed its own labor mix and level of effort, rather than using the estimates provided by the agency. Specifically, Eagle Harbor proposed [DELETED] labor hours per full-time equivalent (FTE), rather than the 1,912 labor hours provided for in the RFP’s pricing template. AR, Exh. 3(g), Eagle Harbor Pricing Template at column D. Additionally, as permitted by the solicitation, the record shows the agency chose to evaluate prices for realism. AR, Exh. 4, BVDD at 4.

The entirety of the record of ATF’s price realism analysis is as follows. The evaluators concluded that Eagle Harbor “provided appropriate rationale for [its] adjustment” of the number of labor hours per FTE.<sup>8</sup> AR, Exh. 6, Price Evaluation Report at 2. Additionally,

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<sup>7</sup> Moreover, to the extent MPZA’s contention is that the agency was required to use the same number of labor hours or the same number of FTEs to evaluate offerors on a common basis, such a contention is an untimely challenge to the solicitation. The solicitation permitted offerors to propose a customized labor mix in lieu of using the labor estimates provided by the agency. 4 C.F.R. § 21.2(a)(1); see e.g., *Microsoft Corp.*, B-420004, B-420004.2, Oct. 29, 2021, 2022 CPD ¶ 155 at 30 (dismissing protester’s argument that proposed prices were not evaluated on a common basis as an untimely challenge to the solicitation).

<sup>8</sup> MPZA argues that the solicitation permitted offerors to propose a different number of FTEs or to change the labor categories from those included in the RFP’s pricing template, but did not permit offerors to deviate from the 1,912 labor hours per FTE provided in the pricing template. Comments & Supp. Protest at 3; Supp. Comments

the evaluators found that Eagle Harbor’s “[p]roposed level of effort and labor mix appear[ed] appropriate for the requirements of the PWS” and that its “[p]roposed prices appear[ed] realistic.” *Id.* The SSA states in the best-value decision that, with respect to all offerors, “[t]he program office and Contracting Officer reviewed the level of effort and the labor mix and confirmed the proposed level of effort and labor mix are appropriate for the requirements of the PWS.” AR, Exh. 4, BVDD at 5. Similarly, the best-value decision provides that “[t]he Government performed price realism analysis to ensure whether proposed prices were realistic” for all offerors.<sup>9</sup> *Id.*

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at 3. In support of its argument, MPZA cites the following question and answer exchange from the solicitation: “Does the government have a standard basis of estimated hours for offerors to utilize?” to which ATF replied “1,912 hours.” *Id.*, citing AR, Exh. 8, RFP amend. 2, Q&A at 42, Q. No. 184. As noted above, however, the agency responded to a different question by stating that the workload (*i.e.*, the number of labor hours per FTE) in the pricing template was only an estimate provided for information purposes. AR, Exh. 8, RFP amend 2, Q&A at 57, Q. No. 237.

Here, any potential conflict between the agency’s answers to two offeror questions regarding whether the number of labor hours set forth in the solicitation was a required standard or an informational estimate was apparent from the face of the RFP, creating a patent ambiguity. A patent ambiguity exists where the solicitation contains an obvious or glaring error. *RELI Group, Inc.*, B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6. When a patent ambiguity exists in a solicitation, an offeror has an affirmative obligation to seek clarification prior to the first due date for submission of proposals following introduction of the ambiguity into the solicitation. *Government Acquisitions, Inc.; PCi Tec, Inc.*, B-407877.2 *et al.*, Mar. 25, 2013, 2013 CPD ¶ 82 at 5.

The purpose of our timeliness rule in this regard is to afford the parties an opportunity to resolve ambiguities prior to the submission of offers, so that such patently ambiguous provisions can be remedied before offerors formulate their proposals. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. Where a patent ambiguity is not challenged prior to submission of offers, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations. *Id.* Accordingly, we dismiss as untimely MPZA’s argument that Eagle Harbor was prohibited from deviating from the number of labor hours per FTE provided in the RFP’s pricing template.

<sup>9</sup> The best-value decision also provides that the agency determined offerors’ proposed prices were “fair and reasonable based on adequate price competition.” AR, Exh. 4, BVDD at 5. As price competition is the only price analysis technique referenced in the record, we note that our Office has stated “that the comparison of offerors’ price proposals in the context of a price realism analysis is an inherently limited methodology given the requirement to consider each offeror’s unique technical approach.” *GiaCare and MedTrust JV, LLC*, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321 at 9.

Other than these conclusory statements in the price evaluation report and best-value decision, the contemporaneous record of the agency's price evaluation provides no indication of how the agency reached these conclusions and does not contain any analysis of Eagle Harbor's proposed labor hours, labor mix, or pricing. Nor, in responding to the protest, has the agency provided any explanation of the analysis ATF undertook to assess the appropriateness of Eagle Harbor's customized labor mix or the realism of its proposed prices. See Supp. AR at 8-13. Rather, the agency's response focuses on providing a point-by-point rejoinder on the numerous contentions made by MPZA about the mathematical accuracy and formatting compliance of various aspects of Eagle Harbor's pricing template.<sup>10</sup> *Id.* at 10-13, 67-73. With respect to the actual price realism analysis undertaken by the evaluators, the agency repeatedly refers back to the above-quoted statements from the contemporaneous record as constituting adequate documentation of the evaluation, arguing that the protester is attempting "to request that [our Office] hold the Agency to a level of detail beyond [what] the Agency is required to do in conducting a price realism analysis." *Id.* at 11, 68-71.

As discussed, although an agency is generally not required to consider price realism in its evaluation of proposals for a fixed-price contract, an agency may choose to do so under certain circumstances, as ATF did here. Having chosen to evaluate price realism, ATF was obligated to document its evaluation adequately. Additionally, the solicitation required the agency to assess any customized labor mixes submitted by offerors to determine whether they were appropriate to meet the requirements of the RFP. We find that the record here lacks sufficient documentation--contemporaneous or otherwise--explaining how the agency assessed the appropriateness of Eagle Harbor's proposed custom labor hours and labor mix, or analyzed the firm's proposed pricing for realism. As such, we have no basis to conclude that the evaluation was reasonable.<sup>11</sup> See *e.g.*, *GiaCare and MedTrust JV, LLC*, *supra* at 9-10 (sustaining protest challenging agency's price realism evaluation where "the record contain[ed] no meaningful consideration of the compatibility of [the awardee's] pricing with its proposed technical approach"); *B&B Med. Servs., Inc.; Ed Med., Inc.*, B-409705.4, B-409705.5, June 29, 2015, 2015 CPD ¶ 198 at 11 (sustaining protest challenging agency's price realism evaluation where the "agency generally claim[ed] that [the awardee's] pricing was

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<sup>10</sup> We do not discuss in detail the protester's various contentions regarding whether Eagle Harbor's pricing template was compliant with the solicitation's submission instructions. See *generally* Comments & Supp. Protest at 2-4. Although, we find that none of the other allegations provide a separate basis to sustain the protest, in light of our recommendation to conduct a new price analysis, the agency may wish to consider verifying the mathematical accuracy of Eagle Harbor's pricing template and the consistency of the template with the firm's pricing proposal volume, as part of the new evaluation.

<sup>11</sup> We note that the record similarly includes only conclusory statements regarding the evaluation of MPZA's proposed labor mix and prices. AR, Exh. 6, Price Evaluation Report at 3.

'realistic,'” but “the record contain[ed] no indication of how the agency reached this conclusion”).

Competitive prejudice is an element of every viable protest. *Valor Healthcare, Inc., supra* at 8. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions; that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award. *AT&T Mobility LLC*, B-420494, May 10, 2022, 2022 CPD ¶ 115 at 12.

Here, the record shows that the agency did not adequately document its evaluation of the appropriateness of the awardee’s custom labor mix or the awardee’s price realism, as required by the solicitation. Because we cannot assess the reasonableness of the agency’s price evaluation, we cannot say what impact this would have made on the best-value tradeoff decision, especially in light of MPZA receiving a higher rating than the awardee under the past performance factor, and MPZA’s price being only 2.5 percent higher than the awardee. In such circumstances, we resolve doubts regarding prejudice in favor of a protester, as a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. *Aluttig-Banner Joint Venture*, B-412952 *et al.*, July 15, 2016, 2016 CPD ¶ 205 at 11. We therefore conclude that there is a reasonable possibility that MPZA was prejudiced by the agency’s actions, and sustain this challenge to the agency’s price evaluation.

#### Organizational Conflict of Interest

The protester alleges that the awardee had an unequal access to information OCI arising from the actions of an operations manager working for Eagle Harbor on a different contract for ATF (we refer to this Eagle Harbor employee as “Y”). See *generally* Comments & Supp. protest at 7-8, 12-13. The agency responds that it meaningfully considered the issue related to Y and reasonably concluded that no OCI exists, primarily because the information accessed by Y was not competitively useful nonpublic information. COS at 8, 10; MOL at 25; Supp. AR at 53-54.

As noted above, the solicitation requires provision of staff to perform data entry, imaging, indexing, IT, and related support services to five ATF divisions. RFP at 13; PWS at 4. Relevant to the discussion below, the five divisions and their corresponding acronyms are the: National Tracing Center Division (NTC), Firearms and Explosives Services Division (FESD), Firearms and Ammunition Technology Division (FATD), Criminal Intelligence Division/Operational Intelligence Division (CID/OID), and National Firearms Act Division (NFA). *Id.* Here, the solicitation advised offerors that, in fiscal year 2021, the NTC “processed over 548,000 firearm trace requests of which over 8,400 were designated as urgent,” and that the agency was “forecasting more than 630,000 incoming trace requests in [fiscal year 2022].” PWS at 21. The solicitation explained that DOJ and ATF headquarters “monitor the NTC through performance measures,” including a target of 75 percent of “[r]outine firearms trace requests completed within 7 days” and a target of 95 percent of “[u]rgent firearms traces

completed within 48 hours.” *Id.* The solicitation provided that the successful contractor will be measured for performance based on the “[p]ercentage of [t]race [r]equests completed successfully correlated to the actual number of investigative leads produced by the NTC” and on the “[a]ccuracy and completion rates of the [t]race [r]esults (which indicates the operational efficiency of the NTC).” *Id.*

In responding to the OCI allegations raised by MPZA in its initial protest, the agency disclosed that it had identified an issue related to Y while investigating the protester’s allegations. Specifically, the agency noted that, while working for Eagle Harbor under a different ATF contract, Y accessed an internal agency database and reviewed reports “regarding turnaround times for tracing firearms from firearms dealers.” COS at 7. The agency contends, however, that the accessed information did not give Eagle Harbor a competitive advantage. *Id.* at 10. In response to the agency’s disclosure, MPZA filed a supplemental protest maintaining that Y “improperly accessed confidential information ‘targeted to show NTC Contract workload and performance of the incumbent vendor’ [MPZA],” and that “as shown by Eagle Harbor’s adjustments in FTEs, [Eagle Harbor] used this information to prepare its proposal.” Comments & Supp. Protest at 12.

The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized broadly into three groups: biased ground rules, unequal access to nonpublic information, and impaired objectivity. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR 9.505(b), 9.505-4; *Raytheon Tech. Servs. Co. LLC*, B-404655.4 *et al.*, Oct. 11, 2011, 2011 CPD ¶ 236 at 4.

In challenging an agency’s OCI determination, a protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *ViON Corp.; EMC Corp.*, B-409985.4 *et al.*, Apr. 3, 2015, 2015 CPD ¶ 141 at 10; *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377, 1387 (Fed. Cir. 2011). The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7. We will review the reasonableness of a contracting officer’s OCI investigation and determination; where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. *Raytheon Tech. Servs. Co. LLC*, *supra* at 5; *Zolon Tech, Inc.*, B-419280.4, Mar. 18, 2021, 2021 CPD ¶ 154 at 6.

As explained by the agency, ATF was aware of the issue related to Y accessing an internal agency database. COS at 7. The record shows that the ATF Internal Affairs Division (IAD) “opened an internal investigation into an allegation of potential

misconduct by [Y] (Operations Manager Eagle Harbor, LLC) on October 3, 2022, alleging that [Y] accessed ATF databases to gain information beneficial to [Y's company's] bid proposal for an upcoming contract that Eagle Harbor, LLC was competing for." AR, Exh. 15, ATF Internal Affairs Memorandum at 1. The investigation stemmed from IAD's receipt of information on September 8, 2022 that, while performing as an operations manager for Eagle Harbor on a contract with ATF's National Integrated Ballistics Information Network (NIBIN) program, Y "had been accessing internal NTC Division performance reports," which Y "ha[d] no apparent need to access." *Id.* at 3. The IAD report indicates that Y accessed 12 reports through the "ATF Analytics portal" "between June 9 and August 26," and that "most of [the reports] were centered around performance metrics and contract related functions that are performed at the National Services Center in Martinsburg, [West Virginia.]" *Id.* at 4, 6. The individual who made the report to IAD indicated a belief that "[h]aving access to this information could offer an unfair competitive advantage in the solicitation/source selection process" for the procurement at issue here, which was ongoing at the time the individual made the report. *Id.* at 4.

The IAD review followed an investigation by the DOJ's Office of the Inspector General (OIG), during which DOJ-OIG "conducted interviews regarding the allegation." AR, Exh. 15, ATF Internal Affairs Memo at 1. The record reflects that DOJ-OIG "closed their investigation into [Y] and returned the investigation back to IAD on January 12, 2023 . . . without a formal OIG report or findings." *Id.* According to the agency, IAD "conducted additional follow-up work, including a review of DOJ-OIG witness interviews and ATF e-mail traffic involving [Y] for the period of April 29, 2022, through October 1, 2022." *Id.* The review "revealed that [Y] had accessed ATF databases which at the time [Y] had access to and included information for the ATF National Tracing Center (NTC), but there was no indication that [Y] provided this information to [Y's] employer (Eagle Harbor, LLC) for the purposes of utilizing the information [Y] accessed for [Eagle Harbor's] bid proposal on the contract that they were competing for with ATF." *Id.*

In addition to reviewing the investigations that already occurred, the contracting officer, in response to the protest, sent questions to Eagle Harbor asking about "[Y's] access to ATF's systems and whether [Y] provided any nonpublic ATF information to Eagle Harbor; the use by Eagle Harbor of any nonpublic information from ATF's systems." COS at 5. In response to the contracting officer's questions, Eagle Harbor submitted a combined declaration from its president and its director of business development, the latter of whom "served as the proposal manager for Eagle Harbor's proposal submitted in response to the Solicitation." AR, Exh. 22, Decls. of Eagle Harbor President and Director of Business Development at 1. In the declaration, Eagle Harbor represents that its proposal did not include any nonpublic or proprietary information from any ATF systems, and that, in preparing its proposal, the firm "did not use any information and/or screenshots from any ATF systems or reports." *Id.* at 2-3.

In response to the supplemental protest, the contracting officer sent a second set of questions to Eagle Harbor; to which Eagle Harbor's president submitted a second declaration. AR, Exh. 25, 2nd Decl. of Eagle Harbor President at 1. Eagle Harbor

represents that it became aware of the issue with Y when “[i]n late December 2022, the [DOJ-OIG] contacted [Y],” and that on “January 9, 2023, [Y] met with two individuals from the OIG while under oath who asked [Y] about [Y’s] use of ATF’s computer system that [Y] had access to as part of the performance of Eagle Harbor’s ATF NIBIN contract.” *Id.* Eagle Harbor explains that as part of Y’s work on the NIBIN contract, “[Y] is able to access certain information stored in the ATF’s systems relating to firearms tracing turnaround times,” that “[t]his access is necessary to improve NIBIN contract performance,” and that “[Y] does not have access to any acquisition-related information, such as confidential proposals, acquisition plans, internal ATF cost estimates, or proprietary information [from] third parties, such as proposals or predecessor contract pricing.” *Id.*

Additionally, Eagle Harbor states that “[Y] accessed ATF information to help [Y] improve Eagle Harbor’s interaction with the National Services Center (NSC) and NIBIN,” but that the information Y accessed “was not relevant to the Solicitation or Eagle Harbor’s proposal in response to the Solicitation” and “[Y] never provided information relating to tracing turnaround to Eagle Harbor and we never used any in our proposal.” AR, Exh. 25, 2nd Decl. of Eagle Harbor President at 1-3. Further, Eagle Harbor asserts that “information relating to firearms tracing turnaround times and efficiencies did not provide Eagle Harbor with a competitive advantage” because “[i]nefficiencies and long turnaround times for tracing firearms is already public information and well-known in the industry.” *Id.* at 2. As support for this assertion, Eagle Harbor references several media stories and ATF publications related to firearms tracing turnaround times. *Id.* In addition to these public reports, Eagle Harbor proffers that issues with turnaround time inefficiencies were known to the firm through its “incumbent experience (going back approximately 20 years.” *Id.* Finally, Eagle Harbor declares that Y participated in preparation of the firm’s proposal by providing “technical writing assistance” for tasks related to supporting two of the five divisions under the solicitation (NFA and FESD), that “[k]nowledge of turnaround times for tracing firearms from firearms dealers is not relevant to either proposal section,” and that Y was not involved with “any other portion of [Eagle Harbor’s] proposal.” *Id.* at 3.

In addition to the declarations submitted by Eagle Harbor’s president and director of business development, Y also submitted a declaration responding to questions from the contracting officer. AR, Exh. 26, Decl. of Y at 1. In the declaration, Y represents:

As part of my role under Eagle Harbor’s ATF NIBIN contract, I am able to access data stored on ATF’s internal system showing turnaround times for tracing firearms from firearms dealers. It is helpful to access this information to perform my NIBIN contract functions and responsibilities. Eagle Harbor employs over 400 employees supporting the NIBIN program. This includes our staff in over 100 locations submitting firearms trace requests to the NSC. It is critical for us to understand trace turnaround times because our staff are submitting trace results (we need to know how we can submit faster) and our staff also receive the trace results from the NSC that we use to develop investigative leads to reduce

crime. Understanding the turnaround time is critical to the success of our performance measures on the NIBIN contract.

At various times, I used the ATF system to access this data solely for use under Eagle Harbor's NIBIN contract. I never took notes, printed out, downloaded, or kept any copy of any information that I viewed while on the ATF system. I never accessed any proprietary or confidential technical or pricing information from any company while using the ATF system. I never provided any information regarding the NSC that I viewed or learned from the ATF system to anyone at Eagle Harbor. I did not use any information regarding tracing turnaround data that I viewed or learned from the ATF system in preparation of any Eagle Harbor proposal. This information is not relevant to the subject NSC Solicitation and would not provide Eagle Harbor any type of competitive advantage. It is public knowledge that ATF is always desiring a reduction in tracing times and that the ultimate goal is essentially prompt tracing turnaround times, with no delays. This knowledge is known by anyone in the industry.

*Id.* at 1-2.

As noted above, the solicitation did provide offerors with the number of firearm trace requests received in fiscal year 2021, the number projected for fiscal year 2022, and the performance metrics against which trace turnaround times are measured. PWS at 21. Further, ATF's special assistant to the assistant director, Office of Enforcement Programs and Services, who served on the source selection team for the current procurement, explains that "MPZA, as the NTC incumbent contractor, had access to 'NTC sources or systems'," and that "MPZA had greater access to 'NTC sources or systems' than any other company could have had, as it was the NTC incumbent contractor." AR, Exh. 20, Decl. of Special Assistant to the Assistant Director at 1.

Based on a review of the internal investigations by DOJ-OIG and ATF's IAD, the declarations submitted by agency and Eagle Harbor personnel in response to questions from the contracting officer, and review of Eagle Harbor's proposal, the contracting officer concluded that "a conflict of interest did not exist and that Eagle Harbor did not have a competitive advantage" stemming from Y's accessing firearms trace turnaround data. COS at 10. Further, the contracting officer found that MPZA "actually has access to more NTC information" than Eagle Harbor did through the actions of Y, including the "irrelevant" tracing turnaround information. *Id.*

The protester takes issue with the contracting officer's conclusion, arguing that:

Eagle Harbor's knowledge of workload and performance information for the incumbent vendor . . . enabled Eagle Harbor to alter the estimated staffing levels in the solicitation to match more precisely actual workloads. For example, Eagle Harbor's proposal jettisoned most of the FTE estimates from the solicitation and used [DELETED] FTEs. Eagle



Harbor's decision and methodology used to adjust the FTE numbers is either irrational or is based on inside knowledge gained from [Y's] espionage in accessing the workload and performance information.

Comments & Supp. Protest at 8 (internal citations omitted). The protester does not, however, explain how the tracing turnaround information accessed by Y is "workload and performance information for the incumbent vendor," nor does the protester refute the agency's representation that tracing turnaround times information is generally known to firms in the industry.<sup>12</sup>

While MPZA disputes the contracting officer's determination that the information obtained by Y was nonpublic, competitively useful information, the protester has furnished no evidence to the contrary. On the record here, we find that the agency reasonably investigated the possible OCI, and we conclude that MPZA's assertions fail to explain how the information accessed by Y provided Eagle Harbor with a competitive advantage. We therefore find no basis upon which to question the contracting officer's determination that Eagle Harbor did not have an unequal access to nonpublic, competitively useful information OCI stemming from the actions of Y. See e.g., *Zolon Tech, Inc., supra* at 7 (denying OCI allegation where agency meaningfully investigated and reasonably concluded that no unequal access to information OCI existed where "the record show[ed] that [the protester and awardee could] access the same information, and [the protester had] not identified particular information that would have given [the awardee] an advantage"); *Raytheon Tech. Servs. Co. LLC, supra* at 6 (denying OCI allegation where agency reasonably investigated and protester's disagreement with the contracting officer's conclusion that no OCI existed were not based on the requisite hard facts). Accordingly, we deny this allegation.

#### Unfair Competitive Advantage

The protester also argues that the awardee gained an unfair competitive advantage from the hiring of a former agency employee--who we refer to as "Z." Specifically, MPZA makes three allegations, without providing any supporting evidence. First, MPZA

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<sup>12</sup> Moreover, as noted above, as the incumbent contractor, MPZA had greater access to the agency systems and type of information accessed by Y than any other company. AR, Exh. 20, Decl. of Special Assistant to the Assistant Director at 1. Prejudice is an element of every viable protest, and we will not sustain a protest unless the protester demonstrates a reasonable possibility that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Dewberry Crawford Group; Partner 4 Recovery, B-415940.11 et al.*, July 2, 2018, 2018 CPD ¶ 298 at 18. Here, even if the information obtained by Y was considered nonpublic, competitively useful information, MPZA cannot demonstrate prejudice as it had access to the same information it argues Eagle Harbor used to craft a proposal that would "match more precisely actual workloads"--actual workloads of which MPZA had direct knowledge as the incumbent contractor. Comments & Supp. Protest at 8.

contends that, while working for ATF, Z “had oversight over MPZA’s team member’s incumbent contract and [had] direct influence and input into the shaping of the subject procurement.” Protest at 7-8. Second, MPZA contends that Z “had information which was clearly competitively useful information which was not public, including pricing and technical information about MPZA’s team member’s incumbent contract.” *Id.* Finally, MPZA contends that after leaving the agency Z “began consulting with Eagle Harbor” and “participated in the Eagle Harbor proposal efforts.” *Id.* The agency responds that it meaningfully considered the protester’s allegations regarding the former agency employee, Z, and reasonably concluded that “Eagle Harbor has not received an unfair competitive advantage as a result of” hiring Z because (1) Z “did not have access to nonpublic information as it relates to the procurement”; (2) Z “did not assist ATF in defining the requirements” or evaluation criteria for the solicitation; and (3) Z did not “have any role in preparing Eagle Harbor’s proposal.”<sup>13</sup> COS at 14; MOL at 29-30.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR 3.101-1; *Interactive Info. Sols., Inc.*, B-415126.2 *et al.*, Mar. 22, 2018, 2018 CPD ¶ 115 at 5. Where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not on mere innuendo or suspicion. *Geo Owl, LLC*, B-420599, June 13, 2022, 2022 CPD ¶ 143 at 4. Thus, a person’s

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<sup>13</sup> MPZA also takes issue with Eagle Harbor’s proposing of former ATF employee Z as a key person. The protester argues Z is subject to statutory two-year post-government employment restrictions that render Z ineligible to “serve as a key person because [Z] cannot execute PWS requirements.” Protest at 8; Comments & Supp. Protest at 10, 14-15; *see also* AR, Exh. 3e, Eagle Harbor Key Personnel Proposal at 17 (proposing Z for one of the task manager key personnel positions). In response to the protest, the contracting officer reviewed the PWS requirements for the task manager position, as well as the duties which Eagle Harbor proposed Z to perform. COS at 17. The agency determined that Z’s position as task manager would not require Z to appear before or communicate to the government with the intent to influence official agency action in a way that would violate the post-government restrictions under 18 U.S.C. § 207. *Id.* at 18-19. Rather, as required by the solicitation, Eagle Harbor’s proposal provides that its project manager “will be [DELETED],” while “[p]roduction monitoring will be [DELETED],” and that “[p]roduction information will [DELETED].” AR, Exh. 3d, Eagle Harbor Technical/ Managerial Proposal at 32.

Ultimately, whether Z may have violated the post-employment restrictions of 18 U.S.C. § 207 is not within the purview of our Office. The provision at 18 U.S.C. § 207 is a criminal statute; the interpretation and enforcement of which are primarily matters for the procuring agency and DOJ. Accordingly, this allegation is dismissed. *Dewberry Crawford Group; Partner 4 Recovery, supra* at 23 n.12; *Systems Research and Applications Corp.; Booz Allen Hamilton, Inc.*, B-299818 *et al.*, Sept. 6, 2007, 2008 CPD ¶ 28 at 30.

familiarity with the type of work required resulting from the person's prior position in the government is not, by itself, evidence of an unfair competitive advantage. Rather, there must be hard facts establishing the person's access to nonpublic information, which could provide a firm with an unfair competitive advantage. *Interactive Info. Sols., Inc., supra*.

To resolve an allegation of unfair competitive advantage under these circumstances, we typically consider all relevant information, including whether the former government employee had access to competitively useful inside information, as well as whether the former government employee's activities with the firm were likely to have resulted in a disclosure of such information. *Dewberry Crawford Group; Partner 4 Recovery, supra* at 25. Whether the appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances in each case, and, the responsibility for determining whether to continue to allow an offeror to compete in the face of such alleged impropriety is a matter for the contracting agency. *Interactive Info. Sols., Inc., supra* at 5; *Perspecta Enter. Sols., LLC, supra* at 7. We review the reasonableness of a contracting officer's investigation 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. *Geo Owl, LLC, supra; Northrop Grumman Systems Corp.--Mission Systems, B-419557.2 et al., Aug. 18, 2021, 2021 CPD ¶ 329* at 9. Here, MPZA's unsupported allegations fall well short of this high standard.

The record demonstrates that in response to the protest, the contracting officer conducted an investigation as to whether a potential conflict existed with regards to Eagle Harbor's employment of Z. See *generally* COS at 10-14, 17-19. The contracting officer's investigation confirmed that Z was a former ATF employee, and from August 2020 to February 2022, served as the chief of one of the divisions to be serviced under the solicitation at issue here--the NTC. *Id.* at 18; AR, Exh. 23, Decl. of Z at 1.

With respect to performance of the incumbent contract, the record reflects that as the division chief for the NTC, Z "set the broad strategic plans for NTC based upon strategic plans received from ATF Headquarters," and worked with the contracting officer's representative (COR), as did the chiefs of the other divisions serviced by the incumbent contract, "to set performance goals for each Division to meet the strategic plan." AR, Exh. 23, Decl. of Z at 1. Z avers that "I did not have any direct role in the acquisition," rather "[m]y only role in the contract was to approve any recommended changes from the COR (if any) to the NTC performance goals, not the goals of any of the other divisions," and "I was not directly involved in establishing the goals for the contract." *Id.* Z further represents that all contractor oversight activities--including those for the incumbent contract--"were the responsibility of the COR and the [contracting officer] in a separate acquisition office," and that as division chief "I did not have any authority to direct, control, or influence any contractor activities." *Id.* at 2. Z asserts that he did not have contact with incumbent contractor staff "except for the Project Manager for monthly briefings." *Id.* Additionally, Z states that "I had access to the overall NTC division budget, but not individual contract pricing or access to the [incumbent] contract

itself,” and “I did not have access to proprietary information” relating to the incumbent contract. *Id.* at 3. Further, Z provides that “I never accessed or had a need to access competitively useful information, such as the processor contractor’s pricing or ATF’s cost estimate” for the incumbent contract as “[a]ll contractual oversight and knowledge was the responsibility of the COR and the Contracting Officer.” *Id.*

With regard to the development of the solicitation for the protested procurement, which was issued approximately three months after Z left the agency, Z represents that:

I did not have direct influence or input into shaping the subject procurement or the Solicitation. ATF Headquarters was responsible for setting the performance goals for the contract and would ask each Division if it wanted increased performance measures. I indicated that I did on behalf of the NTC division, but I had no input into what those performance measures would be, how much they would be increased, or how much funding would be given to such measures. I had no involvement in any decision-making with respect to the procurement or the Solicitation. The ATF contracting office established the procurement requirements, without any input from me. . . . I played no role in the development or review of any of the requirements, statement or scope of work, staffing, evaluation criteria, pricing, or any other aspect of the Solicitation, nor was I made aware of, provided, or given access to any of this information before I left ATF in February 2022.

AR, Exh. 23, Decl. of Z at 2.

Finally, with respect to the development of Eagle Harbor’s proposal in response to the solicitation, Z avers that “I did not have any role in preparing Eagle Harbor’s proposal.” AR, Exh. 23, Decl. of Z at 4. Rather, Z notes that, while not involved in the preparation of Eagle Harbor’s proposal, Z “did share general, public information or offer my own opinions/judgment about NTC operations with Eagle Harbor based on my institutional knowledge.” *Id.* at 5. Eagle Harbor’s President and Director of Business Development also attest that “[Z] did not have any role in preparing Eagle Harbor’s proposal,” that “at no time did [Z] disclose any non-public ATF or MPZA (or MPZA team member) information to Eagle Harbor,” and that Z’s only involvement was to provide “a general overview of ATF operations based on [Z’s] institutional knowledge and personal experiences.” AR, Exh. 22, Decls. of Eagle Harbor President and Director of Business Development at 5-7.

MPZA takes issue with the agency’s investigation and conclusion that no conflict existed related to Z, arguing that: (1) because Z stopped working “at ATF and joined Eagle Harbor simultaneously, a rational person would conclude that [Z] engaged in employment discussions with Eagle Harbor while employed at ATF”; (2) because the solicitation was issued on May 27, 2022, “[a] rational person would conclude that the solicitation was under preparation at ATF at the beginning of 2022, when [Z] was still employed at ATF”; (3) because “the new solicitation was developed while [Z] was

serving as the Branch Chief . . . [Z] had direct knowledge and influence over the requirements including the performance standards that were in the solicitation in the current procurement”; (4) Z’s declaration “is general and as such, misleading”; (5) because Eagle Harbor submitted its proposal on August 26, 2022, “[a] rational person would conclude that Eagle Harbor started proposal preparation sometime prior to that date”; and (6) Z “obviously was ‘actively and extensively engaged’ in the execution of the [incumbent] contract and developing PWS specifications for the protested procurement.”<sup>14</sup> Comments & Supp. Protest at 9-10, 12.

The protester does not allege, however, any corroborated facts to support its arguments, or to rebut the representations reflected in the record. While the protester asserts that the agency’s investigation was insufficient, it offers no hard facts to support its allegations, which amount to nothing more than its own suspicion and innuendo, or to rebut the countervailing evidence. Most critically, the protester fails to provide evidence to rebut the declarations submitted by Z and Eagle Harbor that Z did not have access to proprietary information about the incumbent contract, was not involved in the development of the solicitation at issue here, and did not assist in the drafting of Eagle Harbor’s proposal.

On this record, we find no basis to disagree with the agency’s conclusion that Eagle Harbor did not receive an unfair competitive advantage as a result of hiring a former government employee. We reach this conclusion based on the unrebutted declarations that Z did not have access to nonpublic competitively useful information and did not provide any assistance to the awardee in developing its proposal. See e.g., *Geo Owl, LLC, supra* at 5 (denying allegation of unfair competitive advantage where no evidence presented to rebut declaration establishing that former federal employee was never employed by the awardee and had not been involved with proposal preparation); *Interactive Info. Sols., Inc., supra* at 6-7 (denying allegation of unfair competitive advantage where facts did not establish that former agency employee had access to

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<sup>14</sup> In its comments on the agency report, the protester, for the first time, raises suspicion about the timing of employment negotiations between Z and Eagle Harbor, suggesting that these negotiations may have occurred while Z was still working for the ATF. Although the protester does not explain the legal significance of this timing, the innuendo of its speculation may be that the employment negotiations could have created an incentive for Z to use his position to influence the terms of the solicitation, which had not then been finalized, to favor Eagle Harbor. See, e.g., *Northrop Grumman Sys. Corp.--Mission Sys., B-419560.3 et al.*, Aug. 18, 2021, 2021 CPD ¶ 305 at 7-10 (sustaining protest based on a conflict of interest created by a government employee who developed specifications for solicitation while simultaneously engaging in employment negotiations with firm that ultimately received award under the solicitation). These suspicions and any allegations that may flow there from, however, are untimely where the protester knew the timing of when Z left the agency and began work for Eagle Harbor when it filed its initial protest, yet the protester waited until its comments to raise its concerns in this regard. See 4 C.F.R. 21.2(a)(2).

nonpublic, competitively useful information about procurement). Accordingly, we deny this protest allegation.

### Best-Value Tradeoff

The protester also contends that the agency's best-value tradeoff necessarily was flawed because the underlying price evaluation was flawed. Protest at 9. In reviewing an agency's source selection decision, we examine the supporting record to determine if it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *Guidehouse LLP; Jacobs Tech., Inc.*, B-420860 *et al.*, Oct. 13, 2022, 2022 CPD ¶ 257 at 16. In light of our determination that the record does not provide a sufficient basis for us to find reasonable the agency's price evaluation, we find the source selection based on an unreasonable price evaluation to be itself unreasonable. *Weston-ER Fed. Servs., LLC*, B-418509, B-418509.2, June 1, 2020, 2020 CPD ¶ 311 at 16 ("an agency's best-value determination is flawed when one or more of the underlying evaluations upon which that tradeoff analysis is based are unreasonable, erroneous[,] or improper").

### CONCLUSION AND RECOMMENDATION

As discussed above, although an agency is generally not required to consider price realism in its evaluation of proposals for a fixed-price contract, an agency may choose to do so under certain circumstances, as ATF did here. Having chosen to evaluate price realism, ATF was obligated to document its evaluation adequately. Additionally, the solicitation required the agency to assess any customized labor mixes submitted by offerors to determine whether they were appropriate to meet the requirements of the RFP. We find that the record here lacks sufficient documentation--contemporaneous or otherwise--explaining how the agency assessed the appropriateness of Eagle Harbor's proposed custom labor hours and labor mix, or analyzed the firm's proposed pricing for realism. As such, we have no basis to conclude that the evaluation was reasonable. Further, we find there is a reasonable possibility that MPZA was prejudiced by the agency's actions, and sustain MPZA's challenge to the agency's price evaluation on this basis.

We recommend that the agency evaluate offerors' proposed customized labor mixes for appropriateness in meeting the requirements of the RFP, consistent with the solicitation and our decision. Additionally, we recommend the agency determine whether it will evaluate price realism, as permitted by the solicitation. Regardless of whether the agency includes price realism as part of its reevaluation, the agency should document its reevaluation of proposed prices, and make a new best-value determination. If the agency determines that an offeror other than Eagle Harbor is in line for award, the agency should terminate Eagle Harbor's contract for the convenience of the government and make award accordingly, if otherwise proper. We also recommend that the agency reimburse MPZA's costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for costs,

detailing and certifying the time expended and costs incurred, to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez  
General Counsel