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## Decision

**Matter of:** Washington Business Dynamics, LLC

**File:** B-421953; B-421953.2

**Date:** December 18, 2023

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### DIGEST

1. Protester is an interested party to challenge the agency's establishment of a blanket purchase agreement set aside for service-disabled veteran-owned small business concerns where its eligibility is based on its size status at the time of its initial offer for and award of its Federal Supply Schedule contract.
  2. Protest challenging the agency's evaluation of quotations and resulting award decision is sustained where the agency's evaluation was unreasonable, inconsistent with the terms of the solicitation, and inadequately documented.
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### DECISION

Washington Business Dynamics, LLC (WBD), a small business of Washington, D.C., protests the Office of Personnel Management's (OPM) establishment of a blanket purchase agreement (BPA) with VPD Government Solutions (VPD), a service-disabled veteran-owned small business (SDVOSB) of Arlington, Virginia, pursuant to request for quotations (RFQ) No. 47828, issued for procurement and acquisition support services. The protester challenges the agency's evaluation of quotations and best-value decision as unreasonable.

We sustain the protest.

## BACKGROUND

The agency issued the RFQ on January 26, 2023, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, to SDVOSB firms holding the General Services Administration's (GSA) multiple-award federal supply schedule (FSS) contract for professional services (category 541611). Agency Report (AR), Tab 2.2, Revised RFQ at 69.<sup>1</sup> The solicitation contemplated the establishment of a single BPA, with fixed-price contract line items, with a 1-year base ordering period of performance and four 1-year option periods. *Id.* at 72-73. Through the RFQ, OPM sought acquisition support services, to include all personnel, equipment, supplies, facilities, transportation, tools, materials, and supervision necessary to perform services as defined in the performance work statement (PWS). *Id.* at 73. Specifically, the PWS identified the four following principal performance requirements, all of which included specific subtasks with performance standards: (1) assisting program office personnel develop and prepare acquisition requirements packages; (2) preparing pre-award and post-award documentation for program requirements; (3) providing administrative support to the Office of Procurement Operations; and (4) performing system administration for procurement systems. *Id.* at 79-85.

The solicitation advised that award would be made on a best-value tradeoff basis, considering three factors: (1) technical capabilities, staffing classification, and management approach; (2) past performance; and (3) price. *Id.* at 92-93. For each non-price factor, the agency would assign one of three confidence assessment ratings: high confidence; some confidence; low confidence. *Id.* at 94-95. Only the non-price factors are relevant to the resolution of this protest.

As to the technical capabilities, staffing classification, and management approach factor,<sup>2</sup> the RFQ advised that OPM was to evaluate quotations on the degree to which the contractors' technical capabilities "demonstrate an understanding of all requirements identified in the PWS, as well as the feasibility of the approach." *Id.* at 90. The RFQ further directed that "[c]ontractors shall provide sufficient information for the Government to determine its level of confidence in the ability of the Contractor to perform the requirements of the RFQ based on an assessment of the technical capability, staffing classification, management approach, and relevant experience from the contractor and its team members (if a [contractor teaming arrangement (CTA)] is proposed)." *Id.*

The RFQ provided specific instructions with respect to staffing classification and management approach. As to the staffing classification, vendors were to develop a staffing classification for procurement support services based on the PWS's performance standards. *Id.* Specifically, vendors were to provide labor category

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<sup>1</sup> All citations to the agency's report are to the Adobe PDF document page numbers.

<sup>2</sup> For ease of reference, we address this evaluation factor as either: (a) technical capabilities, staffing classification, and management approach factor; or (b) Factor 1.

descriptions, including education, qualifications, and certifications, with a map to both the vendor's FSS labor categories and the PWS's performance standards an employee in the labor category would perform. *Id.*

As to the management approach, vendors were to address their approach to human capital staffing and quality control in response to five specific areas. First, vendors were to: (i) explain their human capital approach to motivating and stabilizing a properly trained workforce; (ii) describe a risk based human capital strategic management approach that integrates attrition, recruiting, training, and incentives; and (iii) include any specific actions that will be taken to minimize workforce disruption created by possible surge periods. *Id.* at 91. Second, vendors were required to: (i) describe their quality management philosophy and how the philosophy aligns with the quality program proposed by each vendor; (ii) provide an analysis of the planned balance between quality control and quality assurance surveillance; and (iii) identify specific lines of communication and reporting. *Id.* Third, vendors were to describe the top three quality objectives, explaining the rationale for choosing each in order of importance and how they support the vendor's proposed quality system and quality management philosophy. *Id.* Fourth, vendors were to develop a draft BPA call quality control plan (QCP), including developing and implementing procedures to identify, prevent, and ensure non-recurrence of defective services. *Id.* Fifth, vendors were to prepare a draft quality assurance surveillance plan (QASP) in accordance with the PWS's performance requirements. *Id.*

The RFQ provided three distinct bases for the evaluation of the technical capabilities, staffing classification, and management factor. As for technical capabilities, the evaluation criteria largely mirrored the instructions provided to the vendors and as discussed above. Specifically, OPM was to evaluate "the degree to which the contractor's technical capability demonstrate an understating of all the requirements in the PWS, as well as the feasibility of the approach," and the agency's "level of confidence in the ability of the Contractor to perform the requirements of the RFQ based on an assessment of the technical capability, management approach and relevant experience from the contactor and its team member (if a CTA is proposed)." *Id.* at 93.

The RFQ also provided that staffing classification would be evaluated to assess the vendor's understanding of key government requirements. *Id.* As to management approach, the RFQ provided that OPM was to evaluate the feasibility, extent, and quality of the management approach and capacity. *Id.* The RFQ further provided that the agency would conduct a "thorough analysis of the [vendor's] integrated technical approach that also details alternatives considered to demonstrate evidence of critical thinking regarding motivating and stabilizing a properly trained workforce staffing in support services as well as quality control." *Id.*

The RFQ additionally provided specific evaluation criteria for a vendor's QCP and QASP as part of staffing classification. *Id.* As to the QCP, OPM was to evaluate the plan to ensure the vendor has a clear and documented approach to monitor the total quality of its performance, and would specifically evaluate to determine the degree to

which the plan: (i) defined the organization, tasks, roles, and responsibilities necessary to execute quality assurance; (ii) described how the vendor will adhere to or exceed the performance standards defined in the PWS and QASP; (iii) defined the policies and procedures the vendor will use to evaluate and report on the adherence to the PWS’s performance standards and ensure overall quality assurance of the work products, deliverables, and documentation; and (iv) described the process of performance documentation development, submission, and approval. *Id.*

As to the QASP, OPM was to evaluate the vendor’s approach for measuring and attaining quality performance, including specifically evaluating the degree to which the plan: (i) explained the methods and processes the vendor shall implement to ensure that all requirements are being accomplished in accordance with the specifications; (ii) described when, where, and by whom the vendor’s quality process controls will be performed; (iii) identified an official who shall be responsible for the operation of the quality control system/department and for investigating and ascertaining the cause of deficiencies; (iv) highlighted the vendor’s approach to continuous quality improvement and emphasis on deficiency prevention over deficiency detection; and (v) demonstrated a concerted effort of improving quality control to prevent recurrences of unsatisfactory performance and to ensure that any unsatisfactory performance is addressed and rectified in a timely manner. *Id.*

As to the past performance factor, the RFQ instructed vendors to provide “[a] list of at least three contracts for work the same or similar to the requirements specified in the PWS completed or in process, within the last 3 years.” *Id.* at 92. The instructions defined relevant past performance as federal, state, and local government or commercial contracts or work performed or being performed that are or were similar in nature and scope to the RFQ’s requirements. *Id.* OPM was to evaluate the quality of the vendor’s recent and relevant experience in performing projects similar in size, scope, and complexity to the PWS’s requirements. *Id.* at 94.

The agency received multiple quotations by the February 1, 2023, deadline for receipt of quotations, to include quotations from WBD and VPD. The following is a summary of the final ratings of those vendors’ quotations:

	<b>WBD</b>	<b>VPD</b>
<b>Technical/Staffing/Management</b>	High Confidence	High Confidence
<b>Past Performance</b>	High Confidence	High Confidence
<b>Price</b>	\$18,266,332	\$12,648,584

AR, Tab 6, Award Decision Memorandum at 297-298.

The agency made award to VPD on or about August 28. Contracting Officer’s Statement (COS) at 9. On September 7, WBD filed the instant protest with our Office.

## DISCUSSION

WBD principally challenges the agency's evaluation of quotations and tradeoff decision, contending OPM's consideration under the non-price factors was flawed and unreasonable. Protest at 7-25; Comments and Supp. Protest at 14-41; Supp. Comments at 10-39. In this regard, WBD argues the agency's technical and past performance evaluations were inconsistent with the stated terms of the solicitation, and that OPM's assignment of a rating of high confidence to VPD's quotation under those evaluation factors was unreasonable. Moreover, WBD contends that the underlying evaluation record is insufficiently documented to determine if OPM actually undertook a reasonable, qualitative analysis of quotations, as was required by the RFQ. WPD further argues OPM mechanically compared vendors' adjectival ratings but failed to reasonably assess the relative merits of each quotation in making its best value determination. For the reasons that follow, we sustain WBD's protest.

### Interested Party

Before turning to the merits of WBD's allegations, we first resolve the question of whether WBD is an interested party to pursue this protest. Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. *Id.*

OPM filed a request to dismiss WBD's protest arguing that the protester is not an interested party to challenge the agency's evaluation because WBD is no longer a SDVOSB concern, and therefore is ineligible for award of the BPA.<sup>3</sup> Req. for Dismissal at 1. The facts underlying OPM's request are largely not in dispute.

On May 9, 2019, GSA awarded WBD a FSS contract. Protester's Resp. to Req. for Dismissal, exh. 3 at 1. WBD certified it was an SDVOSB at the time of its initial offer for and award of the FSS contract. *Id.* As noted above, on January 26, 2023, the agency issued the instant RFQ for the establishment of a BPA to SDVOSB firms holding the

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<sup>3</sup> OPM filed its request for dismissal prior to the production of the agency's report. Req. for Dismissal at 1. Following responses from the parties, we declined to dismiss WBD's protest, at that time, but "invited [OPM] to further address this issue in its report[.]" GAO Notice of Resp. to Agency's Req. for Dismissal at 1. Our Office subsequently invited the SBA to comment on its interpretation of its regulations, pursuant to 4 C.F.R. § 21.3(j).

requisite FSS contract.<sup>4</sup> AR, Tab 2, RFQ at 1. The protester, which is also the incumbent contractor for these requirements, submitted its quotation in response to the solicitation on February 1. AR, Tab 4.1, WBD Quotation Submission Cover Letter at 186. On June 28, 147 days after WBD submitted its quotation, CNI Government, LLC, which is not a SDVOSB concern, acquired WBD. Req. for Dismissal, exh. 5 at 1. Consistent with FAR clause 52.219-28(b)(2), on July 28, WBD notified OPM (with respect to its incumbent BPA) of the firm's acquisition, and that it was no longer a SDVOSB.<sup>5</sup> *Id.* In its award decision for this challenged "follow-on" BPA, OPM specifically referenced WBD's notice that its designation had changed from a SDVOSB concern.<sup>6</sup> AR, Tab 6, Award Decision Document at 298.

Whether WBD, a concededly other than SDVOSB, is eligible for award of this BPA set aside for SDVOSBs, and thus an interested party to pursue its protest challenging the agency's evaluation of quotations and resulting award decision, ultimately turns on whether the mandatory recertification provision, as set forth in SBA's regulations at

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<sup>4</sup> Although the RFQ indicated that the procurement was set aside for SDVOSBs, the solicitation did not explicitly request vendors to recertify their respective sizes. See *Size Appeal of EBA Ernest Bland Assocs. PC*, SBA SIZ No. 6139 (2022), 2022 WL 529352 at \*5 ("[The SBA Office of Hearing and Appeals] has long held that 'merely setting [a] task order aside for small businesses' does not constitute a request for recertification.") (quotation omitted).

<sup>5</sup> This provision of the FAR, titled "Post-Award Small Business Program Representation" generally requires a contractor to re-represent its size and socioeconomic status following either the execution of a novation agreement, or a merger or acquisition that does not require a novation. FAR clause 52.219-28(b). The FAR clause is consistent with SBA's regulations at 13 C.F.R. § 121.404(g)(1) and (2)(i), which generally require a contractor to recertify its small business size status within 30 days of such covered corporate transactions becoming final.

<sup>6</sup> WBD argues that OPM never contemporaneously determined that the protester was ineligible for award because of the loss of its SDVOSB status. Protester's Resp. to Req. for Dismissal at 2-3. In this regard, the award decision's discussion of contractor responsibility notes WBD's loss of SDVOSB status, but then explains that "[a]s WBD had not been selected as the awardee, this did not affect [OPM's] award decision." AR, Tab 6, Award Decision Document at 298. Regardless of whether WBD was contemporaneously excluded from the competition on this basis, we find this to be of no consequence where the protester concedes that "it no longer [meets] the requirements to be considered an SDVOSB." Protester's Resp. to Req. for Dismissal at 3; *but see The First Choice, LLC*, B-417196 *et al.*, Mar. 25, 2019, 2019 CPD ¶ 158 (finding the protester was interested to pursue its protest where there was no contemporaneous determination that the protester was other than small and the question of the protester's eligibility as a small business was based on an erroneous Sam.gov representation that was subsequently corrected). Thus, as addressed herein, the only operative question in dispute is whether the recertification provision relied upon by OPM and SBA rendered WBD ineligible for the BPA.

13 C.F.R. § 121.404(g)(2)(iii), applies to the facts at hand, and renders WBD ineligible for the BPA. Our Office has previously been confronted with interpreting 13 C.F.R. § 121.404(g); as demonstrated the regulation can be a complex one to implement. *Odyssey Sys. Consulting Grp., Ltd.*, B-419731 *et al.*, Jul. 15, 2021, 2021 CPD ¶ 260 at 8.

In order to reach the ultimate question at issue, we must consider SBA's regulation at 13.C.F.R. § 121.404, concerning when a firm's size status is determined.<sup>7</sup> The general rule is that a firm's size is determined based on its self-certification of its size status at the time the firm submits an initial offer or response to a solicitation, which includes the firm's price. Specifically, 13 C.F.R. § 121.404(a) provides that "SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price." After establishing this baseline, that size is determined at the time of initial offer or response, the regulation then addresses various contracting scenarios, to include multiple award contracts and awards under those contracts and provides further guidance regarding those situations.<sup>8</sup>

As relevant here, because the underlying FSS from which OPM seeks to establish its BPA is a multiple award contract that has multiple associated North American Industry Classification System (NAICS) codes, the relevant subsection applicable to these facts is 13 C.F.R. § 121.404(a)(1)(ii). In relevant part, this subsection provides that:

SBA determines size status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth for each discrete category . . . for which the business concern submits an offer and represents that it qualifies

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<sup>7</sup> Our review of SBA's regulations concerns those provisions in effect as of January of 2023 as SBA has subsequently amended certain relevant provisions of the regulations at issue.

<sup>8</sup> Although part 121 of SBA's regulations do not contain a definition of a "multiple award contract," 13 C.F.R. § 125.1, What definitions are important to SBA's Government Contracting Programs?, defines a multiple award contract as a contract that is:

- (1) A Multiple Award Schedule contract issued by GSA (e.g., GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA [ . . .];
- (2) A multiple award task-order or deliver-order contract issue in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or
- (3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section.

*Id.*

Consistent with the baseline rule, this subsection similarly provides that size is determined at the time of initial offer or response for the multiple award contract, but also specifically references a number of potential exceptions that would require subsequent recertification. Before turning to those exceptions, we note that this subsection provides further guidance regarding certification at the order or agreement level under such multiplate award contracts.

Specifically, the subsequent subsections establish different certification requirements depending on whether the multiple award contract is unrestricted or set-aside for small business concerns, and then whether any subsequent orders or agreements under the contract are procured on an unrestricted or set-aside basis. Relevant here, for unrestricted multiple award contracts, where a business was small at the time of offer and contract-level certification for discrete categories in the multiple award contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or BPA.

13 C.F.R. § 121.404(a)(1)(ii)(A). Thus, absent a specific request from a contracting officer, a firm is considered small for any subsequent unrestricted order or BPA issued under the multiplate award contract. In other words, the baseline rule applies unless there is a specific recertification request.

For orders or BPAs set aside exclusively for small businesses (including subcategories), however, a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or agreement. *Id.* This section, therefore, provides the first material deviation from the baseline that size is determined at the time of the initial offer (or contract-level certification) for the multiple award contract. Rather, if the order or BPA is set aside for small businesses, the concern must recertify its size and qualify as a small business at the time of its initial offer for the order or BPA.

It is worth noting, however, that this section specifically provides that it does not apply to orders or BPAs issued under any FSS contract. *Id.* (“Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract. . . .”).<sup>9</sup>

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<sup>9</sup> The exemption for size recertification at the BPA level for BPAs established under the FSS is also repeated in 13 C.F.R. § 121.404(a)(2). Specifically, that provision provides that: “With respect to ‘Agreements’ including [BPAs] (*except for BPAs issued against a GSA Schedule Contract*), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement.” (Emphasis added).



Indeed, persuasive authority from the SBA's Office of Hearing and Appeals (SBA OHA) unquestionably has confirmed this exception to recertification for FSS BPAs or orders:

Further, SBA regulations do not require a concern to have its size determined at the time it submits an offer under a BPA arising out of an FSS ([*quoting Size Appeal of Total Sys. Techs. Corp.*, SBA No. SIZ-5562 (2014)] at 6 “although the current rule does stipulate that a concern submitting an offer for a set-aside BPA must qualify as small when it submits an initial offer including price, BPAs issued under GSA Schedule contracts are specifically exempted from this requirement.”); 13 C.F.R. § 121.404(a)(2). Therefore, recertification is not required under a BPA issued against an FSS.

*Size Appeal of Oxford Gov. Consulting LLC*, SBA No. SIZ-5732 (2016), 2016 WL 4990545 at \*2; *see also Size Appeal of EBA Ernest Bland Assocs. PC*, SBA SIZ No. 6139 (2022), 2022 WL 529352 at \*6 (finding that, absent a specific order-level recertification requested by the contracting officer, there was no requirement to recertify at the FSS-order level).

Having outlined the general baseline size status rule and its various alternative applications across different scenarios, we return to the exceptions in paragraph (g) specifically contemplated by 13 C.F.R. § 121.404(a)(1)(ii). Paragraph (g) begins by reiterating the baseline principle that a concern that is small at the time of its initial offer remains small for the life of the contract, but explains that this status can be impacted for future options and orders if a firm is unable to recertify as small following certain events requiring size recertification:

A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business, except that a required recertification as other than small under paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders.

13 C.F.R. § 121.404(g).

Thus, paragraph (g) confirms the baseline rule that size is determined at the time of initial offer (or contract-level certification) for the multiple award contract, while also establishing that if one of the recertification exceptions apply, then any change in the firm's size may affect its status for future options and orders.

Two of paragraph (g)'s recertification exceptions are applicable to our analysis here. First, 13 C.F.R. § 121.404(g)(2)(i) requires recertification for existing awards where certain corporate transactions occur, explaining that a change in size may impact the agency's ability to subsequently claim credit for small business goaling purposes. Specifically, that provision provides:

In the case of a merger, sale, or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

13 C.F.R. § 121.404(g)(2)(i). This provision, applicable to recertification under an existing award, parallels the recertification requirements addressed above with respect to FAR clause 52.219-28(b). In sum, if the concern cannot recertify as small after a covered corporate transaction, then the agency can no longer count the options or orders issued pursuant to the contract towards its small business subcontracting goals.

In contrast to 13 C.F.R. § 121.404(g)(2)(i)'s post-award requirements, (g)(2)(iii) applies a different, temporal, limitation with respect to changes in size arising prior to award. Specifically, this regulation requires:

If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. *If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract.* If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

13 C.F.R. § 121.404(g)(2)(iii) (emphasis added).<sup>10</sup> This rule establishes two different consequences based on the timing of the transaction relative to the date of offer

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<sup>10</sup> As addressed herein, SBA has subsequently amended this provision to state, in relevant part:

If the merger, sale or acquisition (including agreements in principle) occurs within 180 days of the date of an offer *relating to the award of a contract, order or agreement* and the offeror is unable to recertify as small, it will not

(continued...)

submission. If the transaction occurs more than 180 days after the concern's offer, then, similar to 13 C.F.R. § 121.404(g)(2)(i), the concern is eligible for award of a set-aside procurement, but the agency cannot count the award towards its small business subcontracting goals. However, if the transaction occurs within 180 days of the concern's offer, then the concern is ineligible to receive the award.

Against this complex backdrop, the parties advance two competing interpretations of the regulation and its impact on this procurement. The agencies and intervenor argue that 13 C.F.R. § 121.404(g)(2)(iii) imposed a mandatory recertification requirement on WBD where the protester was acquired within 180 days of submitting its initial quotation for the BPA. As a result, the regulation mandates that WBD is ineligible for award because it could not recertify as an SDVOSB. In contrast, WBD contends that the requirements in subparagraph (g)(2)(iii) are inapplicable here because the recertification requirements only apply to its FSS contract, not to pending quotations for orders or agreements to be issued thereunder. We find that WBD offers the only reasonable interpretation of the regulation.

Our analysis begins with "SBA's long-standing rule that 'a prime contractor that is small at the time of the contract award remains small for all orders issued under the contract, unless the [contracting officer], in his or her role discretion, chooses to request recertification on an individual order-by-order basis.'" *Size Appeal of Ernest Bland Assocs., PC, id.* (quotation omitted). As addressed above in our detailed analysis of 13 C.F.R. § 121.404, this baseline principle is reaffirmed multiple times. See, e.g., 13 C.F.R. § 121.404(a)(1)(ii), (g).

This baseline, however, is not inviolate, as the myriad exceptions discussed above reflect. For example, a concern must recertify its size for orders or agreements set aside against an unrestricted multiple award contract. This exception, however, is expressly inapplicable to orders or agreements issued under a FSS contract. 13 C.F.R. § 121.404(a)(ii)(A); *Size Appeal of Oxford Gov. Consulting LLC, supra*.

Paragraph (g) of the regulation provides additional potential exceptions to the baseline rule. In this regard, the parties all agree that WBD was required to--and in fact did--recertify its size under its FSS contract and incumbent BPA with OPM pursuant to 13 C.F.R. § 121.404(g)(2)(i). The agencies and intervenor argue that the protester's acquisition also triggered an obligation under 13 C.F.R. § 121.404(g)(2)(iii) to recertify in connection with WBD's quotation for the BPA at issue. We do not agree for two principal reasons.

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be eligible as a small business to receive the award of the contract, *order or agreement*.

88 Fed. Reg. 26164, 26201 (Apr. 27, 2023) (emphasis added). As stated, because the RFQ here predates the effective date of the amended regulation, our decision interprets the version of the regulation in effect at the time the agency issued the solicitation.

First, the agencies' and intervenor's view would produce an unreasonable result, given the regulation's unique treatment of BPAs issued under a FSS contract. In this regard, set-aside orders or BPAs issued against the FSS are expressly exempt from recertification requirements. 13 C.F.R. §§ 121.404(a)(1)(ii)(A) and (2); *Size Appeal of Oxford Gov. Consulting LLC, supra*. The agencies' and intervenor's view would eliminate this express exception and require recertification for a FSS BPA, notwithstanding the inapplicability of the regulation's general recertification requirements for such procurements.

Second, and more importantly, it is not apparent that a corporate transaction requiring recertification at the FSS contract level pursuant to 13 C.F.R. § 121.404(g)(2)(i) automatically triggers recertification for any pending quotations for a BPA or order issued under the FSS contract pursuant to 13 C.F.R. § 121.404(g)(2)(iii). In this regard, SBA OHA's persuasive authority in *Size Appeal of EBA Ernest Bland Assocs. PC* similarly found no basis to conclude that there was a mandatory recertification requirement under similar circumstances.

In *Size Appeal of EBA Ernest Bland Assocs. PC*, SBA OHA heard a size appeal challenging the eligibility for award of an order issued under the FSS of a formerly small business that had subsequently been acquired by a large business. The appellant argued that the awardee's notification to the government of a completed corporate transaction pursuant to 13 C.F.R. § 121.404(g)(2)(i) "obligate[d] the agency to request recertification" for the task order at issue because such "[r]ecertification is required by regulation, not by [contracting officer] discretion." *Id.* at \*4 (internal citation omitted). SBA OHA expressly rejected this argument as "flawed," explaining that "[a]bsent express language in the task order synopsis to a [contracting officer] requesting a size recertification for the individual task order, a plain text reading of § 121.404(g)(2) does not mandate recertification as a result of a merger, sale, or acquisition." *Id.* at \*6. SBA OHA went on to assert that "[a]ppellant's argument contradicts SBA's long-standing rule that 'a prime contractor that is small at the time of the contract award remains small for all orders issued under the contract, unless the [contracting officer], in his or her sole discretion, chooses to request recertification on an individual order-by-order basis.'" *Id.* (quotation omitted).

As in *Size Appeal of EBA Ernest Bland Assocs. PC*, the RFQ for the BPA to be issued under the FSS here does not include an express size recertification requirement, and we decline to adopt the agencies' and intervenor's invitation to read 13 C.F.R.

§ 121.404(g)(2)(iii) to impose one.<sup>11</sup> On this record, we find that WBD is an interested party.<sup>12</sup>

### OPM's Evaluation and Tradeoff Decision

Turning to WBD's allegations, in reviewing protests of an agency's evaluation and source selection decision in procurements conducted under FSS procedures, we do not conduct a new evaluation or substitute our judgment for that of the agency. *AT&T Mobility LLC*, B-420494, May 10, 2022, 2022 CPD ¶ 115 at 4. Rather, we will review the record to ensure the agency's evaluation is reasonable and consistent with the terms of the solicitation. *Id.* Here, we agree with the protester that OPM's evaluation was unreasonable, inconsistent with the terms of the solicitation, and insufficiently

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<sup>11</sup> Our conclusion is further supported by considering the potential results of adopting the agencies' interpretation. As explained above, 13 C.F.R. § 121.404(a)(1)(ii)(A) specifically carves out an exception for BPAs issued against the FSS, expressly exempting them from the recertification requirements that would otherwise apply to a BPA solicited under an unrestricted multiple award contract. Under the agencies' theory, there would be a very narrow exception to this exception. An FSS contract holder would have to recertify its small business status if it is acquired during a very narrow period of time--essentially, within 180 days of when the firm submitted a response to a solicitation for a BPA. If, however, a firm is acquired outside of this window of time, for example a year, or even a day, before the firm responds to a BPA, the general exception of 121.404(a)(1)(ii)(A) would apply and the firm would not have to recertify its size status for the BPA. Similarly, under 13 C.F.R. § 121.404(g)(2)(iii), if WBD had been acquired 181 days (or here, 31 days) later, it would be eligible for award, although OPM could not claim the order for its small business contracting purposes. In other words, under the agencies' reading of the regulations, an FSS vendor would be ineligible for a BPA when it is acquired by an other than small business within 180 days after it has responded to a BPA solicitation, but it would be eligible to receive the BPA if it is acquired before or more than 180 days after it responds to a BPA solicitation. The agencies offer no rationale to support such incongruous and differing results.

<sup>12</sup> To the extent SBA argues policy reasons favoring its interpretation that recertification applies to all awards, including orders and agreements, and notes our prior *dicta* in *Odyssey Sys. Consulting Grp., Ltd.*, *supra* finding reasonable SBA's position that 13 C.F.R. § 121.404(g)(2)(iii) applies to non-FSS orders, we note that such considerations are inapposite here where the regulation specifically exempts orders and agreements issued under the FSS from the general recertification requirements and the facts in *Odyssey* did not involve an FSS procurement. Our decision here is limited to the unique factual circumstances presented in this case.

documented, and that the agency's best-value trade-off determination failed to meaningfully compare vendors' quotations.<sup>13</sup>

First, the underlying record does not demonstrate the reasonableness of OPM's evaluation where VPD's quotation does not meaningfully address aspects identified in the evaluation criteria. As noted above, the solicitation explained that for the "technical capabilities" aspect of Factor 1, OPM would evaluate "the degree to which the contractor's technical capability demonstrates an understanding of all the requirements identified in the PWS, as well as the feasibility of the approach." AR, Tab 2.2, RFQ at 93. The agency was to determine its level of confidence in a vendor's ability to perform the RFQ's requirements "based on an assessment of the technical capability, management approach, and relevant experience" of the vendor. *Id.*

In its evaluation, the technical evaluation panel (TEP) examined VPD's quotation to determine if the "vendor's proposed technical capability demonstrates an understanding of all the requirements identified in the [PWS], as well as the feasibility of the approach." AR, Tab 5.2 TEP Report at 262. The TEP found VPD's technical capabilities "as it relates to staffing classification and management approach" to be acceptable,

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<sup>13</sup> The protester raises a number of additional collateral arguments. Although our decision does not specifically address each of these arguments, we have reviewed all of the protester's objections and, with the exceptions of those addressed herein, we find no basis to sustain the protest on those bases. For example, under the staffing classification aspect of Factor 1, technical capabilities, staffing classification, and management approach, the protester argues OPM failed to consider "inconsistencies" between VPD's staffing and management as compared to its quoted price, which was required by the RFQ. Comment and Supp. Protest at 24-26. Had the agency undertaken this required analysis, OPM would have found VPD's quoted labor rates were, in places, below the independent government cost estimate and what other vendors offered. *Id.* at 26. In turn, the agency would have found risk in VPD's approach and lowered OPM's confidence in VPD's ability to perform. *Id.*

We agree with the agency that WBD is attempting to assert a price realism argument from an evaluation challenge. See Supp. MOL at 4-5. Generally, when a solicitation contemplates award of a fixed-price contract, order, or agreement, an agency may conduct a price realism analysis for the limited purpose of assessing whether an offeror's low price reflects a lack of technical understanding or risk, but it may do so only when it has advised offerors in the solicitation that such an analysis will be conducted. See *IR Techs.*, B-414430 *et al.*, June 6, 2017, 2017 CPD ¶ 162 at 7. Absent a solicitation provision advising offerors that the agency intends to conduct a price realism analysis, agencies are neither required nor permitted to conduct such an analysis when awarding a fixed-price contract. *Id.*

Here, the solicitation did not provide for a price realism evaluation. Thus, because WBD's argument that some of VPD's proposed rates are too low is the very essence of a price realism allegation, the allegation fails to provide a valid basis of protest. Consequently, this allegation is dismissed.

consistent, and without performance risk. *Id.* In support for its conclusion, the TEP points solely to VPD's "[DELETED]" that would "[DELETED]." <sup>14</sup> *Id.* The TEP's evaluation judgments are repeated in the source selection decision document. See AR, Tab 6, Award Decision Memorandum at 286-287. Both the TEP and source selection authority assessed VPD's quotation with a high confidence rating based on an assessment of the vendor's "overall technical capabilities." AR, Tab 5.2 TEP Report at 263; AR, Tab 6, Award Decision Memorandum at 287.

The protester argues OPM's evaluation cannot stand as reasonable where VPD's quotation fails to address any aspect of its technical capabilities under Factor 1. <sup>15</sup> Comments and Supp. Protest at 19-22; Supp. Comments at 12-13. In this regard, WBD argues VPD's quotation contains, at best, minimal, high-level references to the PWS requirements, but insufficient information to demonstrate VPD's understanding of "all the requirements identified in the PWS" or the "feasibility of its approach." AR, Tab 2.2, RFQ at 93. In response, the agency contends the "substance of the Factor 1 evaluation was focused on the assessment of the vendors' staffing classification and management approach[.]" and that the awardee was able to demonstrate its understanding of the PWS requirements by presenting a well-organized submission that complied with the RFQ's requirements. Memorandum of Law (MOL) at 5; Supp. MOL at 3.

The record does not demonstrate the reasonableness of the agency's evaluation. First, to the extent the agency and intervenor argue otherwise, a plain reading of the RFQ confirms that a vendor's technical capability was to be evaluated as an aspect under Factor 1. AR, Tab 2.2, RFQ at 93. Second, even if VPD's quotation does address the salient aspects under the technical capabilities criteria--namely, an understanding of all the PWS requirements, feasibility of approach, and ability to perform the requirements of the RFQ--the underlying evaluation record does not support a conclusion that OPM evaluated VPD's quotation in a manner consistent with the terms of the solicitation. Indeed, OPM's evaluation fails to demonstrate an examination of how, or to what degree, VPD's approach demonstrates an understanding of the tasks to be performed, or the feasibility of that approach. The TEP's only reference to VPD's quotation in its

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<sup>14</sup> The TEP also notes this system [DELETED]. AR, Tab 5.2 TEP Report at 262.

<sup>15</sup> The parties dispute whether the solicitation required, or was ambiguous, as to whether vendors' quotations were required to include a stand-alone section dedicated to "technical capabilities" as part of their submission responsive to Factor 1. See, e.g., WBD Comments & Supp. Protest at 17-22; Supp. Memo. of Law at 2-3. We need not address the issue of whether the formatting of VPD's quotation complied with the submission requirements of the RFQ, as we conclude that the agency's evaluation of VPD's quotation under the technical capabilities portion of Factor 1 was unreasonable. In this regard, the agency failed to adequately explain the basis for its determination that the awardee adequately demonstrated an understanding of all PWS requirements, where VPD's quotation does not specifically address a proposed approach to performing the requirements, and instead provided its more general approach to managing performance. See AR, Tab 3.2, VPD's Quotation Vol. 1.

discussion of the firm's technical capability concerns VPD's quality management system. See AR, Tab 5.2 TEP Report at 262. The TEP does not explain how this, alone, demonstrates an understanding of all the PWS requirements, or how this illustrates the feasibility of the firm's approach. Indeed, a vendor's quality management system was a separate aspect to be addressed under the management approach portion of Factor 1. AR, Tab 2.2, RFQ at 91, 93. Third, to the extent OPM did undertake an evaluation of VPD's technical capabilities, the record (contemporaneous or as developed through this protest) does not document such an examination.

On this record, we agree with the protester that OPM's evaluation of VPD's quotation under Factor 1, with respect to technical capabilities, was unreasonable and inconsistent with the terms of the solicitation.<sup>16</sup>

Next, we also agree with the protester that the underlying record fails to demonstrate that OPM undertook the requisite qualitative analysis of quotations during its evaluation. The thrust of WBD's argument is that for the staffing classification and management approach aspects of Factor 1, the agency deviated from the solicitation criteria, which called for a qualitative analysis, and instead, evaluated quotations on an essentially pass/fail basis. Comments and Supp. Protest at 24-30; Supp. Comments at 17-21. In response, the agency contends because OPM was seeking to establish a BPA under an FSS contract, pursuant to FAR subpart 8.4, the evaluation and documentation requirements for the agency were less fulsome than in a FAR part 15 procurement. In OPM's view, its evaluation was consistent with the FAR subpart 8.4 standards. Supp. MOL at 3-4, 8-9.

Where, as here, an agency issues an RFQ to FSS vendors under FAR subpart 8.4 and conducts a competition for the issuance of an order or establishment of a BPA, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable laws and regulations. *Digital Solutions, Inc.*, B-402067, Jan. 12, 2010, 2010 CPD ¶ 26 at 3-4; *DEI Consulting*, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2. For procurements conducted pursuant to FAR subpart 8.4 and requiring a statement of work, such as this one, FAR section 8.405-2(f) establishes minimum documentation requirements. *RIVA Sols., Inc.*, B-418952, B-418952.2, Oct. 27, 2020, 2020 CPD ¶ 353 at 10. In order for our Office to review an agency's evaluation of quotations, the agency must have adequate

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<sup>16</sup> Similarly, we agree with the protester that OPM deviated from the evaluation criteria where it failed to evaluate, or did not document in its evaluation, vendors' relevant experience as part of its Factor 1 evaluation, with respect to technical capabilities. See AR, Tab 2.2, RFQ at 93. While we agree with the agency that OPM was not required to import the standards of the past performance factor when assessing relevant experience under Factor 1, neither the TEP nor the award decision mention vendors' relevant experience as it relates to the evaluation of firms' technical capabilities under Factor 1 at all. As addressed in our recommendation, to the extent that the agency believes a consideration of relevant experience is unnecessary, it may consider amending the solicitation.



documentation to support its judgment. *Advanced Tech. Sys., Inc.*, B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 9. An agency's evaluation judgments must be documented in sufficient detail to show that they are reasonable. *Id.*

The solicitation made clear that vendors' quotations would be evaluated on a qualitative basis, which would inform the agency's best-value tradeoff decision. See AR, Tab 2.2, RFQ at 93. For example, under the management approach criteria for Factor 1, OPM would assess a vendor's QCP and QASP based on "the degree to which" those plans could satisfy various criteria outlined in the solicitation. *Id.* However, the TEP's examination of the vendors' plans does not demonstrate that the agency considered the underlying evaluation criteria outlined in the RFQ, or reasonably applied a qualitative analysis. Indeed, for VPD, the TEP merely provides that the firm's QCP was "feasible"; the evaluation record provides no information as to how the QCP equaled or surpassed the criteria outlined in the RFQ. AR, Tab 5.2 TEP Report at 264. Moreover, the evaluation makes no mention of VPD's QASP. *Id.* Given the centrality of the QCP and QSAP to the agency's evaluation, as stated in the evaluation criteria, we cannot find reasonable the agency's superficial or non-existent qualitative analysis of VPD's quotation.<sup>17</sup>

While we agree with the agency that OPM was not required to document "every aspect of a proposal, point-for-point[.]" (Supp MOL at 7), our Office will, in a FAR subpart 8.4 procurement, review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. *DEI Consulting, supra* at 2. Here, the underlying record does not contain sufficient documentation for our Office to conclude that OPM undertook a qualitative examination of quotations in a manner consistent with the stated terms of the solicitation. Where the underlying record does not demonstrate an evaluation in accordance with the criteria identified in the RFQ, and where the agency fails to provide supplemental information during the pendency of the protest to support the reasonableness of that evaluation, we will sustain the protest.<sup>18</sup>

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<sup>17</sup> Likewise, OPM's evaluation of VPD's quotation under the staffing classification portion of Factor 1 suffers similar defects. Though the RFQ stated that the agency would assess a vendor's understanding to key government requirements, the TEP's evaluation is largely devoid of any qualitative examination. See AR, Tab 5.2 TEP Report at 264 (noting that VPD's staffing classification "meet the minimum standards" and constitutes an "adequate staffing classification").

<sup>18</sup> Concerning VPD's past performance, the protester argues the agency's assignment of a rating of high confidence was in error because VPD submitted only two recent contract references--where the solicitation required three. Comments and Supp. Protest at 32-36; Supp. Comments at 24-34. In reviewing a protester's challenge to an agency's evaluation of vendors' past performance, our Office does not independently evaluate quotations; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. *Castro & Co., LLC*, B-412398, Jan. 29, 2016, 2016 CPD ¶ 52 at 8. An agency's determination of the relevance or merit of a vendor's performance history is a

(continued...)

The protester also challenges the agency's best-value tradeoff, contending OPM merely compared vendors' adjectival ratings, rather than meaningfully comparing the underlying merit of quotations. Protest at 21-25; Comments and Supp. Protest at 36-41; Supp. Comments at 34-39. Where an acquisition conducted pursuant to FAR subpart 8.4 provides for award on a best-value tradeoff basis, it is the function of the source selection authority to perform a price/technical tradeoff to determine whether a quotation's technical superiority is worth its higher price. *Millennium Corp., Inc.*, B-412866, B-412866.2, June 14, 2016, 2016 CPD ¶ 168 at 7. For FAR subpart 8.4 acquisitions that require a statement of work, such as this one, FAR section 8.405-2(f) specifically requires documentation of the rationale for any tradeoffs made in the solicitation. This rationale, or source selection decision documentation, must be in sufficient detail to show that it is reasonable. *CSR, Inc.*, B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶ 64 at 12.

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. *Patriot Sols., LLC*, B-413779, Dec. 22, 2016, 2016 CPD ¶ 376 at 4. An agency that fails to adequately document its source selection decision bears the risk that our Office may be unable to determine whether the decision was proper. *AT&T Mobility LLC*, *supra* at 9; *Apogee Eng'g, LLC*, B-414829.2, B-414829.3, Feb. 21, 2019, 2019 CPD ¶ 85 at 10.

Our Office has also consistently explained that agencies may not base their selection decisions on adjectival ratings alone, as such ratings serve only as guides to intelligent decision-making; source selection officials are required to consider the underlying bases for ratings, including the advantages and disadvantages associated with the specific content of competing quotations. See, e.g., *AT&T Mobility LLC*, *supra*; *Deloitte Consulting LLP*, B-417988.2 *et al.*, Mar. 23, 2020, 2020 CPD ¶ 128 at 11. While agencies may find that quotations are technically equivalent, the selection official must explain the basis for such a finding. In this regard, when a selection official reasonably regards quotations as being essentially equivalent technically, price may properly

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matter within the discretion of the contracting agency, which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. See *Rotech Healthcare, Inc.*, B-413024 *et al.*, Aug. 17, 2016, 2016 CPD ¶ 225 at 3.

Based on our review of the record, we find no basis to conclude the agency's evaluation judgments were unreasonable. The underlying evaluation record shows that the TEP examined the past performance references for recency, relevancy, and quality, and concluded OPM had high confidence that VPD could successfully perform the requirement. AR, Tab 5.2 TEP Report at 264. Contrary to the protester's interpretation, we do not read the solicitation as requiring a neutral rating--or precluding a high confidence rating--where one of the submitted past performance references does not satisfy the recency requirements identified in the RFQ.

become the determining factor in making award, and it is not necessary to perform a price/technical tradeoff. *W.W. Grainger, Inc.*, B-420045, B-420045.2, Nov. 4, 2021, 2021 CPD ¶ 358 at 11; *Apogee Eng'g, LLC*, supra at 11 and 11 n.8. The factual predicate underlying these principles, however, is that the agency has reasonably determined that quotations are technically equivalent based on a documented qualitative assessment of the quotations. *AT&T Mobility LLC*, supra at 10.

Here, the underlying record does not demonstrate the reasonableness of the agency's best-value conclusions. In its tradeoff analysis, the source selection authority provides that, "[w]hen compared, VPD and WBD represent the highest technical rating for both [non-price] evaluation factors." AR, Tab 6, Award Decision Memorandum at 293. The selection authority explains that "WBD's quote when compared to VPD's demonstrates no major differences in their technical solutions, as a result, they received the same adjectival ratings as [OPM] did not find sufficient technical features in WBD's quote that would warrant paying a price premium over VPD's lower price quote." *Id.* OPM's best-value tradeoff decision is flawed in several respects.

First, as discussed above, the agency's underlying evaluation of VPD's quotation under Factor 1, technical capabilities, staffing classification, and management approach, was fundamentally flawed and insufficiently documented. As a result, the selection authority's reliance on those evaluation determinations taints the underlying tradeoff analysis. Second, the selection official unreasonably compares vendors' adjectival ratings, rather than comparing the underlying merits of the vendors' approaches which support those evaluations, to inform her selection decision. Third, to the extent the agency concluded both quotations to be of equal technical merit, such a finding is not supported by anything in the record other than a mere assertion that the two "demonstrate[] no major differences in their technical solutions[.]" *Id.* Without any documented examination or comparison of the underlying merit of the quotations, there is nothing in the record to support such a conclusion. As a result of the manifold problems with the agency's best-value tradeoff decision, we sustain the protester's allegation.

## RECOMMENDATION

We recommend that the agency conduct and adequately document a new evaluation of quotations including, as appropriate, amending the solicitation to reasonably reflect the agency's needs, conducting exchanges, or receiving revised quotations. After conducting its new evaluation, the agency should prepare and adequately document a new source selection decision. We also recommend that WBD be reimbursed its reasonable costs of filing and pursuing its protest including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. *Id.* at § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez  
General Counsel