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## Decision

**Matter of:** L3Harris Technologies, Inc.

**File:** B-422006; B-422006.2

**Date:** December 20, 2023

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### DIGEST

1. Protest challenging agency's evaluation of proposals and selection decision is denied where the record shows that the evaluation and selection decision were reasonable and consistent with the terms of the solicitation.
  2. Protest challenging the cost realism analysis of the awardee's proposal is denied where the record shows the agency's computation of upward cost adjustments was reasonably based and adequately documented, and where the agency reasonably concluded that an impending corporate transaction would not materially impact the cost of performance or the awardee's ability to perform the contract.
  3. Protest alleging that the timing of agency's hiring decision created an unmitigable appearance of impropriety is denied where the facts do not establish any impropriety requiring disqualification of the awardee, or a conflict of interest that impaired the source selection authority's ability to render an impartial decision.
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### DECISION

L3Harris Technologies, Inc. (L3Harris), of Fort Wayne, Indiana, protests the award of a contract to Ball Aerospace & Technologies Corporation (Ball), of Boulder, Colorado, under request for proposals (RFP) No. 80GSFC22R0055, issued by the National Aeronautics and Space Administration (NASA), Goddard Space Flight Center (GSFC)

for the geostationary extended observations (GeoXO) sounder (GXS) instrument implementation. The GXS will provide, for the first time, sounding observations of the western hemisphere from geostationary orbit with critical information that will be used for weather prediction. The protester challenges the agency's evaluation of proposals and the selection decision. The protester also argues that the agency failed to adequately consider the impact of the planned acquisition of Ball by BAE Systems plc (BAE) on the likely cost of performance. Additionally, the protester argues that the procurement is tainted by an appearance of impropriety after NASA appointed the senior Ball executive responsible for Ball's proposed technical approach to be NASA's new GSFC director. According to the protester, the taint arising from the agency's action can only be cured by disqualifying Ball and making an award to L3Harris.

We deny the protest.

## BACKGROUND

The RFP was issued on February 10, 2023, using the negotiated contracting procedures of Federal Acquisition Regulation (FAR) part 15, and contemplated the award of a contract for the GXS, a hyperspectral infrared instrument that is planned to fly on the GeoXO program series of geostationary satellites. Agency Report (AR), Exh. 3, RFP at 1-2.<sup>1</sup> The GeoXO program is a collaborative mission that is fully funded by the National Oceanic and Atmospheric Administration (NOAA), and NOAA has delegated to NASA the procurement of the GeoXO series of spacecraft and its five instruments, including the GXS. Contracting Officer's Statement (COS) at 1. NASA will manage the development of the satellites and launch them for NOAA, which will operate them and deliver weather data to users worldwide. *Id.*

The RFP stated that the competition would result in the award of a cost-plus-award-fee contract for the development of one flight model (FM1), with two options for the build of two more flight models (FM2 and FM3), and four options to perform additional engineering studies valued at \$2 million per option. RFP at 1. The anticipated period of performance for this contract includes support for 10 years of on-orbit operations and 5 years of on-orbit storage, for a total of 15 years for each flight model. *Id.*

The RFP stated that proposals would be evaluated under the following three factors: mission suitability, cost, and past performance. RFP at 126. The mission suitability factor would be scored for a total maximum of 1,000 points and included three subfactors: technical approach – 750 points; management approach – 150 points; and small business utilization – 100 points. *Id.* at 130. Offerors' proposed costs would be assessed for reasonableness and realism in accordance with FAR section 15.305(a)(1) and NASA FAR Supplement (NFS) section 1815.305(a)(1)(B). *Id.* at 131. The RFP further stated that cost was significantly less important than the mission suitability and

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<sup>1</sup> The RFP was amended once. Citations to the RFP are to the conformed RFP produced by the agency as exhibit 3. Additionally, unless otherwise indicated, all citations are to Adobe PDF page numbers.

past performance factors combined; as individual factors, mission suitability was more important than cost, and cost was more important than past performance. *Id.* at 126.

The agency received proposals from Ball and L3Harris by the March 17 due date. COS at 4-5. Using the procedures set forth in NFS part 1815, the source evaluation board (SEB) assessed offerors' proposals under the mission suitability factor to identify strengths, weaknesses, and deficiencies, and to assign point scores and corresponding adjectival ratings. *Id.* at 9. The SEB members independently read sections of the proposals as assigned by the SEB chair, and later met as a group to reach a final SEB consensus evaluation. *Id.* at 10. Under the mission suitability factor, the SEB identified significant strengths, strengths, and weaknesses in the Ball and L3Harris proposals, but did not identify any significant weaknesses or deficiencies.<sup>2</sup> *Id.* at 11. The SEB also determined that both offerors' proposals required probable cost adjustments as a result of the weaknesses identified. *Id.* at 10. The SEB's final evaluation of proposals was as follows:

	<b>Ball</b>	<b>L3Harris</b>
<b>Technical Approach</b>	Very Good (563)	Very Good (600)
<b>Management Approach</b>	Good (87)	Good (90)
<b>Small Business Utilization</b>	Good (60)	Good (58)
<b>Mission Suitability -- Total Points</b>	710	748
<b>Proposed Cost and Fee</b>	\$486,863,957	\$764,912,447
<b>Probable Cost with Fee</b>	\$553,897,346	\$790,953,918
<b>Past Performance<sup>3</sup></b>	High Confidence	High Confidence

AR, Exh. 8, SEB Presentation to Source Selection Authority (SSA) at 18.

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<sup>2</sup> The RFP provided the following definitions:

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance.

Significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

Deficiency is a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

RFP at 130.

<sup>3</sup> The RFP stated that past performance confidence ratings would be assigned as follows: very high, high, moderate, low, very low, or neutral. RFP at 133-134.

On August 10, the SEB briefed the SSA on its findings. COS at 11. On August 17, Ball Corporation publicly announced the planned acquisition of Ball Aerospace by BAE. *Id.*; AR, Tab 11, Contracting Officer Memo for Record, attach. A, Ball News Release. Thereafter, the contracting officer conducted “an analysis and assessment of this potential transaction, [and] concluded that, if this transaction is consummated, there would be no meaningful impact or effect on the Ball proposal nor will it impact their ability to perform the prospective GXS Instrument contract.” COS at 11-12. On August 29, the SSA was briefed on the contracting officer’s assessment of the planned acquisition, and concurred with the conclusion that there would be no meaningful impact on the Ball proposal or performance of the contract. *Id.* at 12; AR, Exh. 9, Source Selection Statement at 6-7. When performing the best-value tradeoff, the SSA concluded that Ball’s “very significant cost advantage” more than offset the “slight” advantage of L3Harris’s proposal under the mission suitability factor, and selected Ball for award. *Id.* at 10.

On September 11, the agency notified L3Harris that the contract was awarded to Ball. COS at 12. L3Harris received a debriefing on September 20. *Id.* This protest followed.

## DISCUSSION

The protester argues that the agency’s evaluation of technical proposals and cost realism analysis was unreasonable, irrational, and inadequately documented. The protester also argues that the agency failed to properly assess the cost impact of the acquisition of Ball by BAE, and further contends that the award decision cannot stand as the result of an unmitigable appearance of impropriety resulting from NASA’s appointment of a former senior Ball executive to be the new GSFC director. As discussed below, we find no basis to sustain the protest.<sup>4</sup>

The evaluation of proposals is primarily a matter within the agency’s discretion, since the agency is responsible for defining its needs and identifying the best method for accommodating them. *VSE Corp.*, B-414057.2, Jan. 30, 2017, 2017 CPD ¶ 44 at 8. In reviewing protests challenging an agency’s evaluation of proposals, our Office will not reevaluate proposals, but rather will examine the record to determine whether the agency’s judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement statutes and regulations. *Manhattan Strategy Grp., LLC*, B-419040.3, May 21, 2021, 2021 CPD ¶ 216 at 4. A protester’s disagreement with the agency’s judgments is not sufficient to render the evaluation unreasonable. *NCS/EML JV, LLC*, B-412277 *et al.*, Jan. 14, 2016, 2016 CPD ¶ 21 at 8.

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<sup>4</sup> The protester also initially argued that, in the evaluation of L3Harris’s technical approach the agency improperly assigned weaknesses and failed to identify additional strengths, and that the evaluation treated the offerors disparately. Protest at 34-42. These allegations were withdrawn. Comments & Supp. Protest at 6 n.3. Although we do not address each and every remaining argument raised by the protester, we have considered them all and conclude that none provide a basis to sustain the protest.

## Evaluation of Mission Suitability

As noted, the mission suitability factor included three subfactors: technical approach, management approach, and small business utilization. RFP at 103. Under the technical approach subfactor, the RFP identified seven areas of information that offerors were instructed to provide in their proposals: (1) overall technical approach; (2) systems engineering; (3) system performance; (4) instrument design; (5) manufacturing, integration, and test approach; (6) spacecraft integration and test and mission operations support; and (7) risk. *Id.* at 104-110. For example, for the overall technical approach, the RFP stated: “The Offeror shall describe the lowest risk, high maturity integrated GXS mission design solution that meets the totality of the technical requirements with the highest degree of heritage and lowest degree of non-recurring engineering.” *Id.* at 104. For instrument design, the RFP detailed the specific kinds of design information (*e.g.*, mechanical, electro-optical, thermal) for which offerors should provide a description. *Id.* at 106-108.

The RFP stated that the agency would evaluate the mission suitability factor as follows:

[T]he Government will evaluate the offeror’s demonstrated understanding of the Mission Suitability subfactor requirements and approach for accomplishing those requirements, the appropriateness of the offeror’s proposed resources, and associated programmatic risk. A lack of resource realism may adversely affect the offeror’s Mission Suitability evaluation and result in cost realism adjustments under the Cost factor. The Mission Suitability evaluation will take into consideration whether the resources proposed are consistent with the proposed efforts and accomplishments associated with each subfactor or whether they are overstated or understated for the effort to be accomplished as described by the Offeror and evaluated by NASA. The Government will validate the consistency between all proposal volumes and any inconsistencies identified may indicate a lack of understanding and adversely impact the offeror’s adjectival rating(s) and score.

*Id.* at 126. The RFP further stated how each of the seven areas of information identified under the technical approach subfactor would be evaluated. For the overall technical approach, the RFP stated that the agency “will evaluate the Offeror’s overall technical approach, including all areas and information specified in [section L of the RFP] for efficiency, effectiveness, clarity, reasonableness, and degree of risk.” *Id.* at 127. For instrument design, the RFP stated that the agency “will evaluate the risk, heritage and maturity of the Offeror’s GXS mission design solution specified in [section L of the RFP], including all areas and information and including the degree of non-recurring engineering required to meet technical requirements, for clarity, reasonableness, effectiveness and likelihood of successful implementation.” *Id.*

The protester argues that the agency abandoned the RFP’s evaluation framework, and that only L3Harris proposed an approach that satisfied the overall technical approach

requirements of the RFP. Protest at 24-29. The agency argues that its evaluation is reasonable and consistent with the RFP, and that the protester has misinterpreted the RFP by elevating the importance of the overall technical approach--only one of seven areas of information under consideration--that otherwise distorts the unambiguous language in the RFP. Memorandum of Law (MOL) at 3-11. The protester counters that the agency's position, if accepted, reveals the existence of a latent ambiguity in the RFP. Comments & Supp. Protest at 77-78. Specifically, the protester argues that the evaluation of overall technical approach concerning solutions that meet the totality of the technical requirements was "not limited to one element of the proposal --it is the fundamental requirement governing the entirety of the design and had to be evaluated as such." *Id.* at 9.

Here, as an initial matter, we conclude that the RFP does not contain a latent ambiguity. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. *QED Sys., LLC*, B-417090.2, B-417090.3, July 23, 2019, 2019 CPD ¶ 278 at 6. If the solicitation language is unambiguous, our inquiry ceases. *Id.* L3Harris's argument relies solely on language included for the evaluation of an offeror's overall technical approach--just one of the seven areas of information to be considered under the technical approach subfactor, which was only one of three subfactors to be considered under the mission suitability factor, the most heavily weighted of the three factors under consideration in the best-value tradeoff. The protester's interpretation of the RFP is not reasonable.

Contrary to the protester's assertion, the RFP did not establish that award would be made on the basis of which offeror's overall technical approach was determined to provide "the lowest risk, high maturity integrated GXS mission design solution that meets the totality of the technical requirements with the highest degree of heritage and lowest degree of non-recurring engineering." See RFP at 104. Rather, the RFP is clear that the offeror's overall technical approach would be one of many considerations under the technical approach subfactor, and otherwise stated: "A trade-off process, as described at FAR 15.101-1, will be used in making source selection."<sup>5</sup> *Id.* at 126. And as discussed further, based on our review of the record, the agency's evaluation was reasonable and consistent with the terms of the solicitation.

In its evaluation of Ball, under the technical approach subfactor, the SEB identified a significant strength, a strength, and two weaknesses. AR, Exh. 8, SEB Presentation to SSA at 21-26. Specifically, Ball received a significant strength for higher data utility from a faster refresh rate because it proposed a [DELETED]-minute refresh rate that "enables significantly greater data value and operational flexibility compared to the

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<sup>5</sup> Immediately preceding the proposal instructions for the technical approach subfactor, the RFP stated: "The paragraph numbering, formatting, sub-paragraphs within the subfactors below should not be construed as any indication of priority, weighting or as any establishment of elements or lower level criteria. The paragraph numbering is only provided for clarity, traceability, and ease of reading between Mission Suitability Sections L and M." RFP at 103.

required 60 minutes.” *Id.* at 21. The SEB concluded that this provided “a major performance enhancement,” in large part because “[f]aster refresh greatly increases the chances of capturing a cloud free scene over a particular area over the course of the observing period.” *Id.*

Ball received a weakness because it provided “insufficient information on compliance with the GXS Pixel Operability requirements. Therefore, the SEB could not adequately assess the risk of the novel focal plane arrays meeting the proposed performance levels.” *Id.* at 23. However, the SEB considered the lack of information to be “primarily a technical risk since Ball has allocated sufficient resources for [focal plane array] development.” *Id.* at 24. Ball also received a weakness because it provided insufficient information on implementation of spectral performance requirements, leaving “a possibility that the design proposed by Ball will not meet spectral performance requirements, resulting in an impact to overall system performance.” *Id.* at 25. The SEB concluded that “there is an increased possibility that design modifications will need to use unplanned resources (schedule and/or funding) to satisfy spectral performance requirements, which increases the risk of unsuccessful contract performance.” *Id.* at 26.

Under the management approach subfactor, the SEB identified one strength and one weakness. Ball received a weakness for “proposing a schedule with non-credible aspects [such that] there is a high likelihood that Ball will not be able to meet the proposed schedule milestones.” *Id.* at 28. Specifically, the SEB identified five aspects of the proposed schedule that were not credible: (1) an unrealistic path to preliminary design review (PDR); (2) inability to achieve technology readiness level (TRL) 6 by PDR; (3) unrealistic TRL assessments for many of its critical subsystems; (4) schedule driven risk due to “the proposed aggressive schedule”; and (5) an unrealistic options purchase schedule. *Id.* at 28-31. The SEB concluded:

Given the above aspects, the SEB has determined that there is a high likelihood that Phase-B<sup>6</sup> will need to be extended at least 9 months and will do a probabilistic schedule and cost adjustment to reflect this. Ball’s schedule has sufficient un-costed slack between the proposed [FM1] delivery of November 2028 [] and the need date of November 2030 (RFP B.1). Ball’s proposed unrealistic schedule increases the risk of unsuccessful contract performance.

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<sup>6</sup> As the term is used here, Phase B refers to the GXS implementation contract awarded as a result of this procurement. Preceding this procurement, on September 30, 2021, Ball and L3Harris were both awarded 22-month contracts for a Phase A study to develop a design concept and technology development plan for the requirements reflected in the RFP. COS at 2, 21; AR, Exh. 8, SEB Presentation to SSA at 12. This procurement at issue here (Phase B) requires the contractor to implement the GXS, proceeding from preliminary design and technology completion to launch and beyond. See RFP at 1; AR, Exh. 8, SEB Presentation to SSA at 7.

*Id.* at 31. The SEB assigned Ball's proposal 563 out of 750 points and a rating of very good under the technical approach subfactor and 87 out of 150 points and a rating of good under the management approach subfactor. *Id.* at 18. Overall, the SEB assigned Ball 710 points under the mission suitability factor, as compared to L3Harris's 748 points. *Id.*

L3Harris contends that the agency should have identified the technical approach subfactor weaknesses as deficiencies, and the management approach subfactor weakness as a significant weakness, in its evaluation of Ball, and that inappropriately characterizing them as mere weaknesses resulted in higher ratings than Ball's proposal deserved. Protest at 29-36. The agency argues that its evaluation of both offerors' proposals was reasonable and consistent with the RFP's stated evaluation criteria, and it reasonably assigned weaknesses rather than deficiencies in its evaluation of Ball's mission capability. COS at 12-17; MOL at 11-15.

As discussed, the record shows that for each of the weaknesses identified, the SEB explained why it assigned a weakness rather than a deficiency or significant weakness. Related to the weakness for pixel operability requirements, the SEB considered the lack of information primarily a technical risk because Ball had otherwise "allocated sufficient resources for [focal plane array] development." AR, Exh. 8, SEB Presentation to SSA at 24. Related to the weakness for spectral performance, the SEB considered that the insufficient information "increased [the] probability that design modifications will need to use unplanned resources (schedule and/or funding)" to satisfy the requirements. *Id.* at 26. Related to the weakness for Ball's schedule including "non-credible" aspects, the SEB concluded that Ball's schedule would "need to be extended at least 9 months and will do a probabilistic schedule and cost adjustment to reflect this." *Id.* at 31. As noted, the RFP stated that a "lack of resource realism may adversely affect the offeror's Mission Suitability evaluation and result in cost realism adjustments under the Cost factor," RFP at 126, and the record shows that the SEB upwardly adjusted Ball's proposed labor hours to account for the weaknesses identified. AR, Exh. 8, SEB Presentation to SSA at 58-59.

Although the protester disagrees, it has not provided a basis for us to conclude that the SEB should have instead determined that any of the weaknesses constituted "a flaw that appreciably increases the risk of unsuccessful contract performance," or was "a material failure of the proposal to meet a Government requirement" that elevated "the risk of unsuccessful contract performance to an unacceptable level." RFP at 130 (defining significant weakness and deficiency). Rather, as permitted under the mission suitability evaluation, the SEB determined that cost realism adjustments would be required to address its findings underlying the three weaknesses. Despite the weaknesses, when considered against the strengths and significant strength identified, the SEB assigned Ball a rating of very good under the technical approach subfactor, and ratings of good under the management approach and small business utilization subfactors. On this record, we find no basis to sustain L3Harris's allegations that the agency's evaluation was unreasonable.



## Cost Realism Analysis

L3Harris next argues that the agency's cost realism analysis of Ball's proposed costs was flawed because it inadequately documented the basis for the agency's upward cost adjustments, and unreasonably underestimated the effort required for successful contract performance. Protest at 45-48; Comments & Supp. Protest at 37-41. The protester contends that the agency failed to recognize that "the biggest driver in the differences between the evaluated costs of the two proposals is the fact that L3Harris proposed more labor hours overall, particularly after accounting for its major subcontractors." Comments & Supp. Protest at 43. The protester further argues that the agency unreasonably dispensed with its use of the independent government cost estimate (IGCE) and should have made additional upward adjustments to compute Ball's most probable cost of performance. *Id.* at 42-49.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.305(a)(1), 15.404-1(d); *Exelis Sys. Corp.*, B-407673 *et al.*, Jan. 22, 2013, 2013 CPD ¶ 54 at 7. Consequently, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1); *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 8. An agency is not required to conduct an in-depth cost analysis or verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. FAR 15.404-1(d)(2); *AdvanceMed Corp.; TrustSolutions, LLC*, B-404910.4 *et al.*, Jan. 17, 2012, 2012 CPD ¶ 25 at 13.

Determining whether submitted proposals are realistic must be left to the informed judgments and administrative discretion of the contracting agency, which is in the best position to judge the realism of costs and must bear the difficulties and expenses experienced by reason of a defective cost analysis. *QED Sys., LLC, supra* at 9-10. An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide a measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are reasonable and realistic in view of the cost information reasonably available to the agency at the time of its evaluation--including the information provided by the offeror in its proposal. *CDIC, Inc.*, B-419254, B-419254.2, Jan. 11, 2021, 2021 CPD ¶ 139 at 4. We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and adequately documented. *Id.*

Here, the record shows that the SEB made upward adjustments to Ball's proposed costs for the following reasons: (1) the proposed schedule did not include enough time to achieve PDR requirements by the proposed date, and an extension of nine months would be necessary; (2) the hours proposed to achieve development of the Level 1B algorithm were insufficient, and an additional 15 full-time personnel would be needed;

and (3) the long-term support hours proposed were insufficient to meet the RFP's 10-year mission life requirements. AR, Exh. 8, SEB Presentation to SSA at 58; AR, Exh. 18, GXS Cost Report at 4. The SEB made upward adjustments to the labor hours proposed in Ball's work breakdown structure related to these issues, adding a total of [DELETED] labor hours, and computed a corresponding total probable cost increase of \$67,033,389. AR, Exh. 8, SEB Presentation to SSA at 59; AR, Exh. 18, GXS Cost Report at 2-4.

L3Harris argues that the agency should have made even larger upward adjustments in labor hours because "Ball's less developed, less mature, higher risk solution should have required more labor hours than [L3Harris's], not fewer." Comments & Supp. Protest at 45. In response, however, the contracting officer states: "It is not appropriate to perform an hours comparison between two concepts that have substantially different technical and risk reduction approaches." Supp. COS at 1. The contracting officer further explains that L3Harris's hours were higher than those proposed by Ball due to its unique technical approach, and identified four reasons for the disparity as follows: (1) L3Harris proposed a more complex architecture in comparison to Ball's design; (2) L3Harris proposed extensive redundancy, which the SEB identified as a strength under the technical approach subfactor; (3) L3Harris proposed a more comprehensive engineering development unit build and test regimen than Ball<sup>7</sup>; and (4) L3Harris proposed more subcontracted labor than Ball, and proposed "significant subcontractors."<sup>8</sup> *Id.* at 1-3; see also Declaration of Lead Cost Analyst at ¶¶ 10-15 (explaining differences between the proposals and the methodology used to compute Ball's cost adjustments). Based on our review of the record, we find these explanations to be reasonable.

L3Harris also argues that the agency inadequately documented how it computed Ball's most probable cost, but we disagree. In reviewing an agency's evaluation, we do not limit our consideration to contemporaneously documented evidence, but instead consider all the information provided, including the parties' arguments and explanations concerning the contemporaneous record. *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the reasonableness of evaluation decisions--provided those explanations are credible and consistent with the contemporaneous record. *OGSystems, LLC*, B-417026 *et al.*,

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<sup>7</sup> In this regard, the RFP stated that engineering development units or prototype units were "not necessarily required under the contract and will not be construed as a weakness if not proposed." RFP at 108.

<sup>8</sup> For purposes of the cost evaluation, the RFP defined a significant subcontractor as "any subcontractor whose estimated value causes the cumulative percentage of subcontractor work (from lowest to highest percentage of work) to meet or exceed 20 [percent] of the total estimated value (basic and all options combined, if applicable)." RFP at 116.

Jan. 22, 2019, 2019 CPD ¶ 66 at 5. Where an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, however, we generally give little weight to the later explanation. *Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc.*, B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 10.

Here, based on our review, the agency's cost realism analysis was properly documented in the contemporaneous record. AR, Exh. 8, SEB Presentation to SSA at 56-60; AR, Exh. 18, GXS Cost Report at 1-9. To the extent that the record does include further information to explain the methodology used to compute Ball's most probable cost, the information was provided in response to specific arguments raised by the protester but is otherwise consistent with the contemporaneous documentation.

Further, contrary to the protester's contention, the record shows that the agency fully appreciated that L3Harris proposed more labor hours. Specifically, the SEB noted that Ball did not propose any significant subcontractors, and after adjusting Ball's labor hours upward by [DELETED] hours anticipated a total effort of [DELETED] hours. AR, Exh. 8, SEB Presentation to SSA at 53; AR, Exh. 18, GXS Cost Report at 4. By comparison, the SEB noted that L3Harris proposed a total effort of [DELETED] hours, which included labor hours for three significant subcontractors, and did not make any upward adjustments. AR, Exh. 8, SEB Presentation to SSA at 53; AR, Exh. 18, GXS Cost Report at 12-19. Accordingly, we find no merit to the protester's allegation that the agency failed to understand that L3Harris proposed more labor hours.

We further find no merit to the protester's allegation that the agency unreasonably disregarded the IGCE when making upward adjustments to Ball's proposed costs. Here, the IGCE was \$1,169,168,029. AR, Exh. 18, attach. GXS In-House Estimate at 7. As stated by the SEB in the cost report:

The SEB team recognizes the IGCE was higher than both vendor's proposals. The following reasons address the IGCE differences: (1) The IGCE did not assume any specific reuse for any previous design or hardware that both vendors proposed which led to a significant difference between the proposals and the Non-Recurring Engineering from the IGCE; (2) variances due to the indirect/direct rates and labor skill mix; (3) variances in fee percentage<sup>9</sup>; (4) variances in the material amounts; and (5) variances in the proposed FM delivery schedule.

AR, Exh. 18, GXS Cost Report at 1; see also AR, Exh. 8, SEB Presentation to the SSA at 50. Based on our review, we think the agency has provided a reasonable explanation for its computation of Ball's most probable cost despite the categorical

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<sup>9</sup> The record reflects that another reason Ball had a cost lower than L3Harris was that Ball's proposed fee was less than half of the fee proposed by L3Harris. AR, Exh. 8, SEB Presentation to the SSA at 51, 55; AR, Exh. 18, GXS Cost Report at 20. In accordance with the RFP, fee was not adjusted in the agency's evaluation. RFP at 131.

variances between costs proposed by Ball and the IGCE. In sum, we find the agency reasonably explained and adequately documented its cost realism analysis of Ball's proposal. Accordingly, these allegations are denied.

#### Planned Acquisition of Ball by BAE

The protester argues that the agency also failed to investigate and analyze the impact of BAE's planned acquisition of Ball on Ball's proposed costs. Protest at 49-50. The protester argues that Ball's indirect rates will likely increase as a result of the acquisition and result in significantly higher costs, and the agency unreasonably failed to make additional upward cost adjustments to account for the planned corporate transaction. *Id.* at 51; Comments & Supp. Protest at 59-63.

Our protest decisions regarding matters of corporate status and restructuring are highly fact-specific and turn largely on the individual circumstances of the proposed transactions and timing. *VSE Corp.*, B-417908, B-417908.2, Nov. 27, 2019, 2019 CPD ¶ 413 at 8. Our decisions on the subject generally focus on the reasonableness of an agency's conclusions regarding a corporate transaction. *Lockheed Martin Integrated Sys., Inc.--Recon.*, B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258 at 5. Where a change in an offeror's corporate status shows that it will perform the contract in a manner materially different from that represented in its proposal, an award based on such a proposal cannot stand, since both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement process. See *Deloitte Consulting LLP; Mantech Advanced Sys. Int'l, Inc.*, B-420137.7 *et al.*, July 25, 2022, 2022 CPD ¶ 200 at 13. We have also found, however, that where a corporate acquisition or restructuring does not appear likely to have a significant impact on cost or technical impact on contract performance, the corporate transaction does not render the agency's evaluation and award decision improper. *Enterprise Servs., LLC et al.*, B-415368.2 *et al.*, Jan. 4, 2018, 2018 CPD ¶ 44 at 19.

The contracting officer states that following Ball's August 17 announcement, the agency opened an inquiry to determine what effect the acquisition of Ball would have on the firm's proposal. COS at 23. In a series of communications, the contracting officer solicited information from Ball, specifically regarding Ball's ability to comply with the requirements and scheduled delivery dates, availability of the proposed resources and facilities, impact on proposed rates in Ball's cost proposal, and changes to its organizational conflicts of interest (OCI) submission. *Id.*; AR, Exh. 11, Memorandum for Record – Contracting Officer Analysis of BAE Acquisition.

As result of this inquiry, the contracting officer concluded as follows:

After analyzing Ball's response, I noted that Ball confirmed the proposed cost/fee of \$486,863,957. Ball asserts that all rates remain valid as proposed and Ball's rate structure will continue to be reviewed and approved by a US Government cognizant auditing agency. While Ball Aerospace acknowledged that its rates could change (either up or down)

in the future if the proposed acquisition by BAE occurs, it may be several years in the future (2025/2026) before any adjustments, if any, take place. From my experience as a Contracting Officer, I know market rates for supplies and services fluctuate with all offerors. I find that while Ball's response indicates a completion in the first half of 2024, I believe it is likely that finalizing the acquisition may take longer due to the regulatory hurdles and processes required. Further, based upon Ball Aerospace's confirmation of resources, I find no impact on the proposed resources, facilities or its ability to comply with all phases of the requirement, including delivery of the Sounder Instrument within the scheduled delivery dates and post-delivery support.

I also considered Ball Aerospace's assurances that there are no impacts to its OCI submission. I find Ball's response to be reasonable as the acquisition is not imminent or certain at this time. Once the acquisition is completed, NASA will inquire if there are any known organizational conflicts that arose within the time it took to consummate the transaction and if so the Contractor will be asked for an updated OCI Plan to address any springing organizational conflicts of interest. I view this subsequent inquiry as one that I would carry on with any other Contractor taking on new work. Specifically, the Contractor is required to notify the Contracting Officer of OCI as they arise and to submit a Plan to neutralize, mitigate or avoid such. Therefore, I find that the corporate transaction is not imminent and further that if it does come to pass that there is no evidence that Ball Aerospace will perform the effort in a manner materially different from their March 17, 2023, proposal submission. The effect of BAE's potential acquisition does not appear to have a meaningful impact on the prospective contract performance.

AR, Exh. 11, Memorandum for Record – Contracting Officer Analysis of BAE Acquisition at 4. On August 29, the SSA was briefed on the contracting officer's analysis of the impact of the planned acquisition and concurred that the potential transaction would have no meaningful impact or effect on Ball's proposal or its ability to perform the contract. COS at 24; AR, Exh. 9, Source Selection Statement at 6-7.

On this record, we find no basis to conclude that the contracting officer should have upwardly adjusted Ball's proposed costs as a result of the announced acquisition by BAE. Other than its expectation that Ball's rates will be higher, the protester does not demonstrate that NASA had a justifiable basis to make such an adjustment since the transaction had not been completed, or even possessed reliable data to form a basis to compute what the adjustment should be. *But see CDIC, Inc., supra* at 4-5 (finding computation of most probable costs reasonable and realistic in view of the cost information available to the agency at the time of its evaluation, including information provided by the offeror in its proposal). The contracting officer reasonably considered that Ball confirmed its proposed rates remained valid, Ball's rate structure would

continue to be subject to a cognizant government audit agency, and that as with all contractors, Ball's indirect rates may fluctuate.

L3Harris also argues that the agency should not have accepted Ball's representations at face value and should have sought further representations from BAE. Comments & Supp. Protest at 59-63; Protest at 50 ("Absent an agreement by BAE to abide by Ball's proposed costs, the Ball Cost Volume evaluated by the Agency is irrelevant to the probable cost of performance."). Since the contract is awarded to Ball--based on Ball's proposal submission and not a proposal from BAE--the contracting officer properly sought representations from Ball as the entity with which NASA would have privity of contract. Moreover, the protester has not shown that any of the planned resources or facilities proposed to perform the contract have been rendered unavailable by the planned acquisition such that Ball cannot implement its proposed approach.

We find the contracting officer's inquiry and analysis of the planned acquisition of Ball by BAE considered whether there would be a significant impact on cost or technical impact on contract performance, and reasonably concluded it would not. *Enterprise Servs., LLC et al., supra* at 19. Accordingly, we deny these allegations.

#### Appearance of Impropriety

The protester argues that the agency created an unmitigable appearance of impropriety by appointing as its new GSFC director the senior Ball executive responsible for Ball's proposed technical approach and to whom the SSA now reports; as such, Ball should be disqualified, and the contract awarded to L3Harris. Protest at 53-59. Specifically, L3Harris argues that "[NASA's] hiring of the former head of Ball's civil space business while the GX5 Implementation procurement was underway gave Ball an unfair competitive advantage, cloaked the SSA in a personal conflict of interest that rendered [the SSA] unable to act 'with complete impartiality,' and created the appearance of impropriety." *Id.* at 58. The agency argues that it took reasonable and appropriate steps to avoid or mitigate any conflict of interest, the protester's allegations are illegitimate and speculative, and the record clearly shows that there was no actual conflict of interest in this instance. MOL at 26-31.

The contracting officer states that the SSA was appointed on October 16, 2022, after which the SEB was selected, and all procurement participants were reminded of the requirement to comply with the FAR, NFS, and the Procurement Integrity Act, "which prohibits the disclosure of information to individuals not also participating in the same evaluation proceedings." COS at 25-26. The contracting officer states that the SEB evaluated proposals beginning on March 17, 2023, continuing through July, and only the SSA, SEB members, consultants, and *ex officio* agency participants were granted access to SEB information. *Id.* at 26.

The record also shows that on March 12, 2023, Dr. X<sup>10</sup> accepted the position of GSFC director, and officially entered civil service on April 6. COS at 3-4; AR, Exh. 12, Declaration of Dr. X at ¶ 3. In response to the protester’s allegation, Dr. X states that prior to employment at NASA, Dr. X worked at Ball beginning in January 2013, and the most recent position began in August 2018 and continued until September 16, 2022, during which time Dr. X “served as Vice President and General Manager for Civil Space where I was responsible for all new business execution and financials and the development of the workforce.” AR, Exh. 12, Declaration of Dr. X at ¶ 6. Dr. X states that in that final position, the GeoXO program was within Ball’s Civil Space Strategic Business Unit and was the responsibility of a deputy that reported directly to Dr. X. *Id.* at ¶ 7. Dr. X states that after leaving Ball in September 2022, Dr. X started a consulting business and worked there until accepting the GSFC director position at NASA. *Id.* at ¶ 6.

Dr. X further states that prior to entering civil service, beginning in October 2022, Dr. X divested all Ball Corporation assets owned, including cashing out a pension. *Id.* at ¶ 8. Dr. X also took steps to separate deferred compensation to which Dr. X was entitled from Ball Corporation stock and place it into an index fund so that when paid, the deferred compensation would not be based on the performance of Ball Corporation stock. *Id.* at ¶ 9. Additionally, Dr. X states that all Ball Corporation stock had been converted to index funds by the time the deferred compensation payment was made in August 2023, and neither Dr. X nor any family hold any financial interest in Ball Aerospace or Ball Corporation. *Id.* Finally, Dr. X states:

The Deputy Center Director, Associate Center Director, and the Office of the General Counsel all knew of my need to avoid any NASA matters with Ball Aerospace and ensured that I did not take part in any matters, including 80GSFC22R0055. As such, I have not been involved in any activities related to my former employer, including those activities related to the GeoXO Program and more specifically the procurement for the GeoXO Sounder. In fact, I only learned of Ball Aerospace’s winning the GeoXO Sounder contract after it was reported in the news.

*Id.* at ¶ 11.

In response to the protester’s allegation, the SSA states: “I did not consult or talk to [Dr. X] regarding this procurement.” AR, Exh. 13, SSA Declaration ¶ 7. The SSA states that no discussion of the procurement occurred with anyone outside of the SEB or *ex officio* agency participants in attendance at the SEB presentation, and the decision to select Ball for award was made after hearing the SEB presentation. *Id.* at ¶¶ 6, 8. The SSA further states:

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<sup>10</sup> GAO does not generally disclose the names of specific individuals. Here, and throughout this decision, we use the pseudonym Dr. X to refer to the NASA GSFC Director.

I did not select Ball Aerospace for this award as a way to curry favor with NASA-GSFC Center Director as the Protester has asserted nor would I. My selection Decision sets forth my reasons and the basis for my Decision. Simply put, I accepted the SEB's findings and determined in accordance with the RFP that the Ball Aerospace Proposal offered the best value to the Government.

*Id.* at ¶ 9. The SSA also confirms that the SSA does not own stock in Ball and has never worked there. *Id.* at ¶ 10.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR 3.101-1; *KOAM Eng'g Sys., Inc.*, B-420157.2, July 6, 2022, 2022 CPD ¶ 174 at 7. In setting out the standards of conduct that apply to the award of federal contracts, the FAR provides that:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR 3.101-1; *Lockheed Martin Corp.*, B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 at 8 (explaining that where the record establishes that a conflict exists, we will presume that the protester was prejudiced, unless the record establishes the absence of prejudice).

In our view, the facts here do not establish any impropriety requiring Ball's disqualification for award, or otherwise indicate that the SSA had a conflict of interest that prejudiced the protester. The facts here do not reasonably suggest that the SSA could not make an impartial selection decision simply because one of the competitors formerly employed Dr. X, an individual to whom the SSA reports. We disagree with the protester that the SSA was faced with any conflict of interest, and as discussed, the record shows that neither the SSA nor Dr. X would benefit financially or otherwise from Ball's selection for award. Rather, the record shows that the SSA rejected L3Harris's higher rated proposal because the SSA concluded it was not worth the anticipated cost premium. AR, Exh. 9, Source Selection Statement at 10 ("While I recognized that Mission Suitability is the most important factor, I concluded that Ball's very significant cost advantage more than off-sets L3Harris' slight Mission Suitability advantage."). Accordingly, this allegation is denied.

#### Best-Value Tradeoff Decision

The protester argues that the agency's selection decision was materially flawed as a result of the numerous underlying errors in the evaluation and these flaws in the



procurement process prejudiced L3Harris, which otherwise had a substantial chance of receiving the award. Protest at 59-60; Comments & Supp. Protest at 76-77.

As a general matter, source selection officials enjoy broad discretion in making tradeoffs between the comparative merits of competing proposals in a best-value evaluation scheme; such tradeoffs are governed only by the test of rationality and consistency with the solicitation's evaluation criteria. *Primary Care Sols., Inc.*, B-418799.3, B-418799.4, Sept. 8, 2021, 2021 CPD ¶ 314 at 9. Where, as here, technical merit is more important than cost, an agency may properly select a lower-cost proposal if it reasonably decides that the cost premium involved in selecting a higher-cost proposal is not justified. See *Integral Consulting Servs., Inc.*, B-415292.2, B-415292.3, May 7, 2018, 2018 CPD ¶ 170 at 10.

Here, as noted, the RFP stated that cost was significantly less important than the mission suitability and past performance factors combined; as individual factors, mission suitability was more important than cost, and cost was more important than past performance. RFP at 126. The SEB assigned the same ratings to both offerors under the mission suitability subfactors as follows: technical approach – very good; management approach – good; and small business utilization – good. AR, Exh. 8, SEB Presentation to SSA at 18. Ball's score was 710; L3Harris's score was 748. *Id.* Both offerors were rated as high confidence under the past performance factor. Ball's most probable cost with fees was \$553,897,346, and L3Harris's was \$790,953,918. *Id.*

The record shows that the SSA determined that the SEB's evaluation was detailed and consistent with the RFP's evaluation criteria and provided a clear description of the merits of each proposal. AR, Exh. 9, Source Selection Statement at 7. The SSA engaged in discussions with the SEB regarding the rationale for its findings, ratings, and scores, and agreed with them all. *Id.* Under the technical approach subfactor, the SSA found L3Harris had a slight advantage which accounted for its higher score under the mission suitability factor. *Id.* However, the SSA specifically explained that the significant strengths assigned to Ball and L3Harris under the technical approach subfactor were not a discriminator because "Ball's GXS design is optimized for exceeding requirements with higher development risk, while L3Harris is optimizing the design to make an efficient, reliable instrument that meets the GXS requirements with lower known technical risk." *Id.* at 8.

Ultimately, the SSA explains his selection of Ball for award, when considering the RFP evaluation and award criteria, as follows:

I carefully considered the findings in relation to the evaluation criteria in the RFP and again referred to the relative order of importance of the three evaluation factors as specified in the RFP. Under Mission Suitability, the most important factor, I determined that L3Harris' proposal was slightly more advantageous than Ball's proposal, based primarily in Subfactor A, [technical approach]. However, regarding Cost, the second most important factor, Ball's probable cost was significantly

lower L3Harris's probable cost which I found to be a very significant cost advantage for Ball. For Past Performance, the least important factor, I concluded that both Offerors can successfully perform the GXS contract, and therefore this was not a discriminator.

AR, Exh. 9, Source Selection Statement at 9-10. On this record, we find no basis to question the SSA's selection of Ball for award.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel