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Decision

Matter of: Associated Energy Group, LLC

File: B-420857.6; B-420857.7

Date: January 10, 2024

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DIGEST

1. Protest alleging that the agency's disclosure to another offeror of an internal agency memorandum violated the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107, or gives the offeror an unfair competitive advantage, is denied where the record demonstrates the agency's disclosure was not knowingly made, and the agency's conclusions regarding the lack of competitive usefulness of the information were reasonable.
 2. Protest challenging the agency's decision to allow offerors to revise any parts of their proposals as part of its corrective action is denied where the agency's decision was reasonable and consistent with the discretion afforded to agencies when taking corrective action.
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DECISION

Associated Energy Group, LLC (AEG), of Miami, Florida, protests the scope of the Department of Defense, Defense Logistics Agency's (DLA) corrective action, taken in response to a previous protest by Kropp Holdings, Inc. (KHI), of Overland Park, Kansas, in connection with request for proposals (RFP) No. SPE608-21-R-0203, issued for commercial payment card solutions and transaction processing services. The protester contends that DLA violated the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107 (hereinafter, the Procurement Integrity Act or PIA) when it released Procurement Integrity Act protected information to KHI, and the agency's decision to allow

offerors to revise any parts of their proposals as part of its corrective action was unreasonable.

We deny the protest.

BACKGROUND

The agency issued the solicitation on June 22, 2021, pursuant to the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15, seeking contractor support related to DLA's aviation into-plane reimbursement (AIR Card) program. Agency Report (AR), Tab 54.1, Conformed RFP (RFP) at 1.¹ This program allows for the procurement of aviation fuel and ancillary ground services at commercial airports across the globe. AR, Tab 54.2, Conformed Performance Work Statement (PWS) at 2. Specifically, the contractor will provide transaction processing services, customer service, a retail merchant network, issuance of charge cards, and an electronic access system to satisfy the agency's requirement. *Id.* The RFP contemplated the award of a fixed-price contract, with a 3-year base period of performance and two 1-year option periods. RFP at 3.

The solicitation explained that award would be made on a best-value tradeoff basis, considering six factors:² (1) technical approach; (2) management approach; (3) AIR Card electronic access system (EAS); (4) merchant acceptance with level III data plan; (5) past performance; and (6) price.³ RFP at 126. For the non-price factors other than past performance, the agency would assign one of five adjectival combined capability/risk ratings: outstanding; good; acceptable; marginal; and unacceptable.⁴ For past performance, the agency would assign one of five adjectival performance confidence ratings: substantial confidence; satisfactory confidence; neutral confidence; limited

¹ All citations to the agency's report are to the Adobe PDF document page numbers, and all citations to the solicitation are to the conformed version, unless otherwise noted.

² The solicitation also included a pass/fail preliminary evaluation factor, concerning whether an offeror's proposal was at no cost to the government. RFP at 126. An offeror's price under this contract was represented as a refund percentage to DLA based on sales volume. *Id.* at 131.

³ The technical approach factor had six subfactors: (a) technical capability; (b) quality management; (c) transition/risk management; (d) corporate experience; (e) security; and (f) cybersecurity. RFP at 127-128. The management approach factor had two subfactors: (a) merchant network; and (b) key personnel. *Id.* at 128-129. The merchant acceptance with level III data plan had three subfactors: (a) continental U.S. (CONUS) merchant acceptance; (b) outside of CONUS (OCONUS) merchant acceptance; and (c) tax exemption supplied by merchants. *Id.* at 129.

⁴ The RFP explained that DLA would assign a rating to each subfactor, and "will then assign an overall rating to each Factor based on the Subfactor ratings for that Factor." RFP at 130.

confidence; and no confidence. *Id.* at 131. Concerning price, the solicitation explained that offerors would be evaluated on their percentage refund rate remitted to DLA:

Offerors are expected to propose competitive pricing at the minimum 1% or greater based upon AIR Card® Program Total Sales History (non-contract fuel, non-contract fuel related charges, and non-contract ground services transactions) to calculate refunds of this request for proposal. The sales refund based on the volume of spend will be the only price evaluated for the purpose of the award. Price will be evaluated based on the Total Net Refund for the base period and all option periods.

Id. at 131. DLA reserved the right to conduct a price realism analysis. *Id.*

The technical approach, AIR Card EAS, and merchant acceptance with level III data plan factors were of equal importance, and were more important than the other factors. *Id.* at 126. The RFP further explained that the management approach and past performance factors were equally important, but more important than price. *Id.* The agency would make award, based on a price/technical tradeoff to the proposal representing the best value. *Id.*

The agency received proposals from AEG and KHI (the incumbent contractor) by the established due date of August 19, 2021. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. Following discussions and the submission of proposal revisions, DLA selected AEG for award on June 3, 2022. COS/MOL at 4. DLA explained that AEG offered a superior technical proposal, and, because it also offered the highest (and therefore most advantageous to DLA) refund rate, no tradeoff was required. AR, Tab 32, Source Selection Decision Document (SSDD) at 5. KHI received a debriefing, through which the firm learned of AEG's adjectival ratings under each factor, as well as AEG's refund rate and estimated dollar amount refund over the life of the contract.

On July 5, KHI filed a protest with our Office, in which it argued DLA's procurement was marred by several conflicts of interest, that the agency failed to consider information relevant to AEG's responsibility, and DLA's evaluation of proposals was unreasonable and unequal. AR, Tab 35, KHI's Protest (B-420857.1). Our Office dismissed the protest as academic on July 29, based on the agency's intention to take corrective action, which included a reevaluation of proposals and new award decision. *Kropp Holdings, Inc.*, B-420857, July 27, 2022 (unpublished decision).

As part of its corrective action, DLA issued Amendment 012 to the RFP, which adjusted the page limitations for offerors' proposals with respect to the technical approach, management approach, and past performance factors (proposal volume 2). AR, Tab 37, RFP Amendment 012 at 2. The agency also engaged in an additional round of discussions with AEG and KHI (December 2022 Discussion Letters) and solicited final revised proposal from both. COS/MOL at 5; see AR, Tab 38, AEG Dec. 2022 Discussions Letter; AR, Tab 42, AEG Jan. 2023 Proposal Revisions.

On January 23, 2023, KHI filed a protest with our Office challenging the scope of DLA's corrective action. AR, Tab 44, KHI's Protest (B-420857.2). KHI's protest challenged, among other things, DLA's conduct of discussions and the agency's decision to limit the scope of proposal revisions. *Id.* On January 30, our Office dismissed KHI's protest as academic based on the agency's proposed corrective action, which included reissuing discussion letters and allowing for updated proposal revisions. *Kropp Holdings, Inc.*, B-420857.2, Jan. 30, 2023 (unpublished decision).

DLA's corrective action in response to KHI's protest (B-420857.2) included issuing Amendment 013 to the RFP, which again adjusted the page limits for offerors' volume 2 proposals. AR, Tab 48, RFP Amendment 013 at 2. In addition, DLA issued revised discussion letters (February 2023 Discussion Letters) to AEG and KHI, and solicited proposal revisions. COS/MOL at 6; see AR, Tab 47, AEG Feb. 2023 Discussion Letter; AR, Tab 49, AEG Feb. 2023 Proposal Revisions.

On February 21, KHI filed a second protest challenging DLA's corrective action. AR, Tab 66, KHI's Protest (B.420857.3); see *also* AR, Tab 67, KHI's Comments and Supp. Protest (B-420857.4). KHI alleged, among other things, that DLA's conduct of discussions and limitations on proposal revisions were unreasonable and unequal. On May 4, our Office conducted an outcome prediction alternative dispute resolution (ADR) teleconference call.⁵ During the ADR call, the GAO attorney assigned to the protest advised the protest would likely be sustained, in part, with respect to two specific allegations.

First, the GAO attorney explained that the record demonstrated that AEG's volume 2 proposal exceeded the solicitation's stated page limitations during the initial competition, and AEG received the benefit of discussions on that excess proposal material. Further, DLA's December 2022 and February 2023 discussion letters with AEG (following the agency's corrective action in response to B-420857 and B-420857.2, respectively) permitted AEG to revise any aspect of its volume 2 proposal to stay within the prescribed page limitations (as provided for in Amendments 012 and 013), whereas KHI was limited to revising only specific areas of its volume 2 proposal, related to issues raised during discussions related to specific subfactors. The GAO attorney explained this approach did not place offerors on equal footing; AEG received the benefit of discussions on its additional proposal volume 2 content (which was evaluated by DLA) and could modify the entirety of its volume 2, yet KHI was only permitted to modify a specific portion of its volume 2 proposal to address DLA's concerns raised during discussions.

⁵ In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. 4 C.F.R. § 21.10(e); *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 2 n.1. The purpose of such outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. *Booz Allen Hamilton, Inc.*, *supra*.

Second, the GAO attorney explained KHI's protest allegation concerning the reasonableness of DLA's limitations of KHI's proposal revisions would likely be sustained. KHI argued that the imposed limitations on proposal revisions--that is, limited to addressing issues related to a specific management approach subfactor--were unreasonable, where KHI's proposal changes responsive to that subfactor would create inconsistencies within other aspects of its proposal. The GAO attorney explained that DLA's limitations on KHI's proposal revisions were unreasonable, and indicated that our Office would also likely sustain this protest allegation.

The GAO attorney further stated that he would recommend, at a minimum, DLA allow all offerors to revise their volume 2 proposals, without content limitation, and for the agency to engage in meaningful discussions. The attorney assigned to the protest also explained that DLA should permit KHI to identify and revise any inconsistencies in its proposal as a result of its proposal changes. The GAO attorney further provided that DLA may consider taking broader corrective action. While noting that the default rule that an offeror should be permitted to change any aspect of its proposal in response to discussions, and that only in limited circumstances will GAO allow for more limited revisions where no solicitation amendment has been issued--that is, if the agency's rationale for allowing limited revisions is reasonable and tailored to address a specific procurement impropriety--the GAO attorney explained that KHI's proposal revisions in response to discussions may warrant more fulsome proposal revisions.

On May 11, our Office dismissed KHI's protest as academic based on the agency's proposed corrective action. *Kropp Holdings, Inc.*, B-420857.3, B-420857.4, May 11, 2023 (unpublished decision). The agency explained it would either "[a]llow offerors to make unrestricted revisions to their Volume 2 proposals, allow discussions on the revisions to Volume 2, and allow offerors to identify and revise inconsistencies and derivative issues in their proposals resulting from those revisions and the revisions made in response to the February 2023 limited discussions letters;" or will "[t]ake broader corrective action as the contracting officer deems appropriate." *Id.* at 1.

On August 31, the contracting officer prepared a memorandum explaining DLA's decision to allow full proposal revisions as part of its corrective action. AR, Tab 53, Memorandum on Corrective Action. In the memorandum, the contracting officer explained:

The discussion letters will allow offerors to make unrestricted revisions to their proposals and allow discussions on the revisions to their proposals. This course of action addresses KHI's second and fourth protest grounds because the full revisions will allow offerors to address any inconsistencies resulting from addressing the deficiencies and weaknesses and allows offerors unrestricted use of the additional pages granted by Amendment 0013 along with discussions. The contracting officer considered limiting revisions to unrestricted revisions to Volume 2 and allowing offerors to identify and revise other areas in which inconsistencies were created as stated in the Notice of Corrective Action filed on May 8, 2023. However, after further review, the unrestricted revisions to Volume 2 could reasonably

affect all areas of offerors' proposals. As a result, allowing unrestricted revisions is the best way to ensure the offerors have equal opportunities to revise their proposals without creating inconsistencies or derivative issues elsewhere in their proposals.

Id. at 3. Also on August 31, the agency issued Amendment 014 to the RFP and provided AEG and KHI with updated discussion letters. COS/MOL at 7-8.

On September 21, prior to the deadline for final proposal revisions, AEG requested that DLA provide updated historical sales data for fiscal years 2021 and 2022. AR, Tab 58, Email from AEG Requesting Updated Price Information at 1 (stating "the incumbent [KHI] has an unfair advantage...since they have more current purchasing data [than] we have been provided in Amendment 2, dated June 22, 2021."). In response, on September 28, DLA issued Amendment 015 to the RFP, which provided updated historical sales data for fiscal years 2021 and 2022. AR, Tab 61, RFP Amendment 015. Also on that date, and as relevant to the protest, the contracting officer signed a memorandum explaining the rationale for why DLA was issuing Amendment 015. AR, Tab 60, Memorandum on Amendment 015. As discussed herein, the contracting officer represented that she inadvertently forwarded the supporting memorandum to KHI when she was attempting to provide the firm with a copy of Amendment 015.

AEG filed the instant protest on October 10, prior to the established due date for revised proposals.

DISCUSSION

AEG marshals two principal challenges to the agency's conduct of this procurement. First, the protester contends that DLA's disclosure of the memorandum to KHI violated the Procurement Integrity Act (PIA) and harmed AEG's competitive position, warranting KHI's disqualification from the competition. Comments and Supp. Protest at 2-14; Supp. Comments at 1-10. Second, AEG argues DLA's decision to allow offerors to fully revise their proposals--rather than limiting offerors to revising volume 2--lacks a reasonable basis. Protest at 8-19; Comments and Supp. Protest at 14-20; Supp. Comments at 10-12. For the reasons that follow, we find no basis to sustain the protest.⁶

Disclosure of Procurement Sensitive Information

AEG alleges DLA's disclosure to KHI of the agency's internal memorandum concerning the issuance of amendment 015 (see AR, Tab 60, Memorandum on Amendment 015) constituted a PIA violation. Comments and Supp. Protest at 2-14; Supp. Comments at 1-10. In this regard, the protester argues the disclosed memorandum contained procurement-sensitive information which, when coupled with the agency's earlier

⁶ AEG raises other collateral allegations. Although our decision does not specifically address them all, we have considered each argument and find that none provides a basis on which to sustain the protest.

disclosure of AEG's pricing information during DLA's debriefing (in conjunction with KHI's post-award protest (B-420857.1)), provided KHI with an unfair competitive advantage. Moreover, AEG contends DLA's investigation regarding the disclosure of the internal agency memorandum was insufficient, as were the remedial actions DLA undertook to cure or otherwise address the disclosure. AEG asserts that given the competitive harm it suffered from the disclosure, KHI should be disqualified from the competition.

The facts underlying AEG's allegations, in this regard, are not in dispute. As noted above, AEG requested that DLA provide updated historical sales data for fiscal years 2021 and 2022. AR, Tab 58, Email from AEG Requesting Updated Price Information. On September 28, in response to AEG's request, DLA issued Amendment 015 to the solicitation, which provided the requested historical data to the offerors. AR, Tab 61, RFP Amendment 015. Concurrent with the release of the amendment, the contracting officer prepared a memorandum explaining the reasons underpinning the release of Amendment 015. AR, Tab 60, Memorandum on Amendment 015. In relevant part, the contracting officer explained:

On September 21, 2023, AEG requested the AIR Card® History Sales Data as presented on solicitation Amendment 0002, issued on August 4, 2021, to be updated to present updated data for FY21 & FY22. The Contracting Officer determined AEG's request is reasonable and that providing this information will ensure that both remaining offerors have the relevant information to revise their proposals. More than two years have passed since the sales data from FY13 to FY20 were provided in Amendment 0002 and the sales data sometimes changes significantly from year to year. Additionally, both AEG's and KHI's price proposals included rates and projections based on estimated sales volume on the contract. It's reasonable to conclude that the merchant fees and refund rates are based, at least in part, on the projected volume of sales in the contract and therefore changes in the recent sales volume may reasonably impact the proposed rates and fees. Since the offerors are authorized to submit full revisions, the offerors may decide to revise their price proposals as part of the revisions. Accordingly, since the sales data was previously provided, but is now stale due to two years passing since Amendment 0002 was issued, the Contracting Officer has determined that this information is relevant to the revisions and therefore should be provided to both offerors.

Id. at 1-2.

Also on September 28, the contracting officer provided AEG with a copy of Amendment 015 via email. Supp. COS/MOL at 2. While attempting to provide the same to KHI, the contracting officer included as an email attachment her memorandum justifying the issuance of Amendment 015, rather than the actual amendment, itself. *Id.*; see AR Tab 77, Email from DLA to KHI, Sept. 28, 2023. After realizing the error, the contracting officer informed her supervisor and DLA counsel of the disclosure, and also asked the two KHI recipients of the email to delete all copies of the email. Supp.

COS/MOL at 3; see also AR, Tab 63, Memorandum Concerning Possible Disclosure of Source Selection Information (hereinafter PIA Memo) at 2. KHI informed the agency that the two individuals who received the email read its contents, and that prior to its deletion, the email was forwarded to four other individuals (two attorneys serving as KHI's in-house counsel, and two attorneys serving as KHI's outside counsel). Supp. COS/MOL at 3. By October 2, KHI apprised DLA that only these six individuals accessed the email and its contents, and all had deleted the same. *Id.*; see AR, Tabs 81 and 82, Email Correspondence between DLA and KHI.

Consistent with FAR 3.104-7 (which concerns an agency's responsibility concerning a violation or potential violation of the PIA) and internal DLA regulation, the agency conducted an investigation and prepared a memorandum regarding the disclosure. AR, Tab 63, PIA Memo at 1. The memorandum provides that while the contracting officer did disclose proposal and source selection information, the disclosure was not done knowingly or intentionally. *Id.* at 3. The memorandum notes that the disclosure included "the internal DLA Energy decision making methodology in releasing Amendment 0015, the fact that there are now only two offerors being allowed to provide final proposal revisions, the fact that AEG requested the historical price information, and that the historical sales information provided in Amendment 0002 had been used by both offerors in developing pricing." *Id.* However, the agency determined that "this information did not provide information that would create an unfair advantage or impact the acquisition" because "the information was very general, could likely be inferred through common sense and understanding of normal business practices, and therefore does not provide KHI with an advantage in the ongoing source selection." *Id.*

Specifically, DLA explained the disclosure that both offerors used previous sales data provided in Amendment 002 to the RFP in developing their pricing was not prejudicial because the information "gives no indication as to what changes, if any, either offeror could make with the new data." *Id.* at 4. Moreover, the agency noted that "[w]hile the fact that AEG used the provided data in their previous proposal was revealed, how AEG used the data was not revealed to KHI, and because both offerors used the same data similarly in their previous proposals it can be concluded that any reasonable person would use this pricing methodology in developing their [updated] pricing volume." *Id.* The agency concluded that "neither competitive harm nor an unfair advantage has occurred or will occur[.]" and "there is no impact on the procurement from the inadvertent unauthorized disclosure of potential source selection information[.]" *Id.*

Potential PIA Violation

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, provide, among other things, that a federal government official "shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(a)(1). The FAR sets forth the requirements for an agency to investigate potential violations of the PIA. See FAR 3.104-7. As relevant here, a "contracting officer who receives or obtains information

of a violation or possible violation [. . .] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.”

FAR 3.104-7(a). If the “contracting officer concludes that there is no impact on the procurement, the contracting officer must forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to an individual designated in accordance with agency procedures.” FAR 3.104-7(a)(1). If that individual concurs, the agency may proceed with the procurement.⁷ FAR 3.104-7(a)(1)(i).

Based on our review of the record, we conclude AEG’s PIA allegation provides no basis on which to sustain the protest. The Procurement Integrity Act prohibits “knowingly” disclosing bid or proposal information. 41 U.S.C. § 2102(a)(1). Here, the protester presents no argument to suggest that DLA’s disclosure was other than inadvertent. See Supp. Comments at 2 (“It is immaterial, at this time, whether knowing PIA violations occurred or did not occur...”); at 9 (“It does not matter if the improper disclosure of PIA protected information resulted in a PIA violation.”). In any event, the record demonstrates that the contracting officer’s disclosure was not knowingly or intentionally done; indeed, upon realizing of her disclosure, the contracting officer immediately notified her supervisor and servicing legal counsel, and attempted to remediate the issue by having the recipients confirm deletion of the email. AR, Tab 63, PIA Memo at 1-3. Based on the record before us, we cannot conclude an intentional or “knowing” disclosure was made, and therefore have no basis to disagree with the agency’s conclusion that the contracting officer’s disclosure did not amount to a PIA violation.⁸

Unfair Competitive Advantage

⁷ DLA’s investigation, as reflected by its memorandum regarding the disclosure, are consistent with FAR 3.104-7 and DLA’s FAR supplement, DLAD 3.104-7. AR, Tab 63, PIA Memo at 1.

⁸ The Procurement Integrity Act also provides that, “[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(b). To the extent AEG argues KHI “knowingly” obtained the information at issue, we disagree. See Supp. Comments at 8-9 n.1. The record does not demonstrate that KHI knowingly and improperly obtained access to the material at issue, but instead, was inadvertently provided this information by the agency. *C.f. Computer Tech. Assocs., Inc.*, B-288622, Nov. 7, 2001, 2001 CPD ¶ 187 (finding a PIA violation where an offeror obtained transcripts of other offerors’ oral presentations from the agency’s email system, produced copies, and then disseminated them to the company’s project manager, who in turn provided them to the deputy project manager).

Where an agency disclosure does not give rise to a PIA violation, it may, nonetheless, create an unfair advantage affecting the integrity of a competition. See FAR 3.104-7(a). The disclosure of proprietary or source selection information to an unauthorized person during the course of a procurement is improper. 41 U.S.C. § 2102; FAR 3.104; *S&K Aerospace, LLC*, B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 at 8. Where an agency inadvertently discloses an offeror's proprietary information or source selection information, the agency may choose to cancel the procurement if it reasonably determines that the disclosure harmed the integrity of the procurement process. See *Kemron Envtl. Servs., Inc.*, B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2. Where an agency chooses not to cancel the procurement after such a disclosure, we will sustain a protest based on the improper disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure. *Gentex Corp.--Western Operations*, B-291793, *et al.*, Mar. 25, 2003, 2003 CPD ¶ 66 at 9-10.

AEG contends that, contrary to DLA's conclusions, the agency's disclosure of the memorandum regarding Amendment 015 to KHI prejudiced the protester and caused it competitive harm, and the agency failed to sufficiently mitigate that harm. Comments and Supp. Protest at 2-14; Supp. Comments at 1-10. Specifically, the protester argues DLA released both source selection information and AEG's proposal information with respect to price, that this information was competitively useful in that it gave KHI an unfair advantage with respect to forthcoming proposal revisions, and the agency's mitigation efforts--having the recipients delete the email, after having already reviewed the contents--were insufficient to address the competitive harm that flowed to AEG as a result of the disclosure. *Id.*

The protester points to two salient pieces of information in the released memorandum to support its argument of competitive harm: (1) that both offerors used historical sales information (provided in Amendment 002 to the RFP) in developing their pricing; and (2) that AEG requested the updated historical pricing data provided in Amendment 015.⁹ AR, Tab 60, Memorandum on Amendment 015 at 2. The gravamen of AEG's allegation is that this information, when combined with the information KHI received as part of its debriefing following the initial award to AEG (which AEG terms its "winning refund rate strategy"), provides insight on how AEG would prepare its final proposal revisions, specifically with respect to price. Supp. Comments at 2. In response, the agency and intervenor contend the information provided was of no competitive consequence. Supp. COS/MOL at 5-10; Intervenor's Supp. Comments at 6-13.

⁹ AEG also argues that DLA's statement in the disclosed memorandum--"[s]ince the offerors are authorized to submit full revisions, the offerors *may decide to revise their price proposals as part of the revisions*["--implicitly signaled to KHI that it *should* revise its refund rate. Comments and Supp. Protest at 9-10 (emphasis in original). AEG's conclusion does not logically follow. Indeed, the mere fact that the agency is providing updated historical data, and that offerors were permitted, but not required, to revise their price proposals, does not somehow equate to DLA, either implicitly or explicitly, urging offerors to adjust their prices.

First, as noted above, the agency (though its investigation of the potential PIA violation) explained the disclosure that both offerors used historical sales data provided with the solicitation in developing their pricing yielded no competitively useful information. As the agency memorandum states:

[The information] is very general and broad and does not provide KHI with the specifics of how AEG would use the provided data in their proposal. The information contained in the [memorandum] gives no indication as to what changes, if any, either offeror could make with the new data. While the fact that AEG used the provided data in their previous proposal was revealed, how AEG used the data was not revealed to KHI, and because both offerors used the same data similarly in their previous proposals it can be concluded that any reasonable person would use this pricing methodology in developing their pricing volume. Given the fact that the compensation structure in the solicitation does not include a separate fee paid by DLA Energy, but rather is based on what the contractor collects from merchant fees less the refund rate offered, the anticipated sales volume is necessary for offerors to determine their estimated compensation.

AR, Tab 63, PIA Memo at 4.

Second, the memorandum also concluded the disclosure that AEG requested the updated historical pricing information was not competitively useful because the memorandum “gives no indications of what revisions, if any, an offeror would make to their proposal.” *Id.*

Though the protester chafes at the agency’s conclusions, in this regard, we find reasonable the agency’s conclusion that the disclosed material was not competitively useful. AR, Tab 63, PIA Memo at 4. First, the mere fact DLA revealed that both offerors used historical sales information--which was provided in the solicitation--to complete their respective price proposals during the initial competition in no way tilts the competitive field. Indeed, as the agency notes in its PIA memorandum, given that contractors under this solicitation were compensated “based on what the contractor collects from merchant fees less the refund rate offered, the anticipated sales volume is necessary for offerors to determine their estimated compensation.” *Id.* That is, use of historical sales data would, necessarily, be assumed to be built-in to an offeror’s price.¹⁰ More to the point, as the intervenor notes, the solicitation provides that offerors were expected to use program sales history when determining price. RFQ at 131 (“Offerors are expected to propose competitive pricing at the minimum 1% or greater based upon AIR Card *Program Total Sales History*[.]”) (emphasis added); Intervenor’s Supp. Comments at 3.

¹⁰ Indeed, AEG makes this very assumption in its request for updated sales information. See AR, Tab 58, Email from AEG Requesting Updated Price Information at 1 (AEG explained that KHI has an unfair advantage because KHI has “more current purchasing data [than] we have been provided in Amendment 2[.]”); Supp. COS/MOL at 8-9.

Second, we disagree with the protester that DLA's disclosure that it was AEG who requested the updated sales information somehow gave KHI insight into the protester's competitive strategy. Given that Amendment 014 to the RFP allowed for full proposal revisions, to include price, a natural assumption would be that offerors may revisit their proposed prices. This is especially true where, as here, offerors submitted their price proposals more than two years prior. AR, Tab 60, Memorandum of Amendment 015 at 2 ("More than two years have passed since the sales data from FY13 to FY20 were provided in Amendment 0002 and the sales data sometimes changes significantly from year to year."). However, the agency's disclosure that AEG requested the updated historical sale information (which KHI, the incumbent contractor, presumably already had) in no way provides insight into how, or even *if*, AEG would adjust its price. Indeed, AEG could use the updated data to confirm its "winning" refund rate was appropriate, or could use the updated data to either upwardly or downwardly adjust its rate, based on its independent business judgment.

Citing our decision in *Kemron Env'tl. Servs., Inc., supra*, AEG implores our Office to look holistically at the competitive harm caused by DLA's disclosure, based on the totality of information available to AEG. That is, because KHI knew (a) AEG's "winning refund strategy" (disclosed during KHI's debriefing)¹¹, (b) that AEG used historical data to compute its refund, and (c) AEG requested updated historical data, KHI was put in a superior competitive position. Supp. Comments at 6-8. But AEG fails to articulate how, specifically, it was competitively disadvantaged through the release of this information. Unlike our prior decisions cited by AEG, the disclosure at issue here does not include, for example, specific proposal content, or underlying price data or detailed methodology. See *Inmarsat Government, Inc.*, B-419583, B-419583.2, May 21, 2021, 2021 CPD ¶ 215 (finding competitive harm in the agency's release of an offeror's specific pricing elements); *c.f. Kemron Env'tl. Servs., Inc., supra* at 4 (denying protest where agency inadvertently disclosed protester's price information because information was insufficient to allow other offeror to strategically price its proposal below the protester's). The protester fails to demonstrate how KHI, through this specific disclosure, would somehow gain insight on how AEG would prepare or otherwise price its proposal. AEG's generalized arguments about competitive harm are vague and speculative, and fail to persuade us that DLA's disclosure resulted in an unfair competitive advantage. As a result, we find no basis to sustain this protest allegation.¹² *S&K Aerospace, LLC*, B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 at 8.

¹¹ We note that the debriefing only exposed AEG's percentage refund to DLA (and the estimated total refund amount based on full performance of the contract). The debriefing did not reveal any information about how AEG calculated its refund rate. AR, Tab 32, SSDD at 5.

¹² Because DLA reasonably concluded that the disclosed information was not competitively useful, we need not address the scope and efficacy of DLA's remedial measures.

Scope of Proposal Revisions

The protester also argues DLA's decision to allow wholesale proposal revisions as part of its corrective action, specifically as it relates to price proposal modifications, is unreasonable. Protest at 11-19; Comments and Supp. Protest at 14-20; Supp. Comments at 10-12. In this regard, AEG contends nothing identified during discussions, in either offerors' proposals, would implicate or otherwise necessitate a change to an offeror's refund rate, and the agency's justification for allowing such wholesale revisions is inadequate. The protester advocates for a return to DLA's earlier litigation position, that is, allowing revisions only to volume 2 of proposals to address deficiencies identified in the discussions letters, but not "unrelated aspects of the proposals like the refund rate." Comments and Supp. Protest at 20. For its part, the agency argues AEG misinterprets GAO's prior decisions regarding the permissible scope of corrective action and proposal revisions; instead, DLA contends its decision to allow for full proposal revisions was reasonable and consistent with applicable caselaw.

As a general rule, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *Northrop Grumman Sys. Corp.*, B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8. The details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *MSC Indus. Direct Co., Inc.*, B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; *Unissant, Inc.*, B-418193.2, Jan. 31, 2020, 2020 CPD ¶ 67 at 4 ("[A]s a general rule, an agency has the discretion to determine its needs and the best way to meet them."); see also *Dell Fed. Sys., L.P. v. U.S.*, 906 F.3d 982, 994-995 (Fed. Cir. 2018) (finding an agency's corrective action to be reasonable because it was rationally related to an identified procurement defect). An agency's discretion when taking corrective action extends to the scope of proposal revisions. See, e.g., *Computer Assocs. Int'l.*, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5. This standard permits the agency discretion to determine how to appropriately remedy its reasonable concerns, absent a showing that this discretion is being abused in some way. *360 IT Integrated Solutions, VariQ Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 6; see also *Dell Fed. Sys., L.P.*, *supra* at 998 (rejecting argument that the agency failed to consider "more limited" corrective action because "[t]he Army was not legally required to address every option, but rather to provide a reasonable corrective action and adequately explain its reasoning for doing so") (internal quotation omitted).

We agree with the agency that the protester advances a legal theory not found in our prior decisions. In essence, AEG contends an agency may not allow full proposal revisions as part of its corrective action unless it provides sufficient justification for that action. But this turns our standard on its head; AEG seeks to apply the standard for when an agency *limits* proposal revisions following corrective action to a situation when proposal revisions are unfettered.

As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions. *NCS Techs., Inc.*, B-413500.2, Feb. 14, 2017, 2017 CPD ¶ 123 at 6; *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355. Thus, the general rule is that offerors should be permitted to revise all aspects of their proposals, absent a reasonable basis proffered by the agency for limiting revisions. *Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186 at 3-4. Where the corrective action taken by an agency is otherwise unobjectionable, a request for revised proposals is not improper merely because the awardee's price has been previously exposed. *Laducer & Associates, Inc.*, B-401735.3, Feb. 23, 2010, 2010 CPD ¶ 57 at 4.

However, we have concluded that an agency, in conducting discussions to implement corrective action may reasonably limit the scope of revisions. When assessing the reasonableness of an agency's restrictions on proposal revisions, we consider the extent to which the amendment, and the permitted changes in response to the amendment, materially impact or are inextricably linked with other aspects of a vendor's quotation. *Castro & Co., LLC*, B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74 at 3; *Deloitte Consulting, LLP*, *supra*.

Here, we find no basis to object to the agency allowing full proposal revisions. First, contrary to an assertion otherwise, DLA's implemented corrective action is consistent with its representations to our Office following KHI's earlier protests. See *Kropp Holdings, Inc.*, B-420857.3, B-420857.4, May 11, 2023 (unpublished decision) (where the agency explained it would take narrow corrective action and limit proposal revisions to volume 2, or would "[t]ake broader corrective action as the contracting officer deems appropriate."). Second, as documented in its contemporaneous memorandum, the contracting officer made the determination that unrestricted proposal revisions were in the best interest of DLA. AR, Tab 53, Memorandum on Corrective Action at 3-5. Indeed, the contracting officer explains she considered a narrower scope to proposal revisions just to proposal volume 2, but "after further review, the unrestricted revisions to Volume 2 could reasonably affect all areas of offerors' proposals." *Id.* at 3. The contracting officer concludes that "allowing unrestricted revisions is the best way to ensure the offerors have equal opportunities to revise their proposals without creating inconsistencies or derivative issues elsewhere in their proposals." *Id.* Thus, consistent with its broad discretion to fashion appropriate remedial corrective action, the agency elected to reopen discussions and obtain proposal revisions.

AEG argues that the contracting officer's determination makes no attempt to "show specifically how the deficiencies noted in either of the offeror's discussions letters is inextricably linked to the refund rate[,]" or "demonstrate how those specific deficiencies warranting revisions to Volume 2 impact the refund rate." Comments and Supp. Protest at 16. But AEG is adding a documentation requirement that is found nowhere in caselaw or regulation. See *Dell Fed. Sys., L.P.*, *supra* at 994-995 (rejecting requirement that an agency's corrective action be narrowly tailored to address identified deficiencies, but instead, finding that an agency's corrective action need only be rationally related to a procurement defect). Indeed, AEG cites to no GAO decision suggesting that an agency

that permits unconstrained proposal revisions following corrective action must support its decision by showing a material impact to every aspect of an offeror's proposal. See, e.g., *Pacific Shipyards Int'l., LLC*, B-420587.3, B-420587.4, July 25, 2022, 2022 CPD ¶ 190 (denying protest arguing for more limited proposal revisions where agency's decision to permit price proposal modifications was within the agency's discretion); *360 IT Integrated Solutions, supra* at 6-10 (same, where agency's decision to obtain most accurate, up-to-date, and competitive pricing available was reasonable even where agency could have proceeded with corrective action without seeking updated pricing); *Veterans Medical Supply, Inc.*, B-418019.6, Jan. 29, 2021, 2021 CPD ¶ 70 (same); *Partnership for Response and Recovery*, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 (same). On this record, we conclude the agency's decision to allow for full proposal revisions was reasonable and within the discretion afforded to it.¹³

The protest is denied.

Edda Emmanuelli Perez
General Counsel

¹³ AEG suggests that because DLA disclosed the protester's refund rate during KHI's debriefing, and is now allowing for KHI to revise its own rate, DLA is fostering a reverse auction competition, where offerors will race to the bottom to provide the lowest price (or, as applied here, the highest refund rate). Comments and Supp. Protest at 16-18. We disagree. First, as noted above, where the corrective action taken by an agency is otherwise unobjectionable, a request for revised proposals is not improper merely because the awardee's price has been previously exposed. *Laducer & Associates, Inc.*, B-401735.3, Feb. 23, 2010, 2010 CPD ¶ 57 at 4. Second, AEG's own case citation undermines its position that DLA should have considered potential auction-like effects of its decision to allow full revisions. See *Consolidated Eng'g Servs., Inc.*, B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 4 (noting "[w]hile it may have been *within the agency's broad discretion to permit price revisions without regard for creation of an auction*, the agency was not precluded from taking this consideration into account[.]") (emphasis added). Third, the record supports the agency's view that its corrective action would not cause a reverse auction--price is the least important factor, and AEG was rated as technically superior to KHI.