U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Global Patent Solutions, LLC

File: B-421602.2; B-421602.3

Date: February 23, 2024

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

DIGEST

Protest challenging agency's evaluation of awardee's proposal is sustained where proposal failed to demonstrate compliance with solicitation's mandatory small business participation percentage.

DECISION

Global Patent Solutions, LLC (GPS), a small business of Chandler, Arizona, challenges the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts to Cardinal Intellectual Property, Inc. (CPI) and CPA Global, Inc. (CPAG), under request for proposals (RFP) No. 1333BJ23R00151001, issued by the Department of Commerce, United States Patent and Trademark Office (PTO or USPTO) for professional services to assist the PTO in reviewing international patent applications. The protester challenges the agency's evaluation of proposals and resulting source selection decision.

We sustain the protest.

BACKGROUND

On October 31, 2022, the agency issued the solicitation directly to four firms identified during market research as being "most likely to successfully meet the Agency's needs." Contracting Officer's Statement (COS) at 3; Agency Report (AR), Tab 8, RFP at 1.[1] The PTO issued the solicitation under its unique alternative competition method procurement authority, which is authorized by The Patent and Trademark Office Efficiency Act (PTOEA), 35 U.S.C. § 2(b)(4)(A), and implemented through section 6.1.1

[1] Our citations use the Adobe PDF pagination of documents in the record.

of the PTO Acquisition Guidelines (PTAG), 78 Fed. Reg. 61185, 61186-87 (Oct. 3, 2013). AR, Tab 25, RFP attach. 6, Sections L & M (RFP §§ L-M) at 2.

The solicitation sought proposals for "professional comprehensive services" to assist the PTO in fulfilling its duties as the international search authority (ISA) for the United States under the Patent Cooperation Treaty (PCT). AR, Tab 11, RFP attach. 4, Performance Work Statement (PWS) at 1-2. The solicitation explains that "[t]he PCT is a multilateral treaty administered by the International Bureau (IB) of the World Intellectual Property Organization (WIPO)," and that it "provides applicants with a simplified means for effectively filing patent applications in" participating countries "by filing a single International Application (IA)." *Id.* at 1. In its capacity as the United States' ISA, the PTO annually "prepares approximately 23,000" international search reports (ISRs) and written opinions (WOs). *Id.* The solicitation sought contractor assistance in the preparation of ISRs and WOs "under the provisions of the PCT for international applications in which the USPTO is the ISA." *Id.* at 2. "This requirement is currently fulfilled by three incumbent 'PCT Search' contractors": the protester (GPS), and the two awardees, CPI and CPAG. COS at 2-3.

The solicitation contemplated the award of "at least one, and possibly multiple, IDIQ contract(s)" using a highest technically rated, fair and reasonable price award methodology. RFP §§ L-M at 2. The awarded contract(s) would be fixed-price, have a 1-year base period, and four 1-year option periods. AR, Tab 20, RFP attach. 5, Provisions and Clauses at 1, 30. The solicitation provided for evaluation of proposals using the following four non-price factors, in descending order of importance: (1) technical approach; (2) past performance; (3) oral presentations; and (4) small business participation. RFP §§ L-M at 2-3.

The solicitation established a three-phased evaluation process. RFP §§ L-M at 3. In phase 1 the agency would first perform a proposal adequacy and compliance check to assess the timeliness of proposals and whether the offeror complied with solicitation instructions related to "page/reference restrictions, font formatting, ability to access documents, file type, and teaming agreements." *Id.* at 5. The solicitation provided that submittals in phase 1 "determined not to be adequate and compliant may result in Offeror disqualification from further consideration for award." *Id.* After performing the adequacy and compliance check, the agency would evaluate phase 1 written proposal submissions under the technical approach, past performance, and small business factors. *Id.* at 3. In phase 2, the agency would evaluate offerors' oral presentations. *Id.* After assessing proposals under the four non-price factors during the first two evaluation phases, the technical evaluation team (TET) would "determine a ranking of proposals from highest to lowest technically rated." *Id.* at 2.

After establishing technical rankings, the agency would evaluate price under phase 3 for only those offerors determined to be the highest technically rated. RFP §§ L-M at 13. The highest-rated offerors' prices would be evaluated to determine if prices were "fair, reasonable, and balanced" based on an assessment of the ceiling amount possible

under an offeror's proposal if the maximum IDIQ quantities were ordered. *Id.* at 2-3, 13; AR, Tab 67, Source Selection Decision (SSD) at 21 n.1.

With respect to the number of awards to be made, the source selection decision explains that the contracting officer, who also acted as the source selection authority (SSA), considered three award scenarios: (1) a single award; (2) two awards; and (3) three awards, "which is the *status quo*." AR, Tab 67, SSD at 4. After discussing the various award scenarios with PTO senior leadership "and weighing the benefits and risks" of each scenario, the SSA "determined it was in the best interest of the Government to go with the two (2) Contractor scenario and issue two (2) awards" for performance of the required work. *Id.*

All four offerors solicited by PTO submitted proposals. Following the phase 1 evaluation, the agency issued an advisory "down-select" notice to one of the four offerors informing the firm that it was not among the highest technically rated offerors. AR, Tab 67, SSD at 5-6. This firm chose not to proceed, leaving the protester and two awardees as the three remaining firms continuing to phases 2 and 3 of the competition. *Id.* at 6. Based on the results from all three phases of the evaluation, the agency selected CIP's and CPAG's highest and second highest technically rated proposals, respectively, for award. *Id.* at 3; COS at 7. GPS protested to our Office, and, in response the agency submitted a notice of intent to take corrective action. *Id.* As a result of the agency's proposed corrective action--to reevaluate proposals and make a new award decision--we dismissed GPS's protest as academic. *Global Patent Solutions, LLC*, B-421602, May 4, 2023 (unpublished decision).

Subsequent to our dismissal of GPS's protest, the agency reevaluated written proposals and oral presentations, determining "that CIP and CPAG were still the" highest technically rated offerors. COS at 7. The agency then reevaluated price proposals for CIP's and CPAG's two highest technically rated offers. *Id.* After reevaluation, the three offerors were rated and ranked as follows:

	CIP - Rank 1	CPAG - Rank 2	GPS - Rank 3
Technical Approach	High Confidence[2]	High Confidence	Some Confidence
Past Performance	High Confidence	Some Confidence	Some Confidence
Oral Presentation	High Confidence	High Confidence	Some Confidence
Small Business	High Confidence	Some Confidence	High Confidence
Evaluated Price	$271,358,945	$267,409,700	Not evaluated[3]
Price Evaluation	Fair, Reasonable, Balanced	Fair, Reasonable, Balanced	Not evaluated

Id.; AR, Tab 67, SSD at 16, 21.

In accordance with the solicitation's highest technically rated, reasonably priced award methodology, and in line with the SSA's determination that making two awards would best meet the agency's needs, the agency again selected for award CIP and CPAG. AR, Tab 67, SSD at 22. On November 11, the agency notified GPS that it, again, had not been selected for award. This protest followed.

DISCUSSION

The protester raises a number of challenges to the agency's evaluation of proposals, and argues it was unreasonable for the agency to make two awards instead of three. For the reasons below, we sustain the protester's challenge to the agency's evaluation of CPAG's proposal. While we do not discuss the protester's remaining allegations, we have considered them all and find none provide additional bases to sustain the protest.

Standard of Review

As a preliminary matter, we must address the standard of review applicable to this protest. The PTO, as noted above, issued the RFP under its unique alternative competition method, which is authorized by the PTOEA and implemented through section 6.1.1 of the PTAG. We previously have concluded that, while the PTOEA exempts a PTO procurement from the substantive requirements of the federal procurement statutes set forth in title 41 of the United States Code and their implementing provisions in the Federal Acquisition Regulation (FAR), it does not exempt the PTO from the portions of the Competition in Contracting Act of 1984 (CICA),

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[2] The solicitation provided the agency would assign proposals one of the following adjectival ratings under the non-price factors: high confidence, some confidence, or low confidence. RFP §§ L-M at 3. An additional rating of neutral was possible under the past performance factor. *Id.*

[3] As provided for in the solicitation, and in accordance with the SSA's determination that making two awards was in the best interest of the government, the agency evaluated the prices of only the two highest technically rated offers.

codified at 31 U.S.C. §§ 3551-3557, regarding our Office's bid protest jurisdiction. *See CGI Fed., Inc.; Ascendant Servs., LLC*, B-418807, B-418807.2, Aug. 18, 2020, 2020 CPD ¶ 276 at 5 (establishing that our Office's bid protest jurisdiction generally extends to PTO procurements conducted pursuant to the PTOEA); *KeyLogic Assocs. Inc.; KSD Techs., LLC*, B-421346 et al., Mar. 8, 2023, 2023 CPD ¶ 65 at 5 (same). In fact, the PTAG expressly acknowledges that "[t]he [PTO] continues to be subject to the bid protest jurisdiction of the Government Accountability Office." 78 Fed. Reg., 61185, 61188 (Oct. 3, 2013). Accordingly, this challenge is within our bid protest jurisdiction, and, in fact, the PTO does not contest our jurisdiction over this protest. Memorandum of Law (MOL) at 4.

Notwithstanding our Office's jurisdiction to review protests of PTO procurements, the PTO argues that GAO's "review is limited to the authority it is granted under CICA." MOL at 4. That is, the agency contends our Office has jurisdiction only to consider whether the PTO's award decision complies with statutes and regulations, to which it is not exempt. *Id.* (*citing* 31 U.S.C. § 3554(b)(1)). In this regard, we have previously found that the PTOEA exempts PTO procurements from, *inter alia,* the majority of the public contracting requirements of division C of subtitle I of title 41 of the United States Code. *KeyLogic Assocs. Inc.; KSD Techs., LLC supra* at 7 *citing* 35 U.S.C. § 2(b)(4)(A). Here, specifically, the PTO maintains that it is "exempted from the requirement that when awarding a contract, '[a]n executive agency shall evaluate . . . competitive proposals, and award a contract, *based solely on the factors specified in the solicitation*." MOL at 4, *citing* 41 U.S.C. § 3701(a). According to the PTO, because this requirement is set forth in one of the procurement statues in title 41 of the United States Code, from which the PTOEA exempts the agency, the fact that the PTO may not have "strictly follow[ed] the terms of its Solicitation when awarding a contract . . . does not provide a basis for sustaining a protest." MOL at 4.

In its current form, the codified requirement for agencies to make contract awards based solely on the factors set forth in a solicitation stems from section 303B(a) of CICA. 41 U.S.C. § 3701(a) ("An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation."), *see e.g., Bellevue Bus Serv., Inc.--Req. for Recon.*, B-219814.2, Sept. 27, 1985, 85-2 CPD ¶ 349 at 1-2 (citing "section 303B(a)" of CICA, Pub. L. No. 98-369, 98 Stat. 1175, 1179 (1984), 41 U.S.C. § 253b(a)). The essence of this requirement pre-dates CICA, however, reflecting a fundamental principle of government procurement that bidders or offerors for government contracts must be made aware of the basis on which such contracts will be awarded.

For example, nearly a century ago we found that to reject a bidder "because of noncompliance with a condition that the bidder was not given reasonable notice would be material in determining the award creates a situation where the bidders are not placed on a fair and equal basis." *Comptroller General McCarl to R.P. Brown, disbursing clerk, Department of Labor*, A-25283, Dec. 13, 1928, 8 Comp. Gen. 299; *see also Comptroller General McCarl to the Secretary of Commerce*, A-12660, Jan. 28, 1926, 5 Comp. Gen. 546 (finding that if time of delivery "is to be a controlling element in

the acceptance or rejection of a particular bid, it should be so stated in order that all bidders may have equal opportunity to offer supplies, etc., within the time so stated"). In more contemporary parlance, it is a fundamental principle of government procurement that competitions must be conducted on a fair and equal basis; that is, the contracting agency must even-handedly evaluate offers against common requirements and evaluation criteria. *SecTek, Inc.*, B-417852.2, Jan. 13, 2020, 2020 CPD ¶ 123 at 4.

If, as PTO argues, its exemption from the procurement statutes codified in title 41 would allow the agency to freely ignore the ground rules it establishes for a competitive procurement, it would give PTO license to treat competitors without regard to principles of fundamental fairness. Competitors would be required to follow the terms of the solicitation, but the agency would not be bound by evaluating offers according to the very terms it established. We do not view the specific exemption under the PTOEA to afford PTO such a broad license. Moreover, if we were to accept the PTO's argument that it is not required to award contracts based on the factors set forth in solicitations issued by the agency under its alternative competition method, it would lead to an incongruous result; we would have no foundation upon which to build our review of protests of such procurements or provide a remedy to competitors where the agency would make corrections to its process. As noted, this is a review that the PTO concedes our Office has authority to conduct. Consequently, we reject the PTO's argument that--because it is exempt from the substantive requirements of the federal procurement statutes set forth in title 41 of the United States Code--the agency was free to ignore the evaluation criteria established in the RFP and make award on bases other than those provided for in the solicitation.[4]

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[4] We note that this protest is distinguishable from our Office's prior decision, *KeyLogic Assocs., Inc.; KSD Techs., LLC, supra.* In *KeyLogic*, under its alternative competition method authority, the PTO issued multiple RFPs for information technology services. The agency, however, only selected one individual offeror for receipt of each issued RFP. *Id.* at 2. The protesters raised numerous challenges, including alleging (1) that the PTO had not appropriately justified its decision to use other than competitive procedures, *i.e.*, the alternative competition method; and (2) in the absence of that justification, the agency's issuance of the RFPs was improper.

Our decision concluded that the agency had properly exercised its authority under the PTOEA to use its alternative competition method. As such, we found that the protesters could not demonstrate competitive prejudice stemming from any alleged errors because the PTO, as permitted by its unique procurement authority, had chosen to solicit a single offeror for each RFP. *Id.* at 14. The protesters, therefore, could not demonstrate that they would have had a substantial chance of receiving awards under the RFPs for which they had not been solicited. *Id.* Here, in contrast, while proceeding under its alternative competition method, the PTO chose to solicit proposals from four firms--*i.e.*, the agency chose to conduct a competitive procurement. Having chosen to conduct a competition, the PTO was obligated to evaluate proposals and make award in a manner consistent with the competition parameters set forth by the agency in the solicitation.

Accordingly, we will apply the same standard used when reviewing challenges to any agency's evaluation of proposals. In such reviews, we will not reevaluate proposals or substitute our judgment for that of the agency; rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *Metric8 LLC et al.,* B-419759.2 *et al.*, July 29, 2021, 2021 CPD ¶ 299 at 12; *see also Al-Tahouna Al Ahliah General Trading & Contracting Co. WLL et al.*, B-412769 *et al.*, May 9, 2016, 2016 CPD ¶ 127 at 2 n.1, 5 (setting forth same standard of review in non-statutory protest involving the sale of government property); *Osram Sylvania Prods.*, Inc., B-287468, July 2, 2001, 2001 CPD ¶ 158 at 2 n.1, 5 (same).

Small Business Participation

The protester argues that the agency's "evaluation of CPAG's proposal under Factor 4, Small Business Participation, was unreasonable" because "CPAG's proposal contained a fatal flaw which rendered the proposal ineligible for award," but the PTO "erroneously treated this flaw as one of insignificant matter of procedure or formatting." Supp. Protest at 2. The agency maintains that it "correctly evaluated CPAG's Factor 4 submission and identified those items that lowered confidence and some that raised confidence." MOL at 15.

At the outset we note that the evaluation of an offeror's proposal under a small business participation factor is a matter within the agency's discretion. *Mission Essential Personnel, LLC*, B-410431.9, B-410431.10, Mar. 18, 2015, 2015 CPD ¶ 109 at 7. We will question an agency's conclusions where they are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. *Peraton, Inc.*, B-417358, B-417358.2, June 11, 2019, 2019 CPD ¶ 216 at 7. Further, it is a fundamental principle that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis of award. *Id.*

Relevant here, the solicitation required large business offerors to submit a small business subcontracting plan, and provided that an offeror's plan "shall comply with all elements of FAR Subpart 19.704 (Subcontracting Plan Requirements) and FAR Clause 52.219-9 (Small Business Subcontracting Plan)." RFP §§ L-M at 12. The solicitation further instructed offerors that "[t]he extent of small business participation shall equal or exceed the minimum requirement" of at least 10 percent with a goal of reaching at least 25 percent. *Id*. The solicitation advised that "[t]o receive credit under this factor, an enforceable teaming agreement must be in place with one or more small businesses (unless the Prime Offeror is a small business) and a copy of each signed agreement shall be included with the Offeror's proposal as an attachment." *Id.* The solicitation defined an "Enforceable agreement" as one "signed by both parties committing to a teaming arrangement if the contract is received and identifying the percentage of the total contract to be subcontracted." *Id.*

The solicitation established that an offeror's small business subcontracting plan would "be evaluated to the extent the Offeror complies with all elements of FAR Subpart

19.704 . . . and FAR Clause 52.219-9." RFP §§ L-M at 12. Additionally, the solicitation provided each offeror's proposal would "be evaluated to ensure it meets or exceeds the Government's minimum requirement that at least ten percent (10 [percent]) of the annual order value be directed to small business for each of the five ordering periods," and that the teaming agreements would "be reviewed to ensure compliance." *Id.* The solicitation further advised that, for evaluation purposes, offerors were to assume the PTO would make two awards, that there would be a workload of 23,000 reports per year, and that the workload would be evenly split between the two awardees. *Id.*

The record shows that CPAG's proposal stated the firm "remains committed to identifying and utilizing small businesses in support of this and other contracts, consistent with the USPTO's stated goals of small business participation." AR, Tab 33, CPAG Phase 1 Proposal at 66. To this end, CPAG proposed "goals" of [DELETED] percent small business participation during the contract's various periods of performance. *Id.* at 66. To achieve these goals, CPAG entered into teaming agreements with [DELETED] small businesses. *Id.* at 65-66, 114-371. CPAG's proposal explained that each of the [DELETED] small businesses was "projected to receive up to [DELETED] [percent] of the total awarded volumes (with actual volumes depending on received volumes from the USPTO and variations in technical fields assigned)." *Id.* at 66. The teaming agreements themselves stated that in the event CPAG received award, the small business "Partner will accept and perform a subcontract for the services *for up to* [DELETED] *[percent]* of awarded volumes." *Id.* at 115, 125, 135, 146, 157, 168, 178, 189, 200, 210, 220, 230, 240, 251, 261, 271, 281, 291, 301, 311, 321, 331, 342, 352, 362 (emphasis added).

During the adequacy and compliance check portion of evaluations under phase 1, the contract specialist found that CPAG's proposal did not include all the information required to be included in its small business subcontracting plan. AR, Tab 35, CPAG Phase 1 Proposal Adequacy Check at Row 11; COS at 20. Further, the contract specialist found that the subcontractor teaming agreements submitted by CPAG "do not specify any percentages of work to be contracted," leading the specialist to conclude both "Yes and No" as to whether CPAG's proposal complied with the solicitation. AR, Tab 35, CPAG Phase 1 Proposal Adequacy Check at Row 18.

For its part, the TET found that because CPAG's teaming agreements "specify 'up to [DELETED] [percent]' of work will be directed towards each partner as opposed to firm commitments with guaranteed minimum percentages as specified in the Sections L&M document," it was "impossible for the USPTO to evaluate exactly how much is guaranteed to go to small business (*e.g.,* 0 [percent] minimum x [DELETED] subs = 0 [percent] overall; [DELETED] [percent] maximum x [DELETED] subs = [DELETED] [percent] overall)." AR, Tab 60, CPAG Phase 1 Evaluation at 15. The TET also noted that "of [DELETED] teaming agreements CPAG provided, only [DELETED] had a digital or wet signature that could be verified as authentic." *Id.* Additionally, the TET explained that while the solicitation asked offerors to include in their small business subcontracting plans, two different percentages--the percentage as it relates to the subcontract value, and the percentage as it relates to the total contract value--"CPAG did not clearly state

which percentage calculation methodology" the firm used in its proposal. *Id.* Thus, the TET "assumed" a particular methodology based on context within the proposal; however, even accepting the evaluators' assumption to be correct, the TET still observed that "CPAG's proposal also neglected to state what the percentages were as a portion of the subcontract value as required by FAR 52.219-9." *Id.*

The TET indicated that all three of these issues with CPAG's proposal lowered expectations of success under the small business participation evaluation factor. AR, Tab 60, CPAG Phase 1 Evaluation at 15. The TET also found elements of CPAG's proposal that raised expectations of success. *Id.* For example, the TET took note of CPAG's history of increasing its small business subcontracting from 12 percent to [DELETED] percent over the 5-year course of the firm's incumbent contract. *Id.* The TET also noted that CPAG "projects" small business subcontracting of [DELETED] percent for the solicited contract. *Id.* Overall, the TET concluded CPAG's proposal merited a rating of some confidence under the small business participation factor. *Id.* at 1.

The SSA, for the most part, adopted the TET's evaluations and conclusions. For instance, similar to the evaluators, the SSA found that "CPAG did not adhere to the USPTO's instructions to Offerors in Sections L and M of the RFP." AR, Tab 67, SSD at 10. Specifically, the SSA noted that the solicitation "required submission of signed teaming agreements with firm percentages of work to be directed to small business subcontractors," but while CPAG provided "partially signed teaming agreements" those agreements "only identified an 'up to [DELETED] [percent]' commitment of work to be subcontracted to each subcontractor." *Id.* As with the evaluators, the SSA found this language "could be interpreted as low as 0 [percent], these teaming agreements did not represent a guaranteed amount of work to be subcontracted to small business." *Id.* Therefore, the SSA observed there was no way for the agency to confirm "whether or not CPAG was guaranteed to meet the 10 [percent] floor or 25 [percent] goal for Small Business Participation Factor Four (4), which lowered the TET's confidence." *Id.* Further, the SSA determined that CPAG's proposal did not identify the percentage calculation methodology used for its small business subcontracting plan and "failed to provide a secondary percentage as required by FAR 52.219-9." *Id.*

The SSA also noted, however, that "CPAG did state a commitment to meeting the USPTO's small business subcontracting goals" and "projects a [DELETED] [percent] small business subcontracting rate to kick off" the contract. AR, Tab 67, SSD at 10. Further, the SSA pointed out that "the TET believes CPAG will be able to meet [PTO's] small business participation floor and goal based on [CPAG's] historical performance in this category, but since [CPAG] did not follow the proper format outlined in Sections L and M for their small business subcontracting plan, [CPAG's] overall confidence rating was brought down to 'Some Confidence.'" *Id.* Taking into consideration CPAG's historical rates of small business subcontracting under the firm's incumbent contract, the SSA concluded that "CPAG's flaws" in the small business participation "area were mostly procedural and not substantive." *Id.* at 17.

The protester contends that CPAG failed to comply with the solicitation requirements because it did not "submit copies of 'enforceable teaming agreements,' as that term is defined in" the RFP. Supp. Protest at 3. In support of this contention, the protester cites to the contemporaneous adequacy and compliance check, the TET evaluation report, and the source selection decision, all of which recognized CPAG's noncompliance. *Id.* The protester argues that despite this noncompliance, "the TET operated under the inadequately supported assumption that CPAG will subcontract [DELETED] [percent] of the awarded volume," and the evaluators improperly assigned a rating of some confidence to CPAG's proposal under the small business participation factor. *Id.* Similarly, the protester asserts the contracting officer, as the SSA, "baselessly dismissed" CPAG's failure to comply with the solicitation requirements as trivial formatting flaws or simple procedural matters. *Id.* at 3-4. The protester maintains that CPAG's failure to comply was a "material flaw," and that had the PTO properly assessed CPAG's subcontracting plan as deficient, GPS, rather than CPAG, would have received the second contract award. *Id.* at 4.

The contracting officer represents that "CPAG's teaming agreements were considered enforceable because 1) they were signed by both parties and 2) they identified the percentage of the total contact to be subcontracted." COS at 19. The contracting officer further states that "[w]hile I concurred with the TET's finding that the 'up to [DELETED] [percent]' commitment makes it difficult for the USPTO to evaluate exactly how much is guaranteed to go to a specific small business, I also interpreted 'up to [DELETED] [percent]' to constitute a percentage, and never considered the Teaming Agreements to be unenforceable," as having "a range of infinite potential percentages didn't invalidate the teaming agreements." *Id.* (internal citations omitted). Rather, the contracting officer "considered it reasonable for CPAG to have included a range [of] 'up to [DELETED] [percent]' in their individual teaming agreements." *Id.* at 21. The contracting officer explains that "I found this satisfied the requirement to provide a percentage, as I would have found 0 [percent], [DELETED] [percent], [DELETED] [percent], or any number between 0 [percent] and [DELETED] [percent] to have all satisfied this requirement, since they are all percentages." *Id.* at 20.

Similarly, the agency posits that it was "logical" for CPAG to include "up to [DELETED] [percent]" in its teaming agreements "because the small business, independent contractors that CPAG intends to use are specialists in various eight technical fields," and as "the USPTO does not guarantee how many [international applications] in which technical fields will be received . . . it is not realistic for CPAG to guarantee each Independent Contractor a specific percentage of work as opposed to a range (*e.g.,* up to 2 [percent])." MOL at 15.

Additionally, the contracting officer acknowledges that the solicitation specified "a format to follow for the Small Business Subcontracting Plans." COS at 21. The contracting officer maintains it was reasonable for the agency to assess a decrease in confidence while still assigning a rating of some confidence related to CPAG "not follow[ing] the exact format outlined in FAR Subpart 19.704 and FAR Clause 52.219-9." *Id.*

In reviewing an agency's procurement actions, we do not limit our consideration to contemporaneously documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 4 n.3. Our Office will accord lesser weight to *post hoc* arguments or analyses because judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. While we accord greater weight to contemporaneous materials as opposed to judgments made in response to protest contentions, 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 rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, the agency's arguments in response to the protest do not "simply fill in previously unrecorded details," but contradict the contemporaneous evaluation record and ignore the plain language of the solicitation. Specifically, under the small business participation factor, the solicitation established a material requirement that a minimum of 10 percent of the annual order value be subcontracted to small businesses. RFP §§ L-M at 12. The solicitation was clear and unambiguous that, for an offeror to receive credit under this factor, it must submit "enforceable teaming agreements" that were signed by both parties and identified "the percentage of the total contract to be subcontracted." *Id.*

The contemporaneous record similarly is clear in demonstrating that at each stage of assessment--the adequacy and compliance check, the technical evaluation, as well as the source selection decision--the agency found CPAG's teaming agreements and the firm's overall subcontracting plan to be lacking. The contract specialist who conducted the compliance check found that the agreements "do not specify any percentages of work to be contracted," and noted that CPAG's small business subcontracting plan did not include all the information required by the solicitation. AR, Tab 35, CPAG Phase 1 Proposal Adequacy Check at Rows 11 and 18. The TET found that CPAG's teaming agreements failed to include "firm commitments with guaranteed minimum percentage[s] as specified in the [solicitation]," and that the signatures for [DELETED] of the [DELETED] agreements could not "be verified as authentic." AR, Tab 60, CPAG Phase 1 Evaluation at 15.

Similar to the contract specialist's adequacy check, the TET noted that CPAG's subcontracting plan "neglected" to include certain required information necessitating that the evaluators make assumptions in order to assess the proposal. *Id.* Again, in the source selection decision, the SSA noted that the solicitation "*required* the submission of *signed* teaming agreements *with firm percentages* of work to be directed to small business subcontractors," but that CPAG's agreements were only partially signed and

"*did not represent a guaranteed amount of work to be subcontracted*." AR, Tab 67, SSD at 10 (emphasis added). Also again, the SSA took note of CPAG's failure to provide all the information required to be in the subcontracting plan. *Id.*

Despite these repeated findings that neither CPAG's teaming agreements nor its subcontracting plan complied with the solicitation's requirements, the TET assigned CPAG's proposal a rating of some confidence under the small business participation factor, and the SSA selected CPAG for award because the firm had a history of meeting small business participation goals and promised to continue to do so in the future. In this respect, we find the agency's evaluation of CPAG's proposal to be unreasonable, because the evaluators' and SSA's conclusions were inconsistent with the solicitation's material requirement for offerors to demonstrate through the use of enforceable teaming agreements that a minimum of 10 percent of the annual order value would be subcontracted to small businesses. *See e.g., Peraton, Inc., supra* at 5-7 (sustaining protest that awardee's proposal did not meet small business participation requirement of 25 percent when using formula dictated in solicitation revealed awardee proposed lower percentage); *NCI Info. Sys., Inc.*, B-417685, B-417685.2, Sept. 23, 2019, 2019 CPD ¶ 344 at 6 (sustaining protest where protester proposed to meet solicitation's minimum 15 percent small business participation requirement through its "fully executed teaming agreements" but agreements did not indicate definitive workshare to be subcontracted).

Further, we find unpersuasive the agency's post-protest arguments that an offeror could satisfy the solicitation requirement for enforceable agreements to include "*the percentage of the total contract to be subcontracted*" by providing "a range of infinite potential percentages." *See* RFP §§ L-M at 12; COS at 19 (emphasis added). Regardless of whether, as the agency argues, it may have been "logical" for CPAG to include only a range of up to [DELETED] percent rather than guaranteeing "a specific percentage of work" in its teaming agreements, an identification of "*the percentage*" of work to be subcontracted is specifically what the solicitation required in order for CPAG's teaming agreements to meet the definition of "enforceable" and receive credit under the small business participation factor. *See* MOL at 15; RFP §§ L-M at 12; *see also e.g., Peraton, Inc., supra* at 9-10 (finding "illogical and inconsistent with the plain language of the solicitation" agency's post-protest argument that a large business offeror could meet a material requirement for small business participation by counting amounts paid to the large business instead of its small business subcontractors). In sum, we find the agency's evaluation of CPAG's small business participation plan to be unreasonable, where the record demonstrates that CPAG failed to comply with a material requirement of the solicitation, and the SSA improperly concluded that "CPAG's flaws" under the factor "were mostly procedural and not substantive." *See* AR, Tab 67, SSD at 17.

Competitive prejudice is an element of a viable protest, and our Office will not sustain a protest unless the record contains evidence reflecting a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. *CIGNA Govt. Servs., LLC*, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 7-8. Here, CPAG's proposal failed to demonstrate--in the manner

prescribed by the solicitation--that it would meet the material minimum requirement of 10 percent small business participation, and therefore was technically unacceptable and ineligible for award. *See Peraton, Inc., supra* at 10. Because the SSA "determined it was in the best interest of the Government to . . . issue two (2) awards," and the elimination of CPAG's proposal would leave the other awardee, CIP, and the protester as the only two technically acceptable offerors, there is a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the second award. Accordingly, we conclude that the protester was prejudiced by the agency's unreasonable evaluation of CPAG's proposal and resulting improper award.

RECOMMENDATION

In light of the agency's improper award to CPAG on the basis of a proposal that failed to meet a material solicitation requirement, we recommend that the agency evaluate consistent with the solicitation and this decision; make a new source selection decision; and, if CPAG is not selected for award as part of the new source selection decision, terminate CPAG's contract for the convenience of the government.[5] In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for such costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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General Counsel

[5] While the PTO conducted this procurement using its alternative competition method, rather than as a standard procurement under the FAR, the agency incorporated a number of FAR provisions and clauses into the solicitation, including FAR clause 52.249-2 Termination for Convenience of the Government (Fixed-Price). AR, Tab 20, RFP attach. 5, Provisions and Clauses at 12.