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## Decision

**Matter of:** Alutiiq-Banner Joint Venture

**File:** B-412952; B-412952.2; B-412952.3; B-412952.4

**Date:** July 15, 2016

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### DIGEST

1. Protest that agency miscalculated awardee's past performance is sustained where agency unreasonably considered past performance by awardee for which there was no record of performance, contrary to the terms of the solicitation.
  2. Protest that agency improperly awarded 8(a) set-aside contract to ineligible joint venture is sustained where, although awardee was an approved 8(a) joint venture, it had not submitted an addendum to its joint venture agreement for approval by Small Business Administration (SBA), and thus SBA is rescinding its approval of awardee's eligibility.
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### DECISION

Alutiiq-Banner Joint Venture (ABJV), of Anchorage, Alaska, protests the award of a contract to CTRMG-GAPSI JV, LLC (CGJV), of Fairfax, Virginia, by the National Aeronautics and Space Administration (NASA), under request for proposals (RFP) No. NNJ15541361R for human resources support services for the human resources office at the Lyndon B. Johnson Space Center, in Houston, Texas. ABJV argues that NASA miscalculated the proposals, and that CTRMG-GAPSI JV was ineligible for award.

We sustain the protest.

## BACKGROUND

NASA issued the RFP on October 19, 2015, as a competitive set-aside for participants in the Small Business Administration's (SBA) section 8(a) program. The RFP anticipated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract, to be known as the human resources integrated professional services (HRIPS) contract.<sup>1</sup> Agency Report (AR) at 1. The contract was to have a 5-year ordering period and a maximum value of \$24.6 million. RFP at B-3. The RFP included a statement of work (SOW) organized into seven substantive sections. RFP at C-1 to C-15.

The contract was to be awarded to the firm whose proposal was technically acceptable<sup>2</sup> and provided the best value based on a tradeoff between past performance and price. RFP at M-1. The past performance evaluation was to consider three "aspects" in determining a performance confidence rating--recency, relevancy, and performance. Id. at M-3. In defining recency, the RFP stated that past performance had to be within 3 years of the issuance of the RFP, that more recent past performance would receive greater consideration, and that NASA "will not consider performance on any contract that has no documented performance history." Id. The overall past performance confidence rating was to be determined based on a combination of relevance and performance, and would result in ratings of very high, high, moderate, low, or very low confidence, or else a rating of neutral for a firm that lacked relevant past performance. Id.

The RFP required offerors to submit past performance information in several areas, including relevant performance by the offeror and significant subcontractors or affiliated companies, past performance of the proposed project manager, a past performance relevance matrix, and environmental and safety information. RFP amend. 2 at L-12 (¶ L.17.2(a)). The past performance instructions went on to state that past performance information should address the relevance of the prior work to "the ability to perform the proposed effort." Id. at L-12 to L-13 (¶ L.17.2(b)-(c)).

The RFP also provided an electronic spreadsheet to be used as a model for the past performance relevance matrix, and instructed offerors to complete the matrix as part of their responses. Id. at L-13 (¶ L.17.2(c)). The spreadsheet contained rows for the offeror to enter the name of each team member firm (or parent, affiliate,

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<sup>1</sup> HRIPS is the follow-on contract to the human resources management, operations and development support services (HRMODSS) contract. NASA awarded the 5-year HRMODSS contract in 2011 to GAPSI-Banner Joint Venture, a joint venture of two firms, each of which is a joint venturer in the parties here: GAPSI is a joint venturer in CGJV, while Banner is a joint venturer in ABJV. See RFP amend. 2, encl. 2, Questions & Answers, at 1 (answer to question No. 2).

<sup>2</sup> The technical acceptability evaluation is not at issue in the protest.

etc.) and a row for the proposed project manager, followed by columns of cells marked generically for elements of the SOW. AR, Tab 17.1, RFP ¶¶ L.17.2 Past Performance Matrix, at 1-2. The spreadsheet instructed offerors to place dots in cells to indicate relevant past performance corresponding to “the specified SOW section(s),” and noted that the offeror could add columns to the model spreadsheet if necessary. Id.

Offerors were also instructed to submit safety and health data for “all relevant work performed during the past 3 years” as part of their past performance. Specifically, offerors were to submit environmental data, copies of any Occupational Health and Safety Administration (OSHA) citations with explanatory remarks, and “records of the company’s OSHA recordable injuries and illnesses.” The OSHA records were to include “for each worksite, as a minimum, 1 copy of each year’s OSHA logs (Forms 300 and 300A) as required by Title 29 of the Code of Federal Regulations” RFP amend. 2 at L-14 (¶¶ L.17.2(f)). Offerors were also directed to identify their workers’ compensation insurers, and to provide the Experience Modification Rates (EMR) and associated calculations, as well as a letter from the insurance carrier summarizing the firm’s liability and lawsuit history related to safety and health performance, and the historical EMRs, for the previous 3 years. Id. at L-14.

The evaluation of price would assess the realism of proposed labor rates and prices, and would arrive at a total evaluated price for the 5-year contract term (excluding from evaluation the price for a phase-in period). Id. at M-5 to M-6.

### ABJV Proposal

ABJV’s proposal identified the offeror as an SBA-approved 8(a) joint venture between Alutiiq Professional Training, LLC, and Banner Staffing, LLC. AR, Tab 10.1, ABJV Proposal, vol. II, at 1. With respect to its past performance record, ABJV identified and described four recent contracts performed by affiliates of Alutiiq Professional Training, and three recent contracts performed by a joint venture between Banner Staffing and GAP Solutions, including the HRMODSS contract. Id. at 6-20. ABJV also submitted past performance for its proposed program manager, environmental data, safety information, and the past performance relevance matrix. Id. at 44-54 & matrix sheets (unnumbered).

With respect to the contracts for Alutiiq Professional Training, the firm provided a matrix indicating that each contract showed relevant experience in many SOW subsections, and narratives that described the scope of each contract in general terms. For example, ABJV identified a contract performed by Alutiiq **[DELETED]**, LLC, for which the proposal stated that the firm’s personnel provided services that were similar and extremely relevant to the RFP requirements, and demonstrated expertise in human resources automated systems. Id. at 6. The narrative justified the relevance of the contract primarily by identifying various categories of services and asserting each time that the effort by ABJV’s affiliate was “similar and highly relevant” to a specific corresponding SOW section, thus:

Alutiiq provided on-site management and the workforce to perform contract requirements, similar and highly relevant to HRIPS requirements. We provided[] Personnel Services (similar and highly relevant to HRIPS Human Resources (HR) Management and Operations, SOW 4.0 and 5.0), Personnel Management (similar and highly relevant to HRIPS HR Management and Operations, SOW 4.0 and 5.0), Personnel Operations (similar to HRIPS HR Operations, SOW 5.0), Personnel Automation (similar to HRIPS HR Information Systems Development, SOW 7.0), Retirement Services (similar to Workforce Planning & Analysis, SOW 8.0), and Transition Center services (similar to HRIPS HR Management and Develop, SOWs 4.0 and 6.0) and various Army Human Resources automated systems (similar and highly relevant to HRIPS HR Information Systems Development, SOW 7.0).

Id. at 7.

With respect to the contracts for Banner Solutions, ABJV used essentially the same approach. The proposal identified Banner's participation as one joint venture participant in the incumbent HRMODSS contract, and two other contracts. The proposal then similarly justified the relevance of each contract to the requirements here. For example, for a contract performed by Banner Staffing (in a joint venture with GAP Solutions as noted), the proposal explained the relevance as follows:

Banner Staffing, as part of the . . . Joint Venture, provided the on-site management and HR professionals and specialists to perform contract requirements similar to HRIPS. We provided Administrative Services (similar and highly relevant to HR Management and Operations, SOW 4.0 and 5.0)[,] Customer Service (similar and highly relevant to HR Operations, SOW 5.0), Database Administration (similar and highly relevant to HR Information Systems Development, SOW 7.0), Client Services (similar and highly relevant to HR Management and Operations, SOW 4.0 and 5.0) and Managing and Coordinating Conferences (similar and highly relevant to HR Development, SOW 6.0). . . . We provided all **[DELETED]**.

The work performed on this contract was very relevant to the work being proposed on the HRIPS solicitation. Each involve[s] the utilization of Government facilities in the day to day operations. They also both consist of a very diversified workforce capable of adapting to and navigating a myriad of internal and external changes, . . . .

Id. at 18.

With respect to the environmental and safety criteria under the past performance factor, the proposal explained that neither of ABJV's joint venturers had received

environmental citations or non-compliance notices. Id. at 44. Further, the proposal stated that Alutiiq Professional Training had never received any OSHA citations, and Banner Staffing had never received OSHA citations or reports of any other recordable injuries or illnesses. Id. The proposal provided one OSHA summary form for Alutiiq Professional Training for 2014, showing zero reported work-related injuries and illnesses for the year. Id. (copy of OSHA Form 300A). ABJV's proposal then stated that Banner Staffing had no insured losses and thus had an EMR of zero, which was confirmed in an accompanying letter from its insurance broker. Id. at 45-46. Alutiiq Professional Training provided certificates and data showing that its EMR<sup>3</sup> was low (favorable) in comparison to the average EMR for similar businesses. Id. at 47-54.

ABJV also completed the past performance matrix by expanding the example provided in the RFP to provide a separate column for the SOW's major sections, subsections and sub-subsections, and a row for each contract. As instructed by the RFP, ABJV placed dots in cells to indicate which of the contracts involved relevant performance under the corresponding SOW section, subsection, or sub-subsection. Id. (unnumbered relevance matrix pages).

#### CGJV Proposal

The proposal from CGJV identified the offeror as an SBA-approved 8(a) joint venture between GAP Solutions and CTR Management Group. AR, Tab 11.1, CGJV Proposal, vol. II, at 2-3. CGJV provided past performance information concerning four recent contracts performed by GAP Solutions, one recent contract performed by CTR Management Group, and one by a subcontractor. Id. at 2, 7-36. CGJV also submitted past performance for its proposal program manager, environmental data, safety data, and a past performance relevance matrix. Id. at 2 & i to ii, attachs. 1.1 to 1.6.

CGJV's proposal discussed the substance of its past performance contracts with specific reference to corresponding subsections of the SOW. To show the relevance of its contracts, CGJV provided a narrative description of the contract requirements in relation to individual SOW subsections (or sometimes two related subsections together). For example, for one contract, CGJV identified 13 SOW subsections, which it discussed in 11 paragraphs. As an example:

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<sup>3</sup> The supporting information indicated that a parent company and all subsidiaries are treated together for purposes of calculating an EMR. E.g., id. at 47 (Alutiiq); see also AR Tab 11.1, CGJV Proposal, vol. II, attach. 1.4, at 1 (explanation by underwriter for combining entities in determining EMR for CTR Management).

6.1 Training Courses, Programs, and Organizational Development Initiatives. We are responsible for the design, coordination, delivery, and advertisement of all training provided, including [DELETED]. Commands advertise to their subordinate units via e-mail and/or meetings. Some courses can be found on Army ATRRS (Army Training Requirements and Resources System). Team leads produce [DELETED] about upcoming courses and [DELETED]. Some courses are required for all incoming soldiers. Teams are provided a [DELETED] [which] shows what is required by [DELETED].

AR, Tab 11.1, CGJV Proposal, vol II, at 28.

CGJV identified a single past performance reference for CTR Management. The proposal identified the contract as one the Department of Health and Human Services (HHS) awarded in August 2015. CGJV provided narrative explanations of the relevance of the work to 12 SOW subsections or sub-subsections, id. at 30-32, but apparently because the contract commenced shortly before proposals were due here, CGJV noted that no performance ratings were on file. Id. at 30.

With respect to the environmental and safety criteria, CGJV's proposal stated that the companies and their subcontractor had not received environmental citations or non-compliance notices. Id., app. A, at i. The proposal explained that CGJV had attached OSHA Forms for both CTR Management and GAP Solutions for 2012, 2013, and 2014.<sup>4</sup> Id., app. A, at ii. The attachments included copies of the OSHA forms for both, detailed documentation of workers compensation experience rating data for GAP Solutions, a summary of the firm's EMR, and a letter from an insurance exchange manager explaining that CTR Management had experienced no employer liability claims since April 2010. Id., app. A, attach. 1.1 to 1.6.

#### NASA Evaluation and Source Selection Decision

On November 20, NASA received and evaluated proposals from seven firms. Only the proposals from ABJV and CGJV were found technically acceptable, and NASA evaluated those two proposals under the past performance and price factors.

NASA's past performance evaluation concluded that CGJV's proposal showed relevant past performance for both joint venturers and the subcontractor, as well as for the proposed project manager, and the proposal showed a safety record that was poor in some respects, but which NASA concluded was satisfactory overall. AR, Tab 13, CGJV Past Performance Evaluation, at 1-6. As a whole, the evaluators rated CGJV as very high confidence under the past performance factor. Id. at 1.

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<sup>4</sup> The proposal explained that the proposed subcontractor was exempt from routine OSHA recordkeeping under that agency's regulations, due to having fewer than 10 employees, but that it had no documented injuries in 2012, 2013, and 2014. Id.

For ABJV, the past performance evaluation concluded that the firm's proposal showed past performance for both joint venturers, and for the project manager, but that many of the past performance contracts had limited or no relevance to the SOW requirements. ABJV also failed to provide the three years of OSHA safety summary records that the RFP required. AR, Tab 12, ABJV Past Performance Evaluation, at 1-10. As a result, ABJV's past performance was rated as high confidence, but its safety record was viewed as marginal<sup>5</sup> due to the failure to submit OSHA injury and illness reporting forms (other than the single form for Alutiig Professional Training for 2014). Id. at 8-9.

On March 22, 2016, the NASA source selection authority (SSA) prepared a source selection decision which included a discussion of the results of the past performance evaluation in terms of recency, relevance, performance quality, program manager's past performance, environmental issues, and safety record. AR, Tab 15, Source Selection Statement, at 10-13. The SSA agreed with the ratings of ABJV as high confidence, and CGJV as very high confidence. Id. The SSA also noted that the price analysis had determined that both firms' prices were reasonable, and that ABJV's evaluated price of \$14.5 million was approximately 5.2 percent lower than CGJV's price of \$15.3 million. Id. at 14. The SSA made a tradeoff between the two proposals and expressed his judgment that, considering the greater weight placed by the RFP on past performance, CGJV's higher-rated past performance provided "value that easily justify[ed] paying a slightly higher price" compared to ABJV's lower-rated, lower-priced proposal. Id. at 17.

On March 23, the contracting officer determined that CGJV was eligible for award and was responsible. AR, Tab 9, Responsibility Determination, at 1. Attached to the responsibility determination was an undated letter from the SBA stating that "CTRMG/GAPSI JV" was an eligible 8(a) joint venture under the solicitation for the HRIPS contract. Id., attach. 2, Letter from SBA Supervisory Business Opportunity Specialist to NASA Small Business Specialist, at 1. On March 29, NASA notified ABJV that the agency had selected CTRMG-GAPSI JV for award. ABJV filed this protest after its debriefing.

## ANALYSIS

ABJV argues that NASA misevaluated CGJV's past performance and treated the offerors unequally under the past performance evaluation, particularly with respect to the relevance of past performance and the offerors' safety records. ABJV argues that the misevaluation resulted in an unreasonable best value decision.<sup>6</sup> ABJV also

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<sup>5</sup> Although the past performance report uses the term "moderate" in one place, it otherwise uses the term "marginal." Id. at 8-9.

<sup>6</sup> ABJV withdrew challenges to the evaluation of its own past performance (other than as demonstrating unequal treatment).

argues that CGJV could not have properly obtained SBA approval as an 8(a) joint venture because the legal entity was created after submission of proposals, and thus it could not have been approved by the SBA as eligible for award. Second Supp. Protest at 1-2. We address these arguments in turn, and conclude that the protest should be sustained because the past performance evaluation was unreasonable, and because CGJV had not been approved for the award as required by applicable SBA regulations.

### Evaluation of Past Performance Contracts

ABJV raises two types of challenges to the evaluation of the offerors' past performance: that NASA treated the offerors unequally with respect to the evaluation of the relevance of their past performance, and that NASA improperly considered a contract for CGJV that lacked a record of performance.

With respect to the unequal treatment allegation, ABJV argues that its proposal demonstrated that each of its contracts was related to specific sections, subsections, and sub-subsections of the SOW, but with the exception of the incumbent HRMODSS contract, NASA unreasonably considered most of ABJV's past performance to be either not relevant or only somewhat relevant. Id. at 13-14. In contrast, ABJV argues, CGJV's past performance contracts were found relevant even though they allegedly demonstrated no greater relationship to the SOW requirements.<sup>7</sup> Id.; Protester's Supp. Comments at 6-8.

NASA argues that it applied the past performance relevance criteria equally to both offerors, and that the differences in the relevance ratings were based on reasonable judgments made from the information provided in the respective proposals. In general, NASA explains, ABJV's proposal provided "little more than high-level, conclusory assertions" to support the relevance of its contracts. AR at 13. Although ABJV mentioned more subsections of the SOW as being relevant to its past performance contracts, its proposal failed to provide a "rationale supporting [its]

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<sup>7</sup> ABJV's argument that CGJV failed to submit a proper relevance matrix because it listed only the top-level SOW areas is unpersuasive. We agree with NASA that the RFP permitted—but did not require—offerors to create a column for each SOW subsection (or sub-subsection), as ABJV chose to do. Supp. AR at 10. As NASA notes, the agency answered an offeror question about the level of detail required by stating that completing the matrix using "the top WBS [work breakdown schedule] level (2.0, 3.0, 4.0, etc.)" would be sufficient. Id. (quoting AR, Tab 5, Draft RFP Q&A Question 64). Additionally, the matrix simply shows dots in each cell to indicate relevant past performance. There is no evidence that the alleged lack of detail in CGJV's matrix affected the evaluation; NASA properly considered each offeror's specific basis for identifying a contract as relevant, not simply whether the offeror placed dots in particular columns.

assertion of relevance,” as the RFP had specified, for any of the other past performance contracts (with the exception of the highly-relevant incumbent HRMODSS contract). Contracting Officer’s Statement at 10, 12, 13, 15, 16, and 18. The resulting lack of a substantive rationale for relevance reasonably led the evaluators to conclude that ABJV’s past performance was less relevant than claimed, which in combination with the omitted safety information (discussed below), supported a rating of high confidence, not very high confidence. AR at 13.

The past performance evaluation did not reflect unequal treatment, NASA argues, because as shown in the example above, CGJV’s proposal provided specific explanation of the relevance of its past performance. Thus NASA concluded that CGJV’s past performance was relevant, and correspondingly, justified a rating of very high confidence in CGJV’s ability to perform the SOW. Supp. AR at 13-14.

An agency’s evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror’s performance history, is a matter of agency discretion which we will not disturb unless the agency’s assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. Fox RPM Corp., B-409676.2, B-409676.3, Oct. 20, 2014, 2014 CPD ¶ 310 at 3. Our Office will not substitute our judgment for reasonably-based past performance ratings. Id.

In general (with one exception discussed below), we regard NASA’s past performance evaluation as reasonable, particularly with respect to the assessment of differences in the relevance of ABJV’s and CGJV’s past performance. The record supports NASA’s conclusion that ABJV provided minimal substance in demonstrating the relevance of its past performance. NASA explains the basis for its judgment in specific terms for each of ABJV’s contracts. AR at 15-27. In our view, and as supported by the example quoted above, NASA reasonably concluded that ABJV’s proposal provided little more than simple repeated assertions that each contract was similar and highly relevant to a list of SOW requirements, and thus did not demonstrate relevance. Correspondingly, the contemporaneous record also shows that CGJV’s proposal provided specific explanations of the relevance of its past performance to individual SOW subsections, which supports NASA’s higher relevance rating for CGJV under the past performance factor.<sup>8</sup>

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<sup>8</sup> ABJV also challenges NASA’s evaluation of the past performance of CGJV’s proposed program manager as very relevant because the CGJV program manager’s role has been at a higher supervisory level. Protester’s Comments at 15-17. In our view, ABJV’s challenge to NASA’s evaluation judgment--whether a prospective program manager’s role in overseeing performance was essentially the same content, complexity, and size of effort as the SOW--is insufficient for our Office to question NASA’s evaluation judgment.

In one respect, however, NASA's evaluation of CGJV's past performance was unreasonable and contrary to the terms of the RFP. ABJV challenges NASA's consideration of past performance by CTR Management regarding a contract with HHS because there was no record of performance for that contract. Protester's Comments at 3-7; Protester's Supp. Comments at 3-4. ABJV argues that since the RFP expressly provided that the past performance factor would assess the "offeror's performance record," and that NASA "w[ould] not consider past performance on any contract that has no documented performance history," it was improper for NASA to consider CTR Management's past performance under this contract. *Id.* at 4. ABJV argues that given CTR Management's roles as manager of the joint venture, and as the firm primarily responsible for performance of [DELETED] SOW sections, NASA's failure to identify the lack of past performance information for CTR Management was unreasonable. Protester's Comments at 5-6.

Although NASA concedes that the record contains no documentation of the performance by CTR Management under the HHS contract, the agency nevertheless argues that it was proper to consider the contract in the past performance evaluation. Specifically, even though there was no record of CTR Management's performance between the award of that contract in August and the submission of proposals under this RFP in November,<sup>9</sup> NASA maintains that it still was proper to evaluate the HHS contract as both recent and relevant. NASA argues that recency and relevance were separate elements of the past performance evaluation, and therefore, the agency could evaluate past performance for CTR Management despite having no record of the firm's performance. Supp. AR at 3-4.

In our view, the terms of the RFP precluded consideration of past performance for which there was no record of performance, as was indisputably the case for CGJV's HHS contract. Further, we do not see how the fact that one joint venturer had recently been awarded a contract for similar services would have any reasonable relationship to the agency's past performance evaluation absent a record of the quality of that performance. In sum, the record provides no rational basis for NASA to consider the HHS contract in the past performance evaluation of CGJV.

We also conclude that ABJV was prejudiced by the misevaluation of CGJV's past performance. The record does not reflect precisely how significant the consideration of the HHS contract was to the agency's judgment about CGJV's past performance. The record does show, however, that the HHS contract was the only past performance identified by CTR Management; that CTR Management was to have overall management of the JV; and that CTR Management was to have primary responsibility for performance of [DELETED] of the seven main SOW

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<sup>9</sup> The evaluation report states that the evaluators made several calls to the HHS contracting officer and contracting officer's representative, seeking a report of performance directly, but got no response. AR, Tab 13, Evaluation of CGJV, at 5.

areas. AR, Tab 11, CGJV Proposal, vol. II, at 3 (organizational chart and explanation of roles). Given the discussion of CTR Management's HHS contract positively in both the evaluation report and the source selection decision, the record shows that the misevaluation influenced the agency's tradeoff judgment. See AR, Tab 13, Evaluation of CGJV, at 18-20; AR, Tab 15, Source Selection Decision, at 12. In such circumstances, we resolve doubts regarding prejudice in favor of a protester; a reasonable possibility of prejudice is sufficient to sustain a protest. Crowley Logistics, Inc., B-412628.2 et al., Apr. 19, 2016, 2016 CPD ¶ 120 at 8. Accordingly we sustain this aspect of ABJV's challenge to the past performance evaluation.

### Evaluation of Safety Data

ABJV raises two related challenges to the evaluation of the safety element of the past performance factor. ABJV argues that NASA should not have downgraded ABJV's past performance based on its failure to submit OSHA summary forms, while also evaluating CGJV's safety risk as satisfactory when the record in fact reflected poor risk performance and an increasing ERM.

Specifically, ABJV argues that its proposal sufficiently explained that neither Alutiiq Professional Training nor Banner Staffing had any injuries or illnesses to report via OSHA forms. Therefore, ABJV argues that omission of the forms was insignificant; the forms were not required and would merely have restated that the firms had zero injuries and illnesses to report.<sup>10</sup> Protest at 42-43. ABJV also contends that the evaluation reflected unequal treatment because NASA unreasonably rated CGJV as having a satisfactory safety record by minimizing data that actually showed a poor record of safety by GAP Services. Protester's Comments at 14-15.

NASA contends that each of the safety evaluations was reasonable, and reflected specific circumstances of the two offerors. With respect to ABJV, NASA argues that completion of the OSHA forms was required by OSHA regulations (subject only to narrow exception). Thus, even if Alutiiq Professional Training was exempt from preparing OSHA forms before 2014, ABJV did not provide OSHA forms for Banner, as the RFP required. Banner's asserted lack of any reportable injuries or illnesses did not obviate completion of the OSHA summary form each year, or excuse the failure to submit copies of the summary forms with ABJV's past performance proposal. AR at 30. While ABJV argues that searching an OSHA database could

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<sup>10</sup> ABJV argues that, under the OSHA regulations, Alutiiq Professional Training was exempt from preparing OSHA forms until it received its first contract in 2014 (even though the firm itself existed since 2012). Id. NASA disputes this claim, arguing that the RFP required OSHA forms for each of the work locations identified in the proposal as past performance. AR at 29-30. We need not resolve this argument because it would not explain the absence of OSHA forms for Banner Staffing.

also have confirmed the assertion that Banner had no reportable injuries or illnesses, that argument takes exception to the RFP requirement for submission of the forms. Since the RFP required submission of the forms and ABJV did not provide them, NASA argues that its evaluators reasonably downgraded ABJV's proposal.

With respect to CGJV's safety record, NASA argues that its evaluation was reasonable and did not reflect unequal treatment. NASA argues that the evaluators expressly recognized that some safety data for GAP Solutions were negative, including a record of [DELETED] lost workdays due to worker injuries in 2014 (for nearly [DELETED] workers), and a poor [DELETED], among other things. Supp. AR at 15-16. Nevertheless, NASA argues that the agency also properly considered positive aspects of CGJV's safety record: that the worker injuries were low in other years, [DELETED], and that other data suggested that GAP Solutions had experienced [DELETED] in 2015, which was expected to result in its EMR [DELETED]. *Id.* at 16-17. Additionally, NASA argues that the data for CTR Management showed excellent safety performance, including zero worker injuries and illnesses (albeit for [DELETED] workers) and no workers' compensation claims ([DELETED] EMR). *Id.* at 17. Altogether, NASA argues, a satisfactory rating for CGJV was reasonable given the agency's consideration of all safety data, and did not reflect unequal treatment. *Id.*

The evaluation of proposals is largely a matter within the contracting agency's discretion, so our Office's role is not to reevaluate proposals but instead to examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Hi-Way Paving, Inc., B-410662, Jan. 21, 2015, 2015 CPD ¶ 50 at 3. We see no basis to question NASA's judgment that ABJV's failure to provide OSHA forms resulted in a marginal rating for the ABJV's safety. See Johnson Controls, Inc., B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 7-8 (agency reasonably downgraded protester's proposal for failure to submit OSHA forms as requested by RFP). Additionally, the contemporaneous record supports NASA's evaluation judgment regarding CGJV's safety; that evaluators were aware of the negative aspects of the safety data for GAP Solutions, as well as contrasting positive data, and reasoned that a middle rating of satisfactory appropriately reflected CGJV's safety record. See id. at 5 (agency reasonably evaluated protester's mixed safety record as moderate overall). Accordingly, we deny ABJV's challenge to the safety record evaluations.

#### Identity and Eligibility of Awardee

ABJV challenges the award to CGJV on the grounds that the awardee, "CTRMG-GAPSI JV, LLC," did not exist until an official corporate registration was filed in April 2016. As a result, the protester argues, the awardee is not the firm that submitted a proposal, but is a newly-created entity that is legally distinct and thus was not approved by the SBA for award of an 8(a) set-aside contract. Second Supp. Protest

at 1-2; Protester's Comments at 21-22. NASA responds that the differences in the awardee's name are insignificant clerical issues, and do not indicate that there are multiple legally-distinct entities. Rather, NASA argues, the awardee is a joint venture entity that the proposal and the agency consistently identify using a single DUNS number and a single CAGE code,<sup>11</sup> and thus there is no material doubt of the awardee's identity. Contracting Officer's Statement at 34; AR at 37-39.

Uncertainty as to the identity of an offering entity renders an offer technically unacceptable because ambiguity could result in there being no party bound to perform the obligations of the contract. Our Office will consider whether readily-available information, such as a CAGE code and DUNS number, reasonably establishes that despite differences in an offeror's name there is a clear commitment by the same concern to the terms of its proposal and the pending contract. See Raymond Express Int'l, LLC, B-409872.3 et al., Sept. 11, 2015, 2015 CPD ¶ 265 at 6.

Since the protester's challenge related to the SBA's approval of CGJV for award of an SBA set-aside contract, we also requested the views of the SBA regarding whether the awardee was a different entity than the SBA had approved for award as a joint venture. The SBA expressed its view that the awardee was indeed the same entity whose 8(a) joint venture agreement the SBA had approved in 2014, but the SBA nevertheless explained that the joint venture was not, in fact, eligible for award of the HRIPS contract. SBA Brief at 1. The SBA explained that its regulations required an approved 8(a) joint venture (as here) to submit an addendum to its approved joint venture agreement, for approval by SBA, before the award of each contract to the joint venture. Id. at 2 (citing 13 C.F.R. § 124.513(a), (e)). The SBA stated that CGJV did not submit an addendum to its joint venture agreement to the SBA for approval, and thus, SBA had not reviewed an addendum as required. Accordingly, SBA explained, it would now rescind its approval of CGJV's eligibility as being in violation of the SBA regulations, and SBA therefore recommends termination of the contract. Id. at 3.

No party meaningfully disputes the factual basis for the SBA's position. CGJV argues that our Office should not sustain the protest, but should instead recommend that the contract be "stayed pending approval by SBA." Intervenor's Response to SBA at 1. Similarly, NASA objects that the protest should not be sustained on this

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<sup>11</sup> DUNS refers to Data Universal Numbering System (or DUNS) numbers, while CAGE refers to Commercial and Government Entity (or CAGE) codes. CAGE codes are assigned to discrete business entities by the Defense Logistics Agency and are used to establish the identity of a legal entity for contractual purposes. See Federal Acquisition Regulation (FAR) § 4.1801. Similarly, DUNS numbers are also used to establish the identity of a business entity for contract award purposes. See FAR §§ 2.101 (definition of "Data Universal Number System"), 4.605.

basis, and requests our Office should hold this decision “in abeyance until SBA issues its eligibility determination” for CGJV. NASA Response to SBA at 1.

Our Office’s statutory obligation to decide protests (including, where possible, supplemental protest issues) by a written decision within 100 days of the initial protest filing precludes our adoption of the approaches requested by CGJV and NASA. We lack the ability to defer issuing a decision, or to continue supervision of the award process during any SBA review. The statute does not permit exceptions to our obligation to issue this decision by the statutory due date. See 31 U.S.C. § 3554(a).

The award of an 8(a) set-aside contract by an agency such as NASA is not directly between the contracting agency and the 8(a) program participant. Rather, section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), provides that the SBA enters into a contract with the contracting agency, and the SBA then awards a subcontract to the 8(a) program participant (or as here, joint venture). As a result, although NASA and CGJV argue over the appropriate remedy, there appears to be no significant dispute that CGJV did not seek the approval for this award as required under the 8(a) program, and the SBA did not have a basis to approve the award-- both of which are required by the SBA regulations as a precondition of awarding the set-aside contract to a joint venture. Accordingly, we agree with the SBA that the award to CGJV was improper, and we sustain the protest on that basis.

The protest is sustained.

#### RECOMMENDATION

We recommend that NASA terminate the award to CGJV, reevaluate CGJV's past performance reasonably and consistent with the terms of the RFP regarding consideration of past performance for contracts where no documented performance record is received, and make a new source selection decision. We then recommend that NASA and the SBA confirm that the selected offeror is an eligible 8(a) program participant or joint venture, and make award accordingly. We also recommend that NASA reimburse ABJV's costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). ABJV's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

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General Counsel