



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Mountaineers Fire Crew, Inc.; ASP Fire, LLC; Diamond Road Maintenance Inc. (d/b/a Diamond Fire)

File: B-413520.5; B-413520.7; B-413520.8; B-413520.10; B-413520.11

Date: February 27, 2017

Cyrus E. Phillips IV, Esq., Albo & Oblon, L.L.P., for Mountaineers Fire Crew, Inc.; Donald Scaramastra, Esq., Garvey Schubert Barer, for ASP Fire; and Christian B. Nagel, Esq., Ronald L. Fouse, Esq., and James J. Holt, Esq., McGuireWoods LLP, for Diamond Fire, the protesters.

Robert K. Stewart, Jr., Esq., and Derek D. Green, Esq., Davis Wright Tremaine LLP, for Firestorm Wildland Fire Suppression, Inc., and Grayback Forestry, Inc., the intervenors.

Azine Farzami, Esq., and Antonio T. Robinson, Esq., Department of Agriculture, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of an awardee's past performance with regard to a solicitation provision requiring disclosure of prior "non-compliance actions" is denied where the protester does not demonstrate that the awardee failed to disclose any "non-compliance actions" taken against it.

2. Protest alleging that an awardee will not comply with the limitation of subcontracting clause is denied where the awardee's proposal did not, on its face, take exception to the clause.

3. Protest alleging that the agency made award on a lowest-priced, technically-acceptable basis, rather than on the best-value basis set forth in the solicitation, is denied where the record shows that the agency considered the relative merits of the protester's and awardee's proposed technical approaches and prices.

4. Protest challenging the agency's affirmative determination of responsibility for an awardee is dismissed where the protester does not raise any allegations that are within the narrow exceptions for GAO's consideration of this issue.

5. Protest challenging the agency's evaluation of an awardee's proposed price as too low is denied where the RFP did not require the agency to evaluate price realism.

6. Protest challenging the agency's decision to take corrective action in response to earlier protests is denied where the record shows that the agency reasonably concluded that the action was necessary to address defects in the prior awards.

DECISION

Mountaineers Fire Crew, Inc., of Redding, California, ASP Fire, LLC, of Albany, Oregon, and Diamond Road Maintenance Inc., doing business as Diamond Fire, of Sutherlin, Oregon, all small businesses, challenge the awards of contracts to Firestorm Wildland Fire Suppression, Inc., of Chico, California, Grayback Forestry, Inc., of Merlin, Oregon, and Pacific Oasis, Inc., of Ashland, Oregon, also all small businesses, under request for proposals (RFP) No. AG-024B-S-16-9009, which was issued by the Department of Agriculture, Forest Service, for firefighting services.

We deny in part and dismiss in part the protests.

BACKGROUND

The Forest Service issued the solicitation on March 9, 2016, as a small business set-aside, seeking proposals to provide trained and certified Type 2 initial attack firefighter crews on a national basis for fire suppression, all-hazard and severity and preparedness activities, as well as for optional project work, such as hazardous fuel reduction. The RFP listed 41 contract line item numbers (CLINs), each of which was for performance of firefighting services by a firefighting crew in a geographical region or from a specific dispatch point. RFP at 3-4. The solicitation anticipated award of a single indefinite-delivery, indefinite-quantity contract for each CLIN, with a base period of 1 year and four 1-year options. Offerors were allowed to bid on multiple CLINs, but were required to specify the maximum number of CLINs they could accept. Id. at 5-6. The minimum ordering amount for each CLIN was \$80,000, and the maximum value of all CLINs for the base and option years was \$20,000,000. Id. at 59.

The RFP stated that proposals would be evaluated on the basis of price, and the following five equally-weighted non-price factors: (1) past performance; (2) experience; (3) equipment, vehicles, and facilities; (4) quality control plan (QCP); and (5) safety and training. Id. at 102. The RFP required offerors to propose fixed hourly labor rates, and stated that prices for each CLIN would be based on the proposed rates and the hours set forth in the price schedule. Id. at 5, 100. The RFP further stated that award was to be made on a best-value basis where the non-price factors, when combined, were "approximately equal to price." Id. at 101.

The Forest Service received 22 proposals, offering a total of 79 firefighting crews, by the closing date of April 7. On June 29, the agency awarded 13 contracts for the 41 CLINs. In early July, the agency received a number of agency-level protests; the agency either denied or took corrective action with regard to these protests. Contracting Officer's Statement (COS) at 5-6.

On August 5, our Office received protests filed by the following firms: Grayback Forestry, challenging the awards of CLINs 3A, 3B, 4A, 4B, 7A, 7B, 7C, 8A, 8B (B-413520); PatRick Environmental, challenging the awards of CLINs 1A, 1B, 6A, 6B, 6C, 6D, 9A and 9B (B-413520.2); and Firestorm, challenging the award of CLIN 15A (B-413520.3). On August 8, our Office received a protest filed by ASP Fire challenging the award of CLINs 9A and 9B (B-413520.4).

On September 6, 2016, the agency advised our Office that it would take corrective action in response to the protests, and requested that we dismiss the protests. Specifically, the agency stated that it would take the following actions:

The contracting officer will conduct a new best value determination for the following contract line item numbers (CLIN) [challenged by the protesters in B-413520 through B-413520.4]

* * * * *

If as a result of this corrective action the agency determines that an offeror other than the awardee represents the best value to the Government, the contracting officer will terminate the award and make award to a new offeror.

Notice of Corrective Action (Sept. 6, 2016) at 1. Our Office dismissed the protests as academic on September 9.

The Forest Service's corrective action consisted of preparing a new award decision. COS at 7. The agency did not conduct new technical evaluations, and instead relied upon the existing evaluations to either confirm the existing awards or make new awards. Id. The agency issued a new award decision on November 14, and these protests followed. For the reasons discussed below, we find no basis to sustain any of the protests.¹

¹ Although we do not address every argument raised by the protesters, we have reviewed them all and find that none provide a basis to sustain any of the protests.

MOUNTAINEERS FIRE'S PROTEST

Mountaineers Fire raises three primary challenges to the Forest Service's award of a contract for CLIN 15A to Firestorm: (1) the evaluation of Firestorm's past performance was unreasonable because the awardee did not identify, and the agency did not evaluate, negative performance by the awardee, as required by the RFP; (2) the agency's past performance evaluation gave inappropriate weight to the incumbent contract; and (3) the agency failed to reasonably evaluate whether the awardee would comply with the limitation on subcontracting clause. For the reasons discussed below, we find no basis to sustain the protest.

First, Mountaineers Fire argues that the Forest Service failed to reasonably evaluate Firestorm's past performance because the agency did not consider what the protester contends are numerous examples of performance problems that should have been disclosed by the awardee. As relevant here, the RFP required offerors to provide information concerning past performance, including "non-compliance" actions:

Past Performance – For each relevant contract, during the last five years (2011-2015), the Contractor is requested to provide the following:

* * * * *

(iv) List any non-compliance actions taken against your company and explain how the actions were resolved and address how your company plans to mitigate these non-compliant actions in the future.

(v) Furnish copies of the Performance Evaluations received on these incidents for the previous five years. Due to the possibility of voluminous copies, Offers may opt to furnish these electronically or provide a summarized document for evaluations received on these incidents. . . .

Note: If an Offeror has had a National Type 2-IA Firefighter Crew Contract from this office within the 2011 to 2015 period, they are not required to submit Performance Evaluations. These forms are already on file with this office. However, they may address any performance deficiencies they have experienced.

RFP at 98 (emphasis added).

Mountaineers Fire contends that Firestorm was the subject of numerous non-compliance actions by the government in connection with performance problems, including the employment of underage firefighters, sexual harassment, and drug

and alcohol use. Protest (B-413520.5) at 4-5. The protester submitted a declaration by a representative of Mountaineers Fire, which states that he was aware of or had been told about eight incidents where non-compliance actions had been taken against the awardee. Decl. of Mountaineers Fire Representative (Nov. 21, 2016) at 1-7.

Firestorm's proposal disclosed a 2014 non-compliance action in which two employees violated the company's drug and alcohol use policy. Agency Report (AR), Tab 10C, Firestorm Proposal, at 7. In a declaration submitted to our Office, the president of Firestorm states that, aside from the incident disclosed in its proposal, there were no other incidents where the company was the subject of non-compliance actions in connection with the allegations raised in Mountaineers Fire's protest. Decl. of Firestorm President (undated) at 1-2.

The Forest Service's evaluation of Firestorm's past performance addressed the incident disclosed in its proposal as follows:

One issue of Non-compliance was provided. Management dispatched a company representative to the incident and met with the Incident Commander and Operations Section Chief. The crew was [demobilized] and the company revised and strengthened drug/alcohol policy. This issue was reflected in [the Contractor Performance Assessment Reports (CPARs)] and reduced the yearly rating to Marginal. . . .

AR, Tab 40, Revised Source Selection Decision Document (SSDD), at 17.² Aside from this incident, however, the contracting officer states that he had no knowledge of any of the events cited in the protester's declaration. Contracting Officer's Statement (COS) at 8-9.

Aside from the declaration submitted by Mountaineers Fire, the protester provides no evidence to support its allegations. On this record, which also includes declarations from the awardee's president and the contracting officer, we find no basis to conclude that the awardee failed to disclose information required by the solicitation, or that the agency failed to consider relevant information required by the solicitation.

Next, Mountaineers Fire argues that the Forest Service's evaluation of Firestorm's past performance was inconsistent with the RFP's evaluation criteria because the

² Citations to the revised SSDD are to the pages added by the agency to the three documents which comprise Tab 40 of the agency report.

agency only considered the awardee's performance under the incumbent contract, and did not consider any other past performance information.

The protester cites the agency's response to the protest, which stated that the contracting officer was not aware of any of the allegations raised by the protester regarding non-compliance actions taken against Firestorm. Mountaineers Fire's Comments (Jan. 6, 2017) at 12-13 (citing COS at 8-9). The protester argues that the contracting officer's statement demonstrates that the agency considered only the awardee's past performance on the incumbent contract and ignored all other past performance.

To the extent Mountaineers Fire contends that the contracting officer's response to the protester's arguments concerning non-compliance actions expressly or implicitly stated that the agency limited its review of Firestorm's past performance to the incumbent contract, the record does not support this interpretation. Here, the record shows that the agency considered Firestorm's CPARs for 2011-2015, as required by the RFP. AR, Tab 40, Revised SSDD, at 41-42. As the agency notes, these CPARs concern Firestorm's performance on contracts other than the incumbent contract. See AR, Tab 15, Firestorm Past Performance Records, at 1-46. On this record, we find no basis to conclude that the agency's evaluation was inconsistent with the solicitation requirements.

Next, Mountaineers Fire argues that the Forest Service failed to reasonably evaluate whether Firestorm will comply with the limitation on subcontracting clause. The RFP, issued as a small business set-aside, contained Federal Acquisition Regulation (FAR) clause 52.219-14, which requires that at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Mountaineers Fire contends that the agency should have questioned Firestorm's intent to comply with the limitation on subcontracting clause based on information in the protester's proposal concerning Mountaineers Fire's prior role as a subcontractor for the awardee from 2011 to 2012. The protester contends that during its performance as a subcontractor for Firestorm, Mountaineers Fire performed more than 50 percent of the cost of contract performance, which caused Firestorm to violate the limitation on subcontracting clause. Supp. Protest (Dec. 29,

2016) at 2-3. In effect, the protester argues that its own proposal should have caused the agency to question whether the awardee would comply with the limitation on subcontracting clause. As the protester subsequently conceded, however, “had the Agency considered this close-at-hand information as it should have, it would have found no violation of the 50 percent rule.” Protester’s Comments (Jan. 6, 2017) at 9.

In any event, we do not agree that the Forest Service was obligated to consider this information in the manner the protester contends. Our Office has held that some past performance information is simply “too close at hand” to require offerors to shoulder the inequities that spring from an agency’s failure to obtain and consider information. Triad Int’l Maint. Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 7-8; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. For example, our Office has held that an agency may not ignore contract performance for an offeror involving the same agency, the same services, and the same contracting officer, simply because an agency official fails to complete the necessary assessments or paperwork. International Bus. Sys., Inc., *supra* at 4-5. Our Office, however, has not extended this limited principle to hold that an agency is obligated to consider an offeror’s prior performance, as set forth or implied from information in another offeror’s proposal, for the purpose of assessing whether an offeror will comply with the limitation on subcontracting clause. Instead, our Office has held that agencies should examine whether a proposal, on its face, takes exception to the obligation to perform in accordance with the requirements of the clause. TYBRIN Corp., *supra*. On this record, we find no basis to conclude that the agency should have found the awardee’s proposal, on its face, shows the awardee has not agreed to comply with the limitation on subcontracting clause. In sum, we find no basis to sustain Mountaineers Fire’s protest.

ASP FIRE’S PROTEST

ASP Fire raises three primary challenges to the Forest Service’s award of a contract for CLINs 9A and 9B to Pacific Oasis: (1) the Forest Service failed to follow the terms of the RFP by making an award based solely on price; (2) the agency failed to reasonably evaluate whether the awardee was a responsible offeror; and (3) the agency failed to reasonably evaluate whether the awardee’s proposed price was too low. For the reasons discussed below, we find no basis to sustain the protest.³

³ ASP Fire also raised a new protest ground in its comments on the agency report, arguing that the Forest Service unreasonably downgraded its past performance evaluation rating during the corrective action and improperly evaluated Pacific Oasis’s past performance. ASP Fire’s Comments (Jan. 9, 2017) at 11-14. The Forest Service addressed this issue in its supplemental report responding to the protester’s comments. Supp. AR (B-413520.7) at 4. Our Office established a due date of January 25, 2017, for the protesters and intervenors to file comments

(continued...)

First, ASP Fire argues that the Forest Service made award solely on the basis of price. As discussed above, the RFP provided for award on a best-value basis where the price and non-price factors were to have approximately equal weight. RFP at 101. In support of its argument, the protester contends that the agency awarded contracts for every CLIN to the available offeror that proposed the lowest price.⁴ ASP Fire's Comments (Jan. 9, 2017) at 3-4, 15. The protester also contends that, for CLINs 9A and 9B, the agency failed to explain why the awardee's lower-priced, lower-rated proposal merited award.

Contrary to ASP Fire's assertion, the record shows that the Forest Service did not select the lowest-priced available proposal for award of CLINs 3B, 7B, 7C, 8B, 12B, and 15A. AR, Tab 40, Revised SSDD, at 68, 83, 85, 89, 98, 102. In each of those awards, the awardee's proposal was more highly-rated than the lowest-priced offeror. Id.

With regard to the two CLINs challenged by ASP Fire, the protester argues that the agency did not adequately explain why it selected Pacific Oasis's lower-priced proposal. For CLINs 9A and 9B, Pacific Oasis and ASP Fire submitted the two lowest-priced proposals. The evaluation ratings and prices for the offerors were as follows:

	ASP FIRE	PACIFIC OASIS
TECHNICAL RATING	EXCEPTIONAL	EXCEPTIONAL
Past Performance	Acceptable	Exceptional
Experience	Exceptional	Exceptional
Equipment, Vehicles, Facilities	Exceptional	Exceptional
Quality Control Plan	Exceptional	Acceptable
Safety & Training	Acceptable	Acceptable

(...continued)

responding to the supplemental agency reports. ASP Fire, however, did not submit comments on the agency's response to this argument concerning past performance. For this reason, we consider this issue abandoned and will not consider it further. See Aljucar, Anvil-Incus & Co., B-408936, Jan. 2, 2014, 2014 CPD ¶ 19 at 3 n.4; Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6.

⁴ As the protester notes, the offeror with the lowest proposed price for a CLIN was not always available for award because it had already been selected for award of the maximum number of CLINs specified in its proposal. The revised SSDD noted for each CLIN whether an offeror was available for award of that CLIN.

PRICE CLIN 9A	\$132,325	\$115,575
PRICE CLIN 9B	\$132,325	\$117,250

Id. at 92-96.

Although the agency rated ASP Fire’s and Pacific Oasis’ proposals as excellent under the overall technical factor, the selection decision further discussed the relative merits of the offerors’ proposals, as follows:

Pacific Oasis, ASP and [Offeror 3] received equal ratings in all evaluation factors except QCP and Safety & Training. Pacific Oasis met all the requirements of the solicitation for the QCP and Safety & Training but did not have as many assignments as other incumbent contractors to prove the continued success of those two areas. Pacific Oasis is increasing their capacity in this cycle from 1 crew to 4 and I am confident that their QCP and Safety & Training will hold up with the increased capacity. Pacific Oasis has had no non-compliance issues relating to QCP and Safety & Training and I believe they will have continued success in these areas in the future. ASP received an acceptable rating in Safety & Training because their plan only met the requirements of the solicitation [and] it didn’t exceed the requirements or show any processes warranting an exceptional rating.

Id. at 93, 95 (text quoted above is the same for CLINs 9A and 9B). The source selection authority (SSA) concluded that, in light of the additional costs associated with ASP Fire’s proposal, “I do not believe that making a tradeoff for the additional capabilities and benefits associated with [the protester’s] more highly rated QCP and Safety & Training would provide an added value worth the additional cost.” Id. at 93-94, 96. In each case, the agency selected Pacific Oasis’ proposal for award.

Source selection officials in negotiated best-value procurements have broad discretion in making price/technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the solicitation’s evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. Generally, in a negotiated procurement, an agency may properly select a lower-rated, lower-priced proposal where it reasonably concludes that the price premium involved in selecting a higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower price. DynCorp Int’l, LLC, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 23. The extent of such tradeoffs is governed only by the test of rationality and consistency with the evaluation criteria. Best Temporaries, Inc., B-255677.3, May 13, 1994, 94-1 CPD ¶ 308 at 3. While an agency has broad discretion in making a tradeoff between price and non-price factors, an award decision in favor of a lower-rated, lower-priced proposal must acknowledge and document any significant advantages of the higher-priced, higher-rated proposal, and explain why

they are not worth the price premium. See DynCorp Int'l, LLC, supra. A protester's disagreement with the agency's judgment, without more, does not establish that the evaluation or source selection was unreasonable. Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4.

Based on the record here, we conclude that the agency reasonably considered the relative merits of each offeror's proposal and its proposed price. In light of the agency's acknowledgement of advantages associated with ASP Fire's proposal, and the associated price premium, we find no merit to the protester's argument that the agency made award solely on the basis of price, or otherwise failed to follow the RFP's award criteria.

Next, ASP Fire argues that the Forest Service failed to reasonably evaluate whether Pacific Oasis was a responsible offeror. We dismiss this argument because the protester has not set forth a challenge to the agency's affirmative determination of responsibility that our Office will review.

The FAR provides that a purchase or award may not be made unless the contracting officer makes an affirmative determination of the prospective awardee's responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set forth in FAR § 9.104-1; and such determinations involve subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. There is no requirement that a contracting officer explain the basis for an affirmative responsibility determination; a written explanation is only required when a contracting officer makes a determination of nonresponsibility. FAR § 9.105-2(a)(1); Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer unreasonably failed to consider information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7.

Here, ASP Fire argues that Pacific Oasis has not previously fielded four firefighting crews simultaneously, and thus does not have the capability to perform the requirements of the four CLINs it was awarded. Protest (B-413520.7) at 7. The revised SSDD states that the contracting officer found that all of the awardees were responsible under the standards set forth in FAR § 9.104-1. AR, Tab 40, Revised SSDD, at 1. In addition, the agency conducted a site visit for Pacific Oasis on July 9, 2016, and found that the offeror's equipment, key personnel, and training records reflected the ability to perform the contract. AR, Tab, 27, Memorandum for Record (Pre-work Meetings and Inspections), at 1.

ASP Fire does not argue that the awardee's proposed approach rendered it unacceptable under the terms of the solicitation. Rather, the protester questions the agency's conclusion that the awardee is capable of performing the contract. Thus, these allegations fall squarely within the scope of the agency's responsibility determination. The protester, however, does not identify specific available information that the contracting officer failed to consider that should have caused the agency to conclude that the awardee was not a responsible contractor. For this reason, we conclude that the protester has not set forth a challenge to the agency's affirmative determination of responsibility that our Office will consider. See 4 C.F.R. § 21.5(c); FCi Fed., Inc., supra.

Third, ASP Fire argues that the Forest Service did not reasonably evaluate whether Pacific Oasis's proposed labor rates were "unreasonably low." Although the protester uses the term "unreasonably" low, the protester essentially argues that the agency failed to evaluate whether the awardee's proposed labor rates were unrealistically low, that is, were so low as to pose performance risk. As our Office has explained, price reasonableness and price realism are distinct concepts. Logistics 2020, Inc., B-408543,; B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 7. The purpose of a price reasonableness review is to determine whether the prices offered are too high, as opposed to too low. See FAR § 15.404-1(b); Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Conversely, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance. See FAR § 15.404-1(d); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3.

In general, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable. FAR § 15.402(a). Where there is no evaluation factor providing for consideration of price realism, a determination that an offeror's price is too low generally concerns the offeror's responsibility. PAE Gov't Servs., Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶ 91 at 6. While an agency may conduct a price realism analysis in awarding a fixed-price contract for the limited purpose of assessing whether an offeror's low price reflects a lack of technical understanding of risk, offerors must be advised that the agency will conduct such an analysis. See FAR § 15.404-1(d)(3); Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. In other words, offerors must be reasonably informed that a price realism analysis will occur; in circumstances where price realism is not explicitly called for in the RFP, offerors must be reasonably informed that negative consequences may result, e.g., that the agency could reject a proposal as unacceptable or assess technical risk to the offerors' proposal. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 4; see also DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Absent a solicitation provision providing for a price realism evaluation, agencies are neither required, nor permitted, to conduct a realism evaluation in awarding a fixed-price contract. Emergint Techs., Inc., supra.

The RFP here stated that offerors' prices would be evaluated as follows: "Each unit price proposed will be analyzed to ensure it's not unreasonably high or unreasonably low for the effort proposed, and to determine the demonstrated understanding of the level of effort and equipment needed to successfully perform these services." RFP at 103.⁵ With regard to the standard set forth above concerning whether an RFP requires a price realism analysis, the solicitation here stated that the evaluation would consider the offeror's understanding of the requirements. The RFP, however, did not advise offerors that the agency could reject or assess risk to a proposal that proposed a price that was unrealistically low for the proposed technical approach. For these reasons, we conclude that the RFP did not require the Forest Service to evaluate the realism of the offerors' proposed labor rates. See Emergint Techs., Inc., supra. In sum, we find no basis to sustain ASP Fire's protest.

DIAMOND FIRE'S PROTEST

In connection with the July 2016 awards, Diamond Fire was awarded a contract for five CLINs: 2A, 2B, 15A, 15B, and 16. Diamond Fire subsequently advised the agency that its proposal stated that the firm could only perform four CLINs; as a result, the agency cancelled the award of CLIN 15B and awarded it to Firestorm. Protest (B-413520.8) at 2. The award for CLIN 15A was cancelled as a result of the agency's corrective action in response to the August 2016 protest filed by Firestorm challenging the award of this CLIN to Diamond Fire (B-413520.3); this CLIN was awarded to Firestorm following the agency's corrective action.

Diamond Fire's initial protest following corrective action challenged the Forest Service's award of CLINs 15A to Firestorm, and 7B, 7C, 8B, and 3B to Grayback Forestry. Protest (B-413520.8) at 6. In essence, the protester sought to receive the award of one of those CLINs to restore it to the four CLIN maximum specified in its proposal. The protest raised the following three primary arguments: (1) the agency should have selected Diamond Fire's proposal for one of the CLINs awarded following corrective action because its proposal provided benefits that exceeded those of other offerors; (2) the agency did not reasonably evaluate Firestorm's past performance; and (3) the agency did not provide an adequate debriefing.

On December 28, 2016, our Office dismissed Diamond Fire's argument concerning the evaluation of Firestorm's past performance because it failed to state an adequate basis of protest. As the protester acknowledged in its protest, it "has no direct information" regarding the awardee's past performance, and instead sought to

⁵ The RFP provided similar language regarding the evaluation of option prices, and stated that "[t]he Government will not award any Optional Items determined to be unreasonably priced." RFP at 103.

“join” what it believed was another protester’s challenge. GAO Email (Dec. 28, 2016) (citing Protest (B-413520.8) at 5). We also dismissed the protester’s argument concerning the debriefing because our Office does not review protests challenging the adequacy of debriefings. Id. (citing A1 Procurement, JVG, B-404618, Mar. 14, 2011, 2011 CPD ¶ 53 at 5 n.5 (debriefings are procedural matters that do not affect the validity of an award)).

After receipt of the agency report, Diamond Fire submitted comments that raised the following issues concerning the agency’s best-value analysis and corrective action: (1) the agency did not have a reasonable basis for taking corrective action in response to the protests of the July 2016 awards (B-413420 through B-413420.4) since the initial best-value determination was reasonable; and (2) the agency unreasonably limited its corrective action to making new award decisions concerning the previously protested CLINs. On the same date it filed its comments, Diamond Fire also filed a supplemental protest (B-413520.11) arguing that, because the protester had received only three CLIN awards, the agency should have considered it for award of CLIN 15B.⁶

Diamond Fire argues that the contracting officer’s statement in response to the current protests, as well as the record provided by the agency, show that the agency had no basis for its decision to take corrective action in response to Firestorm’s challenge to the award of CLIN 15A to Diamond Fire (B-413520.3). In this regard, the contracting officer stated as follows:

The decision to consider a tradeoff between price/technical capabilities was not adequately addressed in the original award decision, therefore the best value determination had to be re-conducted on the protested line items. As a result of the corrective action the agency determined for some line items that an offeror other than the original awardee represented the best value to the Government. (The rationale behind this decision is all documented in the best value determination).

COS at 8.

As a general rule, agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015,

⁶ Diamond Fire elected not to file comments regarding the remaining argument from its initial protest, which concerned the relative merits of the protester’s and awardees’ proposals; we therefore treat this argument as abandoned and address only those issues pursued in the protester’s comments and supplemental comments. See Aljucar, Anvil-Incus & Co., supra; Earth Res. Tech., Inc., supra.

2015 CPD ¶ 316 at 5. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and our Office 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. Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3. We have recognized a limited exception under which we will object to an agency's corrective action if the record establishes either that there was no impropriety in the original evaluation and award decision, or where there was an actual impropriety, but it was not prejudicial to any of the offerors. Security Consultants Grp., Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53 at 2-3.

Here, the Forest Service states that it took corrective action to address what the agency viewed as an insufficiently documented award decision. COS at 8. In the process of reviewing the award decisions, the agency changed some of the awards, based on a reconsideration of the best-value analysis. Id.

As relevant to Diamond Fire's protest, the new award decision cited several aspects of the evaluation of the protester's and Firestorm's proposals that were not addressed in the original award decision. In particular, the original award decision stated that, for CLIN 15A, award to Diamond Fire was warranted for the following reasons:

Pacific Oasis, Inc. offers the lowest pricing at this location; however they limited the amount of locations for award and provide a better value for other CLINs. Diamond Fire is recommended for contract award at this location. They received an Acceptable technical rating and offer a lower price than the other equally/higher rated Offeror. It has been determined that there is no added value in paying a higher price for an offeror with a higher technical rating, therefore, the [Technical Evaluation Board] determined Diamond Fire the best value to the Government at this location considering price and other factors.

Initial SSDD at 17. This analysis did not address Firestorm's higher-priced, higher-rated proposal. See id.

In contrast, the revised award decision cited a number of additional details concerning the evaluation of Diamond Fire's and Firestorm's proposals:

Diamond Fire received acceptable ratings in all evaluation factors providing them with an overall acceptable rating. Diamond has been a contractor on this contract in the past but did not perform in the last five year cycle for this requirement. Without the recent performance on this contract it was hard to justify exceptional ratings for them. They did however meet all the requirements of the solicitation, and have provided successful performance under this type of contract in a

previous five year cycle. They provided information representing over 1070 shifts for wildland fire assignments for Type 2 hand crews under other fire contracts/agreements in the last five years with at least satisfactory performance. Diamond submitted more than enough qualified personnel to perform under this type of contract. They also provided a list of equipment/vehicles to perform under this type of contract and a plan to obtain facilities should they receive awards, I believe they can obtain those facilities with little difficulty. Their QCP and Safety & Training plans met all requirements of the solicitation. I am very confident in that Diamond can perform under this type of contract based on their proposal submitted, their successful performance under this type of contract in previous contract cycles, and recent successful performance under other contract/agreements.

Firestorm received exceptional ratings in all areas except past performance and safety & training. In past performance they had one issue of non-compliance in the previous five year cycle. Firestorm had 4315 shifts in the last five years as an incumbent contractor and enough key personnel to fill 7 crews. They had an extensive list of equipment/vehicles and facilities with a service truck available 24/7 and pre-established locations from previous cycles. They exceeded the requirements of the solicitation in QCP by providing additional checklist to ensure satisfactory performance.

AR, Tab 40, Revised SSDD, at 103-104.

Based on this additional information, the agency concluded that award to Firestorm at a price premium was merited:

When Firestorm's proposal was evaluated against Diamond's proposal, [it was] found that Firestorm exceeds the requirements of the solicitation in three areas. When the additional cost of \$2,546 (2%) for Firestorm is considered, I believe that making a tradeoff for Firestorm who exceeds the requirements by providing additional checklist for their QCP, additional equipment and facilities with pre-established locations, and a longer history of performance for this requirement, would provide an added value worth the additional cost. I consider Firestorm as the best value of the above stated three offerors for this item.

Id. at 104.

The record here shows that the agency's initial award decision did not document a significant amount of information concerning the relative merits of the offerors' proposals and prices. As our Office has found, an agency's failure to adequately

document the rationale for its evaluations or award decisions is a basis for sustaining a protest; such a lack of documentation is similarly a reasonable basis to take corrective action in response to a protest. See Northrop Grumman Sys. Corp., B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8-9. We conclude therefore that the agency had a reasonable basis to take corrective action to address and reconsider this information—including Firestorm’s higher-priced, higher-rated proposal—in a new award decision.⁷

Next, Diamond Fire argues that the Forest Service unreasonably limited its corrective action to making new award decisions regarding the CLINs that were challenged in the protests of the July 2016 awards (B-413520 through B-413520.4). Diamond Fire was not one of the firms that filed these protests, and thus did not receive the agency’s notice explaining that it would take corrective action only with regard to the CLINs challenged in the protests. The protester knew, however, that the corrective action had been limited to these CLINs as a result of the debriefing letter it received on November 21. This letter advised the protester that the corrective action concerned only the listed CLINs, *i.e.*, those that were “affected by the GAO corrective action.” AR, Tab 44, Diamond Fire Debriefing (Nov. 21, 2016), at 1-2. Additionally, in response to a question from the protester, the agency advised that Diamond Fire had been considered for the new awards that resulted from the corrective action. *Id.* at 5, Question and Answer 2f.

Diamond Fire’s initial protest (B-413520.8) acknowledged that the agency had made new award decisions concerning only the CLINs that were the subject of the protests of the July 2016 awards. Further, in its initial protest, Diamond Fire argued (contrary to the argument set forth in its comments) that the agency should have awarded it one of the “CLINS that were terminated for convenience and [that] could have been re-assigned to Diamond Fire.” Protest (B-413520.8) at 4. The protester did not argue that the agency unreasonably limited its corrective action to the

⁷ Diamond Fire also argues that, because the Forest Service did not request revised proposals or reevaluate those proposals, the agency was required to provide an explanation as to why it reached a different award decision. In support of its argument, the protester cites our decision in eAlliant, LLC, B-407332.6, B-407332.10, Jan. 14, 2015, 2015 CPD ¶ 229 at 11-12, where we sustained the protest because the same source selection official made a new evaluation of the protester’s essentially unchanged proposal and removed a number of strengths from the prior evaluation without any explanation for these evaluation changes. Here, in contrast, the revised award decision expressly cited the factors in the offerors’ proposals that were considered in the revised award decision, and which supported the revised award decision. AR, Tab 40, Revised SSDD, at 103. For this reason, we find no merit to the protester’s argument.

protested CLINs until filing its comments, 45 days after filing its protest. For these reasons, we conclude that this argument is untimely. See 4 C.F.R. § 21.2(a)(2).

Finally, Diamond Fire's supplemental protest argues that it should have been considered for award of CLIN 15B, which was originally awarded to the protester but was subsequently cancelled as a result of the protester's notice to the agency that it had been awarded five CLINs--one more than the maximum in its proposal. This argument is related to the protester's previous argument, and is also untimely.

Diamond Fire incorrectly argues that the revised award decision found that Diamond Fire was the best value for CLIN 15B in connection with corrective action. Supp. Protest (B-413520.11) at 2 (citing AR, Tab 40, Revised SSDD, at 105). The revised award decision stated that the new award recommendations concerned only those CLINs that were the subject of the protests of the July 2016 awards, and that all other evaluations were unaffected: "All other line items not protested remain in this document unchanged from the original Best Value Analysis Report." AR, Tab 40, Revised SSDD, at 61. In essence, although the revised SSDD recited certain findings from the initial SSDD, including the recommended award of CLIN 15B to Diamond Fire, the revised SSDD did not make a new award for this CLIN.

Diamond Fire knew that it had been initially awarded CLIN 15B, and that this CLIN award had been cancelled and awarded to Firestorm in July 2016. Protest (B-413520.8) at 2. As discussed above, the protester also knew as a result of its debriefing that CLIN 15B was not one of the CLINs that was awarded during corrective action. Thus, to the extent the protester believed it should have been considered for award of any of the CLINs that were not the subject of the corrective action (including CLIN 15B), it should have raised this matter in its initial protest (B-413520.8), rather than 45 days after the filing of that protest. See 4 C.F.R. § 21.2(a)(2). In sum, we find no basis to sustain Diamond Fire's protest.

The protests are denied in part and dismissed in part.

Susan A. Poling
General Counsel