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# Decision

**Matter of:** Dynaxys LLC

**File:** B-414459.4

**Date:** April 18, 2018

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Jonathan J. Frankel, Esq., Craig LaChance, Esq., Karla J. Letsche, Esq., and Zachary H. Schroeder, Esq., Frankel PLLC, and Patricia H. Wittie, Esq., for the protester.

Julie Cannatti, Esq., Blythe I. Rodgers, Esq., and Dean A. Roy, Esq., Department of Housing and Urban Development, for the agency.

Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging agency's technical evaluation is sustained where the record shows that the agency did not reasonably and equally evaluate proposals under the technical approach factor.
2. Protest challenging the agency's best-value source selection decision is sustained where the record fails to support the agency's conclusion that the protester's and awardee's proposals were equal under the most important evaluation factor, technical approach, and the record otherwise includes insufficient information and analysis to determine that the award selection was reasonable.
3. Protest that the agency unequally evaluated proposals by waiving a material solicitation requirement for the awardee's price proposal is denied, where the waiver was not prejudicial to the protester.

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## DECISION

Dynaxys LLC, of Silver Spring, Maryland, protests the award of a contract to KeyBank National Association, of Overland Park, Kansas, under request for proposals (RFP) No. DUR100R-15-R-0001, which was issued by the Department of Housing and Urban Development (HUD), for multi-family mortgage loan servicing. Dynaxys challenges the agency's evaluation and argues that the best-value tradeoff and source selection decision was unreasonable.

We sustain the protest in part, and deny it in part.

## BACKGROUND

The RFP, issued on August 31, 2015, under the procedures of Federal Acquisition Regulation (FAR) part 12 (Acquisition of Commercial Items) and part 15 (Contracting by Negotiation), sought contractor support to provide mortgage loan servicing (MLS) for conventional, mark-to-market (M2M) and DEMO notes, property disposition portfolio services, as well as accounting services for all HUD-held notes. RFP, amend. 0001, at 10. The solicitation contemplated award of a fixed-price contract, for a base year with four 1-year options.

The RFP provided for award on a best-value tradeoff basis considering the following six non-price evaluation factors, in descending order of importance: technical approach, management plan, quality control plan, key personnel, past performance, and socioeconomic participation. The non-price evaluation factors, when combined, were significantly more important than price. As proposals became more equal in non-price merit, however, the solicitation provided that the importance of price would increase. In addition, the solicitation provided that the agency would assign adjectival ratings to the offerors' proposals under each evaluation factor, and included definitions for each rating. As relevant here, the ratings for the non-price factors, other than past performance and socioeconomic participation, were excellent/very low risk, good/low risk, fair/medium risk, marginal/high risk, or unacceptable/very high risk. RFP at 33-34.

As relevant here, under the technical approach factor, the RFP provided that the agency would evaluate an offeror's proposed technical approach to determine how well the proposal demonstrates "logical and feasible methods for meeting the requirements described in Performance Work Statement [(PWS)] Tasks 0001 through 0009" and "meeting the performance objectives outlined within the solicitation." RFP, amend. 0001, at 30. The pertinent PWS tasks included: Task 1 (transition-in); Task 2 (new setup and take down); Task 3 (note servicing); Task 4 (property disposition portfolio support); Task 5 (Uniform Commercial Code (UCC) fees); Task 6 (document retention and storage); Task 7 (accounting services); Task 8 (audit, internal control, and system support); and Task 9 (transition-out). PWS at 26-107.

The solicitation also provided that the agency would evaluate an offeror's technical approach to assess how well the project schedule demonstrated "a clear understanding of the required operations and HUD requirement," and "realistic timeframes for performing the PWS tasks and associated deliverables." RFP, amend. 0001, at 30. In addition, the solicitation advised that, to the extent the proposal included subcontractors, the agency would evaluate how well the offeror's proposed technical approach "delineates the technical responsibilities between the prime and subcontractor(s)." Id. The RFP also provided that the agency would evaluate whether an offeror's proposed labor was based upon reasonable assumptions, and was consistent with the requirements set forth in the PWS and with the proposed technical approach. Id. at 31.

The agency received proposals from three offerors, including Dynaxys and KeyBank.<sup>1</sup> Combined Contracting Officer Statement of Facts Memorandum of Law (COS/MOL) at 2. After evaluating proposals, the agency awarded the contract to KeyBank. Id. On March 13, 2017, Dynaxys protested the award, challenging the agency’s evaluation of technical proposals and price reasonableness determination. The protester also asserted that the agency improperly failed to conduct a proper best-value tradeoff, and challenged the agency’s source selection determination. After development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an “outcome prediction” alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the parties that GAO would likely sustain Dynaxys’ protest challenging the agency’s determination that Dynaxys’ proposed price was unreasonably high on the basis that the record failed to support the agency’s determination. In addition, the GAO attorney advised that GAO would likely sustain Dynaxys’ protest of the agency’s source selection decision on the basis that the agency failed to reasonably consider the relative merits of the proposals based on the evaluation scheme set forth in the RFP.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reevaluating proposals, making a new price reasonableness determination, best-value tradeoff recommendation, and source selection decision. Based on the agency’s proposed corrective action, GAO dismissed Dynaxys’ protest as academic. Dynaxys LLC, B-414459, B-414459.2, May 30, 2017, (unpublished decision).<sup>2</sup>

The agency thereafter reevaluated proposals. Dynaxys’ and KeyBank’s final ratings under the non-price factors, together with their final proposed prices, are shown in the table below.

	<b>Dynaxys</b>	<b>KeyBank</b>
<b>Technical Approach</b>	Good	Good
<b>Management Plan</b>	Good	Good
<b>Quality Control Plan</b>	Good	Good
<b>Key Personnel</b>	Excellent	Good
<b>Past Performance</b>	Excellent	Neutral
<b>Socioeconomic Participation</b>	Excellent	Marginal
<b>Price</b>	\$68,269,998	\$46,729,263

<sup>1</sup> After evaluating proposals, the agency concluded that only those submitted by Dynaxys and KeyBank were eligible for award. Agency Report (AR), Tab 14, Source Selection Decision (SSD), at 3.

<sup>2</sup> Following the dismissal of the protest, Dynaxys filed a request that GAO recommend the reimbursement of its costs of filing and pursuing its protest. On September 25, 2017, our Office granted Dynaxys’ request. Dynaxys LLC--Costs, B-414459.3, Sept. 25, 2017, 2018 CPD ¶ 45.

AR, Tab 14, SSD, at 2.

The source selection authority (SSA) agreed with the technical evaluation panel's (TEP) evaluation, ratings, and recommendation to award the contract to KeyBank as the best-value offeror. Id. 2-3. In making this determination, the SSA noted that both KeyBank and Dynaxys were rated as "good" under the three most important technical factors--technical approach, management plan, and quality control plan. Id. at 3-4. The SSA explained that under the technical approach factor, both offerors received two minor strengths; under the management plan factor, neither was assessed any strengths; and under the quality control plan factor, each received a minor strength. The SSA further noted that "[t]he three distinguishing factors" between the two offers were in the areas of key personnel, past performance, and socioeconomic participation, with the protester's proposal rated excellent under all three factors, and KeyBank's proposal rated as good, neutral, and marginal, respectively. Id. at 6. Finally, the SSA noted that Dynaxys proposed a higher price than KeyBank, resulting in a difference between the two of "\$21,540,725.15 (31.55%) over the 5-year contract period, including the 6 month extension." Id.

Ultimately, the SSA concluded that "the technical superiority of Dynaxys over KeyBank clearly does not justify paying the premium price difference," and that "[t]he Government can obtain services nearly as good without paying the premium price." Id. Specifically, the SSA explained that, "although Dynaxys' approach to the [key personnel, past performance, and socioeconomic participation factors] was better than KeyBank's," Dynaxys' higher price "is not in the best interest of the Government." Id. The SSA further explained that because Dynaxys' "technical superiority [was] limited to the least important factors," these strengths did not "outweigh the [price premium] that would be incurred by accepting Dynaxys' offer over KeyBank's." Id. Accordingly, the SSA found that KeyBank's proposal offered the best value to the government, and selected that firm for award. Id. at 7.

On December 29, 2017, the agency notified Dynaxys of its award determination, and thereafter provided the offeror with a debriefing. This protest followed.

## DISCUSSION

Dynaxys argues that the agency failed to reasonably evaluate the offerors' technical proposals, and challenges the agency's best-value tradeoff determination and source selection decision. The protester also asserts that KeyBank's proposal was ineligible for award because KeyBank failed to provide material pricing information in its price proposal. We have considered all of the protester's arguments and sustain Dynaxys' protest for the reasons outlined below. We deny the remaining protest grounds.<sup>3</sup>

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<sup>3</sup> For example, the protester challenges the agency's corrective action, essentially asserting that it was conducted by the agency in bad faith. Comments at 2 ("HUD's promised corrective action was a sham."). In this regard, the protester asserts that the TEP changed all "strengths" to "minor strengths" during its reevaluation to prevent

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## Evaluation Under Technical Approach Factor

The protester challenges the agency's technical evaluation of its and KeyBank's proposals under the RFP's most important non-price factor--technical approach. In this regard, Dynaxys argues that the agency failed to evaluate its and KeyBank's proposals equally with regard to the transition-in task. The protester contends that, as a result of these errors, the agency unreasonably found that the two offerors' proposals were essentially equal under the technical approach factor. As discussed below, we conclude that the agency's evaluation of proposals under the technical approach factor was unreasonable.

In reviewing protests of an agency's evaluation of offerors' technical proposals, our Office does not reevaluate proposals; rather, we review the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6. With regard to adjectival ratings, technical evaluators have wide discretion when assigning such ratings, given that the ratings reflect both objective and subjective judgments concerning the relative merits of different proposals and their ability to meet the agency's needs. See Complete Packaging & Shipping Supplies, Inc., B-412392 et al., Feb. 1, 2016, 2016 CPD ¶ 28 at 7.

Dynaxys asserts that the agency unreasonably assessed two strengths to KeyBank's proposal for the transition-in task under the technical approach factor. Specifically, the protester challenges the agency's assessment of these strengths, arguing that the approaches proposed by KeyBank merely met, but did not exceed, the solicitation's requirements.<sup>4</sup>

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Dynaxys' proposal from receiving a rating of "excellent/very low risk" under any of the three most important technical factors. See Comments at 15. In response, the TEP Chair states: "[D]uring corrective action, for clarity, the TEP designated all strengths that it determined did not rise to the level of a major strength as a minor strength." AR, Tab 20, TEP Chair Declaration (Feb. 13, 2018), at 1. We find nothing unreasonable regarding the agency's explanation in this regard. Government officials are presumed to act in good faith and a protester's claim that an agency official was motivated by bias or bad faith must be supported by convincing proof. Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 4. Our Office will not attribute prejudicial motives to procurement officials on the basis of inference or supposition. Id. Here, although the agency revised the TEP Report during its reevaluation to clarify the type of strengths that had been assessed to the offerors' proposals, there is no indication in the record that the government conducted the evaluation in bad faith.

<sup>4</sup> Alternatively, the protester maintains that, if in fact KeyBank's proposal justified the award of the strengths, then the agency should have also assessed similar strengths to Dynaxys' proposal.

As noted above, the solicitation provided that the agency would evaluate an offeror's proposed technical approach to determine how well it demonstrates logical and feasible methods for meeting the requirements described in PWS tasks 0001 through 0009. RFP, amend. 0001, at 30. As relevant here, under PWS task 0001 (transition-in), offerors were required to provide a web-based servicing system that could:

Generate different levels of reports such as: the fund level, cohort level, Section of the Act level, Section of the Act (SOA) alpha level, project level, field office level, and national level, or as otherwise specified by the GTR/GTM [Government Technical Representative/Government Technical Monitor] for the multifamily portfolio.

PWS at 28. In addition, PWS 0001 (transition-in) specified that:

Within the ninety-day transition-in period, the Contractor shall:

1. Provide a web-based servicing system which shall be fully operational and have the capability to service all HUD-Held notes and provide property disposition portfolio and accounting services as stated in the PWS within 180 days after contract.

Id. at 27.

The agency assessed two minor strengths to KeyBank's proposal concerning PWS task 0001 (transition-in). First, the TEP concluded that KeyBank's proposed web-based system "has multiple fields of loan servicing and accounting data that allow HUD to tailor reporting based on any field such as cohort, fund type, and project type." AR, Tab 10, TEP Report, at 30. The TEP explained that "[t]he customized reporting is a minor strength as HUD has many offices that have different reporting needs." Id. Second, the agency concluded that KeyBank's method "clearly outlines a logical methodology to [convert] (transition-in) the notes servicing portfolio in only 90 days with no disruption in service." AR, Tab 10, TEP Report at 35. The TEP explained that "[t]his is a minor strength as HUD's Notes Servicer needs to be fully functional within 180 days." Id.

Dynaxys argues that the agency's assessment of these two minor strengths was unreasonable because the approaches proposed by KeyBank merely met, but did not exceed, the solicitation's requirements. In response, HUD maintains that its evaluation was reasonable, and that the protester's argument simply reflects disagreement with the agency's evaluation. Alternatively, the agency argues that, even if the protester's argument is valid, Dynaxys cannot show competitive prejudice. In this regard the agency asserts that "KeyBank's rating was not adjusted upward as a result of these minor strengths," and therefore, "nor would Dynaxys' rating have been elevated to 'Excellent/Very Low Risk' had it received similar minor strengths." Supp. AR at 10, n.14.

Although the agency maintains that its evaluation was reasonable, the PWS specified that both of these attributes were minimum requirements. The agency has failed to explain or demonstrate, and the record does not reflect, how KeyBank's proposed transition-in approach exceeded the minimum PWS requirements, or otherwise merited two minor strengths. Accordingly, we conclude that the agency's evaluation in this regard was inconsistent with the RFP's stated evaluation criteria and PWS requirements, and sustain the protest on this basis.

In addition, we find no merit to HUD's assertion that the protester cannot demonstrate competitive prejudice from the assessment of these two minor strengths for KeyBank. In this regard, competitive prejudice is a necessary element of any viable bid protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. As an initial matter, HUD does not deny that Dynaxys' proposed approach would provide the agency with the same "benefits" as the minor strengths assessed to KeyBank's proposal for the transition-in task. See Supp. AR at 10, n.14; see also, e.g., AR, Tab 10, TEP Report at 65-66 (Although, "[t]he proposal is from the incumbent and therefore no transition is required," it is "worth noting that [Dynaxys'] software system already meets the two levels of password protected security levels and has customizable fields already in place the will meet Notes-servicing." In addition, Dynaxys' system "currently interfaces with HUD systems daily," and "[t]he Offeror already has custody of HUD's Notes Servicing documents and maintains approximately 180 . . . HUD documents.").<sup>5</sup>

Furthermore, as described in greater detail below, the TEP assessed two minor strengths to Dynaxys' proposal under the technical approach factor with regard to PWS task 3 (notes servicing), while no other strengths were assessed to KeyBank under the technical approach factor.<sup>6</sup> Accordingly, although the agency maintains that Dynaxys' rating would not have been elevated to excellent/very low risk under the technical approach factor even "had it received similar minor strengths" to KeyBank's regarding the solicitation's transition-in requirements, the record clearly reflects that the TEP concluded that Dynaxys' proposed technical approach exceeded the PWS requirements in ways not matched by KeyBank's proposed approach. As discussed below, however, there is no indication in the record that the agency properly credited Dynaxys' proposal with these strengths in conducting its best-value tradeoff analysis. The fact that the agency failed to take into account the benefits of Dynaxys' proposed approach is

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<sup>5</sup> The TEP further noted that "HUD recently reviewed Dynaxys storage procedures and operations under NARA [National Archives and Records Administration] requirements and found procedures to be in full conformance . . . ." AR, Tab 10, TEP Report, at 65-66.

<sup>6</sup> The protester also argues that its proposal merited additional strengths under the technical approach factor, and under the management approach and quality control plan factors. In addition, the protester contends that the agency should have assessed various weaknesses to KeyBank's proposal under these three factors. Although we do not discuss all of the protester's allegations in this regard in detail, we have reviewed each and conclude that none provides a further basis to sustain the protest.

sufficient to establish a reasonable possibility of prejudice, regardless of whether Dynaxys should have received a higher rating under the technical approach factor.

#### Best-Value Tradeoff Determination

Dynaxys also protests the agency's best-value tradeoff determination, arguing that it was based on an unreasonable technical evaluation, and that the SSA failed to consider the substantive differences between the two proposals. The protester also contends that the SSA failed to explain why Dynaxys' technically superior approach did not merit the higher price.

Where a solicitation provides for a tradeoff between the price and non-price factors, even where price is the least important evaluation factor, as here, an agency properly may select a lower-priced, lower-rated proposal if the agency reasonably concludes that the price premium involved in selecting a higher-rated, higher-priced proposal is not justified in light of the acceptable level of technical competence available at a lower price. i4 Now Solutions, Inc., B-412369, Jan. 27, 2016, 2016 CPD ¶ 47 at 15. However, a tradeoff analysis that fails to furnish any explanation as to why a higher-rated proposal does not in fact offer technical advantages or why those technical advantages are not worth a price premium does not satisfy the requirement for a documented tradeoff rationale, particularly where, as here, price is secondary to technical considerations under the RFP's evaluation scheme. Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 6. Furthermore, a source selection decision based on inconsistent or inaccurate information concerning the technical evaluation or the relative merits and contents of the offerors' technical proposals, is not reasonable. SDS Int'l, Inc., B-291183, B-291183.2, Dec. 2, 2002, 2003 CPD ¶ 127 at 4.

Starting with the most important non-price factor, technical approach, the SSA stated that both KeyBank and Dynaxys were "rated as 'Good,' indicating a thorough understanding of the requirement" and "no deficiencies." AR, Tab 14, SSD, at 3. Regarding the agency's evaluation of KeyBank, both minor strengths related to the transition-in task.<sup>7</sup> Id. With regard to the agency's evaluation of Dynaxys under the technical approach factor, the SSA also described two minor strengths, both of which related to the notes servicing task.<sup>8</sup> In essence, the SSA concluded there was no basis to distinguish these proposals under this factor. See id. at 6.

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<sup>7</sup> Specifically, the SSA stated that KeyBank received one minor strength for its proposed approach to provide "an operational web-based system . . . within 90 days with no disruption," and a second minor strength because KeyBank's software "has multiple fields of loan servicing and accounting data that allows HUD to tailor reporting based on any field." Id. The SSA explained that "[t]he customized reporting is helpful for the many offices that have different reporting needs." Id.

<sup>8</sup> Specifically, the SSA stated that Dynaxys received one minor strength for its "proprietary system Comprehensive Servicing and Monitoring System (CSMS)," which the SSA explained "exceeds HUDs requirement of maintaining seven (7) years of data  
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As discussed in detail above, however, we found that the agency failed to conduct a proper evaluation of the offerors' proposals under the technical approach factor. In this regard, the TEP assessed minor strengths to KeyBank's proposal for the transition-in task, even though Key Bank's approach did not exceed the minimum PWS requirements. The agency also did not otherwise explain or demonstrate how KeyBank's proposal merited the strengths assessed. Furthermore, the record shows that Dynaxys' proposal offered the same benefits as KeyBank's proposal, but the agency did not similarly assess minor strengths to Dynaxys' proposal.

Under the second most important factor, management plan, the SSA stated that "both Offerors were rated as 'Good,'" and noted that "[n]either offeror was assessed any strengths," and that "[n]o weaknesses or deficiencies [for either offeror] exist." Id. at 3-4. Under the third most important factor, quality control plan, the SSA stated that "[t]he Quality Control Plans submitted by both offerors were of 'Good' quality," and that "[b]oth offerors' plans clearly support the achievement of the Government's objectives and requirements." Id. at 4. The SSA also noted that both offerors received a minor strength under this factor for their proposed workflow tool/systems. Id.

Regarding the final three factors, the SSA explained that Dynaxys was rated "excellent" under key personnel as "all [k]ey [p]ersonnel [DELETED]." In contrast, KeyBank was rated "good" due to its "Financial Services Director's resume not stating [DELETED]." Id. at 6. The SSA also noted that Dynaxys was rated "excellent" under the past performance factor with a "high confidence of successful performance due to their highly relevant and high quality past performance," while KeyBank received a "neutral" past performance rating due to "no recent, relevant references with available quality information," which the SSA explained was "neither good nor bad." Id. In addition, the SSA noted that Dynaxys received an "excellent" rating under socioeconomic participation "for being a small business [Woman Owned Small Business] conducting 100% of the labor." Id. In contrast, the SSA noted that KeyBank received a "marginal" rating under the socioeconomic factor because KeyBank is an "other than small business and performing 68% of the labor." Id.

In conducting the tradeoff, the SSA concluded that the offerors were essentially equal under the first three non-price factors. Id. at 6 (explaining that "[t]he three distinguishing qualitative factors between the two offers are in the areas of Factor 4-Key Personnel, Factor 5-Past Performance, and Factor 6-Socionomic Participation," and that "Dynaxys['] . . . technical superiority is limited to the least important factors . . ."). The SSA then acknowledged that "Dynaxys is the higher technically rated offeror, but is also substantially higher price." Id. In this regard, the SSA explained that "the technical

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by [DELETED]." Id. The SSA stated that Dynaxys received a second minor strength because Dynaxys' "monthly MFNSB [Multifamily Notes Servicing Branch] reports [DELETED]." The SSA explained that these features would help "the Notes Servicing Branch and the Property Disposition (PD) branch to closely monitor the escrow accounts." Id.

superiority of Dynaxys over KeyBank clearly does not justify paying the premium price difference,” and that “[t]he Government can obtain services nearly as good without paying the premium price.” Id.

Based on this record, we conclude that the agency’s best-value tradeoff and source selection were not reasonable. As an initial matter, the source selection was not reasonable because--as set forth above--it was based on an unreasonable evaluation of the technical approach factor. SDS Int’l, Inc., supra (source selection decision based on inconsistent or inaccurate information concerning the technical evaluation or the relative merits and contents of the offerors’ technical proposals, is not reasonable).

We also conclude that the agency’s best-value tradeoff and source selection was not reasonable because the agency’s source selection determination lacks a meaningful comparison of the proposals. Specifically, with regard to the most important factor, technical approach, other than a brief recitation of each offeror’s strengths, there is no substantive comparison or analysis of the offerors’ proposals. Instead, the SSA summarily found that the proposals were essentially equal under this factor. Similarly, although the SSA briefly listed the strengths assessed to Dynaxys’ proposal under the key personnel, past performance, and socioeconomic factors, the SSA did not provide any substantive analysis for the determination that “the strengths described in the analysis [for these factors] do not outweigh the” price premium. Id. In light of the significant qualitative differences between the two proposals, such a general statement falls far short of the requirement to justify cost/technical tradeoff decisions. Blue Rock Structures, supra. The protest is sustained on this basis as well.

#### Waiver

Dynaxys also challenges the agency’s price reasonableness assessment, alleging that the agency failed to follow the evaluation scheme in the RFP. In this regard, the protester argues that the solicitation included a mandatory provision that offerors provide “data other than certified cost or pricing data,” and also specified that this data would be evaluated as part of the agency’s price reasonableness determination. The agency responds that the requirement for “data other than certified cost and pricing data” was permissive. We agree with the protester but, for the reasons addressed below, conclude that the agency’s actions nevertheless resulted in no prejudice to Dynaxys.

The solicitation included FAR provision 52.215-20 (Requirements for Certified Cost of Pricing Data and Data Other Than Certified Cost of Pricing Data), which provided that “[t]he Offeror shall submit information other than cost or pricing data in support of the prices proposed in Attachment B--Pricing Sheet[.]” RFP at 63-64. In addition, this provision specified in relevant part, with regard to labor rates, that:

The Offeror shall provide a complete breakdown of the cost items that make up the fully-burdened labor rates proposed for Section B for the entire sixty (60) month ordering period. This labor rate breakout shall

include all direct, indirect, general and administrative costs and profit associated with providing the required skill.

Id. (emphasis in original). In the RFP's business proposal instructions, the solicitation further advised, with regard to this FAR provision, that:

Submission of data other than certified cost or pricing data may be submitted in the offeror's own format but in a workable excel spreadsheet to be included in Attachment B Pricing Sheet Notes and Assumptions. The offeror shall provide a separate cost breakdown of each Contract Line items (CLIN[s]) that is identified in Attachment B Pricing Sheet in the solicitation. This shall include the labor categories, number of hours, labor rates, percentage of effort, labor mix and any other costs that may apply to the total cost of each contract line item.

RFP at 29. The RFP's pricing template advised:

All applicable indirect costs, escalation and fees comprising the fully burdened labor rate[s] [ ] shall be outlined. **\*This section can be revised to show your cost buildup (G&A [General and Administrative Expense], Overhead and profit) for your labor rates.**

RFP, attach. B, Pricing Template at 1 (emphasis in original).

Finally, the solicitation's evaluation criteria for the price evaluation advised that "[t]he reasonableness of the prices proposed will be evaluated," to include, as relevant here: "Analysis of data other than certified cost or pricing data (as defined at [FAR [§] 2.101) provided by the Offeror in accordance with FAR 15.404-1(2)(vii). NOTE: The Government will not be doing a price realism analysis." RFP at 33.

HUD does not dispute that KeyBank's price proposal did not include any "data other than certified cost or pricing data," and therefore, that the agency's price evaluation did not include consideration of this information with regard to KeyBank. Rather, the agency maintains that the RFP's requirement for "data other than certified cost and pricing data" was permissive.<sup>9</sup> In support of this position, the agency points to the

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<sup>9</sup> The agency also asserts that this protest ground is untimely because, during the prior protest, the protester raised this issue only in the comments portion (not the supplemental protest portion) of its comments. AR at 6-7. We disagree. Based on our review, we find that the protester's comments under the prior protest sufficiently raised this issue in a timely manner, such that the protester is timely in raising it again in the instant protest after the agency's reevaluation. See Protester's Prior Comments (Apr. 24, 2017), at 39 (asserting that "KeyBank's failure to include the information required by the solicitation should have disqualified it from award."); Protester's Prior Supp. Comments (May 3, 2017), at 16 ("Indeed where, as here, an offeror's omission involves cost or pricing data that the Agency has properly required, the FAR mandates (continued...)

solicitation's use of the words "may" and "can." AR at 7; see, e.g., RFP at 29 (emphasis added) ("Submission of data other than certified cost or pricing data may be submitted in the offeror's own format but in a workable excel spreadsheet to be included in Attachment B Pricing Sheet Notes and Assumptions"); RFP, attach. B, Pricing Template at 1 (emphasis added) ("All applicable indirect costs, escalation and fees comprising the fully burdened labor rate[s] [ ] shall be outlined. \*This section can be revised to show your cost buildup (G&A, Overhead and profit) for your labor rates.").

We find no merit to the agency's position. As a general matter, where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions; to be reasonable, an interpretation must be consistent with such a reading. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2. Although the agency points to the RFP's use of the words "may" and "can," the plain language of the solicitation, when read as a whole, clearly required that offerors provide "data other than certified cost or pricing data," and specified that this information would be evaluated by the agency as part of its price reasonableness determination. Nevertheless, HUD maintains that any waiver of this RFP requirement for KeyBank did not result any prejudice to Dynaxys. We agree.

It is a fundamental principle of government procurement that competitions must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. Contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals on that basis. Fintrac, Inc., B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 6. An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. Lockheed Martin Corp., B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14; Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Our Office will sustain a protest that an agency improperly waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. Datastream Sys., Inc., B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

Here, although the solicitation required the provision of "data other than certified cost or pricing data" and specified that the agency would evaluate such as part of its price evaluation, the record shows that KeyBank's proposal failed to include the required pricing information, and that HUD evaluated KeyBank's price proposal without consideration of the information. As such, the record shows that HUD essentially waived the evaluation of "data other than certified cost or pricing data." As a result,

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disqualification unless the Head of the Contracting Activity determines that it is in the best interests of the Government to make the award to that offer.").

HUD did not evaluate KeyBank's price proposal in accordance with the terms of the solicitation. Nevertheless, we find no prejudice to Dynaxys.

As previously noted, where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the agency's evaluation of proposals are found. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 12. Similarly, where there is no basis for finding competitive prejudice to the protester, we will not sustain a protest challenging the waiver of a solicitation requirement. Phoebe Putney Mem. Hosp., B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4. Thus, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver, *i.e.*, that the protester would have submitted a different proposal or quotation or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. See Technology & Telecomms Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 14; Vocus Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 6.

Here, rather than relying on what Dynaxys would have done differently had it known that the agency would waive the requirement for "data other than certified pricing data,"<sup>10</sup> the protester maintains that the failure of KeyBank to provide this information makes KeyBank's proposal ineligible for award. In this regard, the protester points to the following FAR provision, which the protester asserts, mandates by law that an offeror that fails to provide requested "other than cost or pricing data" is ineligible for award:

(4) As specified in section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA [Head of the Contracting Activity] determines that it is in the best interest of the Government to make the award to that offeror. . . .

FAR § 15.403-3(a)(4).

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<sup>10</sup> Although the protester asserts that the waiver resulted in the agency evaluating the offerors on different bases, and maintains that Dynaxys "spent time and effort" complying with these requirements, and would have submitted a "different, more streamlined" proposal had it known the agency would waive the requirement, the protester does not assert that it would have lowered its proposed price. Since the RFP provided that the "data other than certified cost or pricing data" would be used solely to evaluate price reasonableness, the protester has failed to establish how it was prejudiced by the waiver. Accordingly, we find no basis to sustain the protest.

As relevant here, the referenced paragraph (a)(1) of the above-quoted subsection states:

(a)(1) In those acquisitions that do not require certified cost or pricing data, the contracting officer shall--

(i) Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

(ii) Require submission of data other than certified cost or pricing data, as defined in 2.101, from the offeror to the extent necessary to determine a fair and reasonable price.

FAR § 15.403-3(a)(1)(i)-(ii).

Section 2.101 of the FAR defines “data other than certified cost or pricing data” as:

[P]ricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price . . . . Such data may include the identical types of data as certified cost or pricing data, . . . , but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror’s estimating process . . . .

FAR § 2.101.

The agency argues that FAR § 15.403-3(a)(4) “merely apprises offerors of the consequences of not cooperating with a contracting officer’s directive to submit required data.” Supp. AR at 4 (emphasis in original). In this regard, the agency contends that “[o]fferors were required to submit data to the extent necessary to determine fairness and reasonableness,” and that “KeyBank provided sufficient data.” Id. at 4-5. We agree with the agency. Although the pertinent FAR provision states that “[a]n offeror who does not comply with a requirement to submit data for a contract . . . in accordance with paragraph (a)(1) of this subsection is ineligible for award,” paragraph (a)(1) indicates, in relevant part, that for acquisitions that do not require certified cost or pricing data, such as here, the contracting officer shall “[r]equire submission of data other than certified cost or pricing data, as defined in 2.101, from the offeror to the extent necessary to determine a fair and reasonable price.” FAR § 15.403-3(a)(1)(ii). The FAR definition of “data other than certified cost or pricing data” does not specify that the data must include the type of cost build-up information required by the instant solicitation. Rather, it states, for example, that the data may also include, for example, “sales data and any information reasonably required to explain the offeror’s estimating process . . . .” Id. The agency maintains that the data submitted by KeyBank was sufficient to determine that its proposed price was fair and reasonable. Based on our review of the record, we conclude that the agency’s evaluation complied with the requirements of FAR

§ 15.403-3(a)(4). Accordingly, we find no basis to sustain the protester's argument that this provision renders KeyBank's proposal ineligible for award.

#### RECOMMENDATION

We sustain Dynaxys' protest challenging the agency's evaluation under the technical approach factor, and the best-value tradeoff decision. We recommend that, at a minimum, the agency reevaluate proposals in a manner consistent with this decision and make a new best-value tradeoff determination and selection decision based on that reevaluation. In addition, we recommend that HUD reimburse Dynaxys the costs associated with filing, and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). Dynaxys' certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained in part, and denied in part.

Thomas H. Armstrong  
General Counsel