



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: Strategic Management Solutions, LLC

File: B-416598.3; B-416598.4

Date: December 17, 2019

Kenneth B. Weckstein, Esq., Tammy Hopkins, Esq., and Andrew C. Crawford, Esq., Brown Rudnick LLP, for the protester.

J. Hunter Bennett, Esq., Jason A. Carey, Esq., and Andrew R. Guy, Esq., Covington & Burling, LLP, for Enterprise Technical Assistance Services, Inc., the intervenor.

Jared D. Minsk, Esq., Harry J. Shearer, Esq., and Rachna M. Talwar, Esq., Department of Energy, for the agency.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to give adequate consideration to awardee's potential organizational conflict of interest (OCI) is denied where the agency reasonably evaluated whether the awardee had an impaired objectivity OCI and where the protester's assertions fail to present hard facts indicating the existence of a conflict.
2. Protest alleging the agency failed to reasonably evaluate the performance risk associated with awardee's price is denied where the protester's allegation is based on an unreasonable interpretation of the solicitation.
3. Protest challenging the agency's evaluation of awardee's past performance is dismissed where protester failed to timely challenge a patent ambiguity in the solicitation.
4. Protest challenging the agency's evaluation of offerors' key personnel is denied where the evaluation was reasonable and consistent with the stated evaluation criteria, and not disparate.

DECISION

Strategic Management Solutions, LLC (SMSI), of Albuquerque, New Mexico, protests the award of a contract to Enterprise Technical Assistance Services, Inc. (E-TAS), of Oak Ridge, Tennessee, under request for proposals (RFP) No. DE-SOL-0010125,

issued by the Department of Energy (DOE) for technical support services (TSS) for DOE's Portsmouth/Paducah Project Office (PPPO). SMSI argues the agency's evaluation of offerors' proposals and resulting award decision were improper.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The DOE PPPO is responsible for conducting "the safe, secure, compliant, and cost effective environmental legacy cleanup" of the Portsmouth and Paducah Uranium Enrichment Sites. Agency Report (AR), Tab A, RFP, Performance Work Statement (PWS) § C.1. To accomplish its responsibilities, PPPO developed the PWS here to obtain technical and administrative support in furtherance of DOE's oversight and management of the clean-up activities at the Portsmouth Gaseous Diffusion Plant (GDP), Pike County, Ohio, and the Paducah GDP, Paducah, Kentucky; the operation of the Depleted Uranium Hexafluoride (DUF6) Conversion Project, Pike County, Ohio, and Paducah, Kentucky; and for various technical engineering functions and general administrative support.¹ PWS § C.1; COS/MOL at 3.

The RFP was issued on July 3, 2017, as a small business set-aside, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15.² The solicitation contemplated the award of a time-and-materials contract for a 3-year base period with a 2-year option.³ RFP § B.2. In general terms, the contractor was to provide qualified personnel to successfully perform the PWS requirements in all specified areas. PWS § C.1.2. The RFP established that contract award would be made on a best-value tradeoff basis, based on five evaluation factors in descending order of importance: (1) technical and management approach (technical approach); (2) key personnel and organizational structure (key personnel); (3) relevant experience (experience); (4) relevant past performance (past performance); and (5) price. RFP §§ M.7, M.8. The non-price factors, when combined, were significantly more important than price. RFP § M.7.

¹ The procurement here combines three separate TSS contracts at different PPPO locations: (1) the Paducah technical services contract, currently performed by Professional Project Services, Inc. (Pro2Serve), the parent company of the awardee E-TAS; (2) the Portsmouth engineering and technical support contract, currently performed by Restoration Services, Inc.; and (3) the Lexington (Kentucky) oversight and technical services contract, currently performed by SMSI. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 3; Protest at 4-5.

² The RFP was subsequently amended five times. Unless specified otherwise, all citations are to the final, conformed version of the solicitation.

³ The RFP also included a 60-day transition period from the date of issuance of the contract's notice to proceed. RFP § B.2.

With respect to price, the RFP provided offerors with the specific labor categories and labor hours for each contract performance period. RFP § B.2. The RFP also specified the minimum qualifications for each labor category. RFP attach. J-3, Minimum Position Qualifications. In total, offerors were required to propose fully-burdened labor rates for 1,325,150 hours in 78 labor categories. RFP § B.2.

Seven offerors, including E-TAS and SMSI, submitted proposals by the August 31 closing date. An agency source evaluation board (SEB) evaluated offerors' proposals using various adjectival rating schemes as follows: outstanding, good, satisfactory, marginal, and unsatisfactory for the technical approach, key personnel, and experience factors; and substantial confidence, high level confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence/neutral for the past performance factor. AR, Tab F.3, SEB Report at 40, 42. Offerors' prices were not rated, but evaluated for reasonableness. Id. at 37; RFP § M.6. On June 28, 2018, after completing its evaluation of offerors' proposals, DOE awarded the contract to E-TAS. COS/MOL at 9.

SMSI filed a protest with our Office on July 20, challenging the award to E-TAS. On August 15, the agency notified our Office that it intended to take corrective action by making a new source selection decision. AR, Tab K, DOE Notice of Corrective Action, Aug. 15, 2018. We dismissed SMSI's protest as academic on August 17. Strategic Mgmt. Solutions, LLC, B-416598, B-416598.2, Aug. 17, 2018 (unpublished decision).

The agency thereafter established a competitive range (which included the E-TAS and SMSI proposals), conducted discussions, amended the RFP, and provided offerors with the opportunity to submit final proposal revisions (FPR) by March 1, 2019. COS/MOL at 10-12. The SEB completed its reevaluation of offerors' FPRs on July 31, with the relevant results as follows:

	E-TAS	SMSI
Technical Approach	Outstanding	Outstanding
Key Personnel	Outstanding	Outstanding
Relevant Experience	Good	Good
Past Performance	Substantial Confidence	High Level Confidence
Price	\$136,628,181	\$142,962,094

AR, Tab F.3, SEB Report, at 18.

The agency evaluators also identified strengths and weaknesses in the offerors' proposals in support of the ratings assigned. For example, the SEB found two significant strengths, five strengths, and no weaknesses in E-TAS' technical approach, and a similar number of significant strengths, strengths, and weaknesses in SMSI's technical approach. Id. at 59-105. The evaluators also made narrative findings regarding the relevance and quality of offerors' prior work in support of the assigned past performance ratings. Id. at 220-304.

The agency source selection authority (SSA) conducted a detailed comparative assessment of offerors' proposals, and found E-TAS and SMSI to be "substantially equal" under the non-price factors.⁴ Id. The SSA thereafter concluded that because E-TAS was the lowest-priced offeror, and because "no other Offeror [was] superior to E-TAS for the evaluated non-price factors," E-TAS represented the overall best value to the government. Id.

On August 22, DOE provided SMSI with notice of contract award to E-TAS. SMSI received a debriefing from the agency on September 5, and filed this protest on September 9.

DISCUSSION

SMSI raises numerous challenges regarding DOE's evaluation of the offerors' proposals and resulting award decision; in fact, there is little about the agency's evaluation that SMSI does not dispute. For example, SMSI alleges that E-TAS has an organizational conflict of interest (OCI) which the contracting officer failed to properly evaluate and mitigate. SMSI also contends the evaluation of E-TAS' proposal under all five evaluation factors--technical approach, key personnel, experience, past performance, and price--was improper. SMSI further alleges the evaluation of its proposal under the key personnel, experience, and past performance factors was improper. Had the DOE performed a proper evaluation, SMSI argues, it would have been selected for award. Although we do not specifically address all of SMSI's complaints about the evaluation of proposals, and the agency's selection decision, we have fully considered all of them and find they provide no basis to affect the agency's selection decision.⁵

OCI Evaluation of E-TAS

SMSI contends that the agency's evaluation of E-TAS' alleged OCI was improper. In support thereof, the protester alleges that E-TAS' ability to objectively perform certain PWS tasks here will be impaired as a result of the fact that E-TAS' parent company, Pro2Serve, is a subcontractor involved in the performance of DOE's deactivation and decommissioning (i.e., site operations) contract at the Portsmouth GDP site. SMSI also contends the contracting officer's OCI review was unreasonable for concluding that E-TAS had adequately mitigated the OCI that would prevent its objective performance of the awarded TSS contract. Protest at 22-49; Supp. Protest at 38-61.

⁴ As part of this determination the SSA found that although E-TAS had a slight past performance advantage over SMSI, it was not a significant discriminator between the offerors' proposals. AR, Tab G, Source Selection Decision Document (SSDD) at 61.

⁵ For example, SMSI also alleged that the integrity of the TSS procurement was undermined by a potential personal conflict of interest of an agency evaluator, Protest at 79-81, but subsequently elected to withdraw this additional protest ground. Supp. Protest at 2 n.2.

The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: impaired objectivity, unequal access to information, and biased ground rules. See McConnell Jones Lanier & Murphy, LLP, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 13. As relevant here, an impaired objectivity OCI exists where a firm's work under one government contract could entail evaluation of itself, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3; L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 5. In these cases, the primary concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. L-3 Servs., Inc., supra.

The FAR establishes a contracting officer's responsibility to "[a]void, neutralize, or mitigate significant potential conflicts before contract award," so as to prevent the existence of conflicting roles that might impair a contractor's objectivity. FAR § 9.504(a)(2). Further, "[t]he exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." Id., § 9.505.

We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. Systems Made Simple, Inc., B-412948.2, July 20, 2016, 2016 CPD ¶ 207 at 7; McConnell Jones Lanier & Murphy, LLP, supra. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Systems Made Simple, Inc., supra; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

As detailed below, the record reflects that the contracting officer reasonably investigated and considered whether a significant potential OCI exists, and that SMSI has failed to identify hard facts demonstrating the existence or potential existence of such an alleged conflict. Thus, we have no basis to question the contracting officer's conclusion that E-TAS' participation in this procurement does not raise significant potential OCI concerns.

Certain facts are not in dispute: E-TAS is the wholly-owned subsidiary of Pro2Serve, which is the incumbent TSS contractor for the Paducah GDP site. AR, Tab E, E-TAS FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 108. Additionally, Pro2Serve is a subcontractor to Fluor-BWXT Portsmouth, LLC (Fluor) for its site operations contract with DOE at the Portsmouth GDP. The Portsmouth contract was awarded to Fluor in

August 2010 and is scheduled to be completed on March 28, 2021. To date, the value of Fluor's contract is approximately \$3.8 billion, while the value of Pro2Serve's subcontract with Fluor is approximately \$36 million. COS/MOL at 25; Protest at 3, 10.

The PWS here includes a wide range of activities that the TSS contractor is to perform, at three different sites. PWS §§ C.3 – C.16. For example, one of the 14 stated tasks is "project planning, integration, and contract management oversight" (PWS § C.12), which consists of 12 enumerated subtasks including "contract closeout and support." PWS § C.12.8. Additionally, in order to avoid possible OCIs associated with incumbent contractors (such as E-TAS and SMSI) at the PPPO sites, "DOE gave the offerors the opportunity to avail themselves of a federal mitigation [plan] option." COS/MOL at 11. Specifically, during discussions, the agency informed offerors that:

As a mitigation of potential [OCIs] arising from closeout work, DOE will self-perform the tasks that involve potential conflicts of interest. Should the Offeror choose to avail itself of this option, the Offeror's mitigation plan should incorporate this and the Offeror should identify which of the closeout activities may potentially involve the Offeror's overseeing of work that the Offeror has done on predecessor contracts.

AR, Tab C.4, SMSI Discussion Questions and Answers at 9.

The agency also modified the language of the PWS contract closeout task, substituting the word "may" for the word "shall" in order to make the task a discretionary rather than mandatory one, thus providing incumbent offerors the opportunity to utilize the federal mitigation plan option in their proposals. Protest, exh. 24, RFP amend. 5 at 1 ("The Contractor may be required to assist DOE with completing all contract closeout tasks of technically complete PPPO contractual agreements . . .").

E-TAS submitted a detailed OCI mitigation plan as part of its FPR. With regard to the incumbent Paducah TSS contract being performed by its parent company, Pro2Serve, E-TAS stated that it would recuse itself from all contract closeout activities associated with Pro2Serve's Paducah TSS contract and avail itself of the DOE federal mitigation plan option.⁶ AR, Tab E.1, E-TAS FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 111; COS/MOL at 12.

With regard to Pro2Serve's subcontract with Fluor at the Portsmouth GDP site, E-TAS explained that Pro2Serve performed a variety of technical support services for Fluor, but

⁶ Similarly, SMSI's OCI mitigation plan also relied on the federal mitigation plan option for the contract closeout activities (e.g., final inspection, past performance evaluations, approval of invoices, assistance with claims) associated with its incumbent TSS contract. COS/MOL at 12; AR, Tab D, SMSI FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 62, 67-68. Further, SMSI does not protest E-TAS' OCI mitigation plan as it relates to Pro2Serve's incumbent TSS contract.

that Pro2Serve was not a member of the Fluor limited liability company. AR, Tab E.1, E-TAS FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 111. Moreover, Pro2Serve did not hold any management positions or authority within this Fluor organization, and Pro2Serve did not participate in Fluor's award fee pool. Id. In its proposal, E-TAS recognized that:

This contract [with Fluor] could present the appearance of an OCI because, should E-TAS be awarded the PPPO TSS contract, it could result in E-TAS reviewing the work of its parent company, Pro2Serve. In order to mitigate this potential OCI, Pro2Serve will exit this contractual relationship prior to [issuance of the] Notice of Proceed (NTP) should E-TAS be awarded the PPPO TSS contract.

Id.

The OCI mitigation plan proposed by E-TAS detailed the specific steps it would undertake to ensure that Pro2Serve terminated its subcontract agreement with Fluor prior to NTP issuance here. Id. at 111-114. E-TAS also discussed how it would resolve various issues (e.g., indemnification, disputes, audit and closeout, transfer of personnel) associated with the termination of its subcontract with Fluor. Id. at 115-117. Further, E-TAS set forth the extent to which it could support, without conflict, the contract closeout of Fluor's Portsmouth GPD contract as well as the extent to which it would recuse itself from any analyses and judgments involving its own prior work (e.g., past performance ratings for Fluor related to the work areas performed by Pro2Serve). Id. at 117-119.

The contracting officer, in the course of the procurement here, conducted a pre-award analysis to identify and evaluate potential OCIs involving offerors, including E-TAS.⁷ Id. The contracting officer also performed an extensive review of E-TAS' OCI mitigation plan regarding Pro2Serve's to-be-terminated contract with Fluor and the potential for significant OCIs. Id., Tab F.6, Supp. OCI Memorandum at 1-7. The contracting officer noted, for example, that the Fluor contract was one of six contracts, at three different sites, the TSS contractor would assist in overseeing, and that the total value of the Fluor contract was approximately \$3.8 billion, while the value of Pro2Serve's subcontract work was less than 1 percent of this total. Id. at 2. Further, she observed that even though the portion of work performed by Pro2Serve was extremely small in relation to the overall Fluor contract,

it is even smaller in light of the fact that an overwhelming majority of this work has already been performed, paid for, and evaluated. To the extent that there may even be a hint of an issue, it would involve the work

⁷ The contracting officer's analysis of potential OCIs also included an assessment of SMSI and its ability to perform contract closeout tasks related to its incumbent Lexington TSS contract. AR, Tab F.1, OCI Memorandum at 1-14.

performed by Pro2Serve immediately prior to termination of its subcontract, which is an even smaller portion of the work.

Id.

Consequently, the contracting officer concluded that the extent to which E-TAS might oversee the work previously performed by Pro2Serve constituted a “negligible impact” on the TSS contract. Id.

Additionally, the contracting officer, “[i]n an abundance of caution, [and] to further analyze the work currently being performed,” also reviewed of Pro2Serve’s subcontract task orders. Id. The contracting officer found the work being performed by Pro2Serve was on level-of-effort type task orders which provided general support to Fluor in areas such as the surveillance and maintenance of facilities; utilities and power operations; plant shift operations support; engineering and technical services; construction engineering and project management support; and facility engineering and support services.⁸ The contracting officer also found that Pro2Serve’s work consisted of routine, repetitive support tasks that were both easily severable and would not impair E-TAS’ ability to provide unbiased advice to DOE regarding performance oversight activities. Id. at 1-2, 5. The contracting officer concluded that Pro2Serve’s prior work did not rise to the level of impaired objectivity, as “Pro2Serve did not directly produce deliverables that would be evaluated under the TSS contract.” Id. at 5.

Finally, the contracting officer also analyzed the potential OCI issues associated with Pro2Serve’s proposed termination of its subcontract with Fluor. First, the agency contacted Fluor and confirmed that it was possible for Pro2Serve to separate itself from the Portsmouth site operations contract. Id. at 1. The contracting officer also found the E-TAS’ OCI mitigation plan provided milestones and timelines by which Pro2Serve would sever its contractual relationship with Fluor and complete subcontract close out prior to issuance of the NTP under the TSS contract. Id. at 5. The contracting officer also considered the potential issues that could possibly arise from Pro2Serve’s termination of its subcontract with Fluor and found them to be both remote--Pro2Serve was paid on a level-of-effort basis by Fluor--and adequately addressed by E-TAS’ OCI mitigation plan. Id. at 5-6. The contracting officer thereafter concluded that there was no significant potential for an OCI involving E-TAS’ performance of the TSS contract in light of Pro2Serve’s proposed termination of its contract with Fluor together with the related aspects of E-TAS’ OCI mitigation plan. Id. at 7.

Based on our review, we find the contracting officer reasonably concluded that E-TAS did not have a significant impaired objectivity OCI that precluded its performance of the TSS contract. As a preliminary matter, the PWS consisted of a wide range of activities

⁸ Pro2Serve’s facilities surveillance and maintenance task order, by far its largest one, did not produce any technical outputs or services and thus, “would not result in the . . . TSS contractor assessing or reviewing the activities being performed” here. Id. at 2.

that the TSS contractor was to perform, of which the contract management support tasks were but one part. Further, the contracting officer reasonably considered that the Fluor contract was but one of six contracts at three different sites that the TSS contractor would be involved in overseeing. The contracting officer also reasonably considered whether Pro2Serve's termination of its subcontract agreement with Fluor prior to issuance of the NTP mitigated potential conflicts related to E-TAS' performance of the TSS contract. Here, the contracting officer determined that Pro2Serve's role in the Fluor contract was extremely limited in size and consisted mainly of "level-of-effort" support tasks that were both easily severable and for which Pro2Serve had (largely) already been paid. Finally, the contracting officer reasonably concluded that termination of the Pro2Serve subcontract with Fluor would prevent E-TAS from being extensively involved in reviewing the past work of its parent company and thereby "virtually eliminating all potential OCIs and removing any incentive to impair E-TAS' objectivity, which I believe is an acceptable and reasonable mitigation." Id. at 1

In sum, the record reflects that the contracting officer exercised "common sense, good judgment, and sound discretion" when determining both whether a significant potential conflict existed and whether E-TAS had developed an appropriate means for resolving it. FAR § 9.505. We will not substitute our judgments for those of the individual charged with this responsibility. While SMSI raises a litany of arguments regarding additional information the contracting officer may have considered (e.g., additional Pro2Serve subcontract task orders), or possible issues that could occur as part of the termination of the Pro2Serve subcontract with Fluor, we find this simply fails to demonstrate "hard facts" that the contracting officer reasonably failed to consider.

SMSI also argues the agency improperly relaxed the PWS requirements for E-TAS as part of the awarded contract. In support thereof, SMSI alleges that E-TAS' OCI mitigation plan proposed to have DOE self-perform certain work (e.g., past performance evaluations, cost invoices, claims) under two additional contract management-related PWS tasks (C.12.7 and C.12.9) not previously identified in the RFP as being subject to the agency's federal mitigation plan. The protester contends that it wasn't informed of DOE's changed requirement, or that DOE was open to self-performing additional aspects of the PWS as part of an offeror's mitigation plan to alleviate potential OCIs. Supp. Protest at 8-10; SMSI Comments at 38-41. We find no merit to SMSI's protest here.

As a preliminary matter, the record reflects that no offeror was informed prior to award that the DOE federal mitigation plan, as executed at the time of contract award, would extend beyond the PWS' contract closeout task (C.12.8). The record also reflects that E-TAS' OCI mitigation plan did not take exception to the additional PWS tasks here (C.12.7 and C.12.9), or avail itself of the federal mitigation plan option beyond the contract closeout task. See AR, Tab E.1, E-TAS FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 106-126. Rather, the record reflects that E-TAS considered the work activities for which it availed itself of the federal mitigation plan option (e.g., past performance evaluations, cost invoices, claims) to be part of the contract closeout task (C.12.8); the record also reflects that SMSI held a similar belief. Id. at 123; AR,

Tab D.1, SMSI FPR, Vol. I, Technical Proposal, OCI Mitigation Plan at 62, 67-68. We therefore find that DOE's decision to expand the scope of its federal mitigation plan did not apply for E-TAS alone, but to all similarly-situated offerors, including SMSI, with a potential OCI related to work previously performed for PPPO.

Further, we find that SMSI has failed to demonstrate how it was prejudiced by the alleged relaxation of PWS requirements. Competitive prejudice is an essential element of a viable protest; 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. Engility Corp., B-413120.3 et al., Feb. 14, 2017, 2017 CPD ¶ 70 at 17; Lockheed Martin Integrated Sys., Inc., B-408134.3, B-408134.5, July 3, 2013, 2013 CPD ¶ 169 at 8; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Here, SMSI has failed to show, or even allege, that it would have proposed any differently had it known that DOE would extend the scope of its federal mitigation plan option to other PWS tasks beyond contract closeout. In fact, SMSI's proposed OCI mitigation plan, unlike that of E-TAS, took exception to mandatory PWS requirements and/or availed itself of the federal mitigation plan option beyond the contract closeout task when it stated in part that:

[I]f it is determined that a particular OCI cannot be adequately mitigated without jeopardizing SMSI's ability to compete for future work . . . , SMSI shall have the right to decline performing the conflict-creating work under this contract. In such a case, the Government will ensure that the work is performed either by the Government or by a firm that does not have an unmitigatable OCI.

AR, Tab D, SMSI FPR, Vol. I, Technical Proposal, OCI Mitigation Plan, at 64.

Consequently, we find SMSI's assertion that DOE improperly relaxed the PWS requirements for only E-TAS to be both without merit and without prejudice, and the allegation is denied.

Evaluation of E-TAS' Price for Performance Risk

SMSI also challenges the evaluation of E-TAS' price. The protester alleges that, as required by the solicitation, the agency failed to assess, or reasonably assess, the performance risk associated with E-TAS' low prices for certain labor categories (specifically those where E-TAS was lower priced than SMSI).

Section M of the RFP established the evaluation criteria by which DOE would make its award determination. Relevant to the protest here, as part of the general evaluation provisions, the RFP stated,

DOE has established a Source Evaluation Board to evaluate the proposals submitted by Offerors in response to this solicitation. Proposal evaluation is an assessment of the proposal and the Offeror's ability to

perform the prospective contract successfully. Proposals will be evaluated solely on the factors specified in the solicitation by assessing the relative significant strengths, strengths, significant weaknesses, weaknesses, deficiencies, and price, and performance risks of each Offeror's proposal against the evaluation factors in this Section M to determine the Offeror's ability to perform the contract.

RFP § M.1.

The RFP then set forth the specific evaluation factors on which contract award would be based. With regard to the price evaluation factor, the RFP stated that "[t]he Offeror's price proposal will not be point scored or adjectivally rated, but will be evaluated for price reasonableness and mathematical accuracy." RFP § M.6. Additionally, during discussions with offerors, the agency elaborated that,

[t]he RFP evaluation factors in Section M do not contemplate the performance of a price realism analysis pursuant to FAR 15.404-1(d), which is only used in exceptional cases for other than cost reimbursement contracts. It is hereby clarified to Offerors that a price realism analysis will not be performed on the FPR submittal

AR, Tab C.3, Discussions with SMSI, Discussion Items at 2.

The SEB thereafter evaluated offerors' prices and determined that E-TAS' price, as compared to those of other offerors and the independent government cost estimate, was reasonable. AR, Tab F.3, SEB Report at 321-324.

SMSI argues that, based on the aforementioned RFP provision, DOE was required to evaluate the "performance risks of each Offeror's proposal" for every evaluation factor, including price. Protest at 55, citing RFP § M.1. SMSI further contends the agency failed to reasonably consider the risks to contract performance associated with E-TAS' allegedly low labor rates for certain labor categories (e.g., the offeror's ability to provide "uninterrupted high-quality work," as set forth in the key personnel evaluation factor). Protest at 56, citing RFP § M.3(g).

The agency argues that performance risk was not required to be assessed under each and every evaluation factor, including price, and disputes SMSI's interpretation of the solicitation.⁹ Id. at 65-68. Additionally, the agency argues the protester is now seeking the performance of a price realism evaluation--"[n]o matter how much SMSI proclaims that it is not asking for a realism analysis"--which the solicitation expressly did not provide for. Id. at 65. We agree with the agency.

⁹ The agency also contends the performance risks of offerors' proposals were properly assessed as part of the RFP's technical evaluation criteria. COS/MOL at 65.

Where a dispute exists as to a solicitation's requirements, we begin by examining the plain language of the solicitation. Harper Constr. Co., Inc., B-415042, B-415042.2, Nov. 7, 2017, 2018 CPD ¶ 47 at 4; Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous, *i.e.*, there is not more than one reasonable interpretation of the solicitation, our inquiry ceases.¹⁰ *Id.*

We find SMSI's interpretation of the solicitation to be an unreasonable one, and its reliance on the cited provision misplaced. As set forth above, the RFP contained a general evaluation provision stating that "[p]roposals will be evaluated . . . by assessing the relative significant strengths, strengths, significant weaknesses, weaknesses, deficiencies, and price, and performance risks of each Offeror's proposal against the evaluation factors in this Section M" RFP § M.1. Here, "performance risks" is listed among the enumerated items the agency would assess against the stated evaluation factors. The provision, however, did not state the agency would assess every enumerated item against every evaluation factor, such as requiring an assessment of performance risks against all evaluation factors as SMSI claims. In fact, we find that such an interpretation would lead to a nonsensical result; it would require, among other things, the assessment of strengths and weaknesses to the price factor, as well as assessing price as part of every non-price factors. Rather, in reading the sentence here in conjunction with the section M provisions as a whole, we find that this general evaluation provision established the sum of the agency's evaluation--that all enumerated items would be taken into account as part of the agency's evaluation as a whole.

Moreover, the solicitation also contained a specific provision regarding how the agency would conduct the evaluation of prices. We resolve questions of solicitation interpretation by reading the solicitation as a whole. Desbuild Inc., *supra*. Here, the RFP established that prices would only be evaluated for "reasonableness and mathematical accuracy," and did not include performance risk. RFP § M.6. In our view, SMSI's interpretation of the solicitation would then result in a conflict between the general evaluation provision in RFP § M.1 and the more specific evaluation provision in

¹⁰ An ambiguity, however, exists where two or more reasonable interpretations of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation (*e.g.*, where solicitation provisions appear inconsistent on their face), then it is a patent ambiguity; a latent ambiguity is more subtle. A-P-T Research, Inc., B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 12; Harper Constr. Co., Inc., *supra*. In order to be considered timely, a protest of a patent ambiguity must be filed prior to the closing time for submission of proposals. DCR Servs. & Constr., Inc., B-415565.2, B-415565.3, Feb. 13, 2018, 2018 CPD ¶ 125 at 4 n.6; 4 C.F.R. § 21.2(a)(1).

RFP § M.6. Under the principles of contract interpretation, if there were a conflict, the rule is that the more specific provision takes precedence over the more general provision. Mevacon–NASCO JV; Encanto Facility Servs., LLC, B-414329 et al., May 11, 2017, 2017 CPD ¶ 144 at 8; Favino Mech. Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174 at 3.

In any event, we believe the agency removed all doubt about the scope of the price evaluation by expressly informing offerors that it did not include a price realism analysis. AR, Tab C.3, Discussions with SMSI, Discussion Items at 2 (“It is hereby clarified to Offerors that a price realism analysis will not be performed on the FPR submittal . . .”). Where a solicitation contemplates the award of a fixed-price or time-and-materials contract, price realism is not ordinarily considered, because a fixed priced-type contract places the risk and responsibility for costs and resulting profit or loss on the contractor. HP Enter. Servs., LLC, B-413888.2 et al., June 21, 2017, 2017 CPD ¶ 239 at 5; see FAR § 15.402(a). While an agency may conduct a price realism analysis in awarding a fixed-price contract, it is for the limited purpose of measuring an offeror’s understanding of the requirements or to assess the performance risk in its proposal. FAR § 15.404-1(d)(3); Hewlett Packard Enter. Co.–Costs, B-413444.3, Mar. 3, 2017, 2017 CPD ¶ 85 at 5; Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. In the absence of an express price realism provision, we will conclude that a solicitation contemplates a price realism evaluation only where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding and/or unacceptable performance risk, and the solicitation states that a proposal can be rejected for offering low prices. DynCorp Int’l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Moreover, absent a solicitation provision providing for a price realism evaluation, agencies are neither required nor permitted to conduct one in awarding a fixed-price contract. DynCorp Int’l LLC, supra; Emergint Techs., Inc., supra.

Finally, SMSI does not dispute that DOE informed offerors the agency would not perform a price realism analysis. Rather, SMSI contends that assessing the performance risk associated with E-TAS’ allegedly low price is different than assessing price realism. Protest at 56; SMSI Comments at 62-63. The protester’s argument reflects a fundamental misunderstanding of what a price realism analysis entails, and amounts to a distinction without a difference. As provided by regulation, and explained in our decisions, in the context of a fixed-price contract, a price realism analysis is an assessment of, among other things, the performance risk associated with an offeror’s price. See, e.g., STG, Inc., B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 14; Emergint Techs., Inc., supra. In sum, the agency was not required (nor permitted) to conduct a price realism evaluation here, and SMSI’s assertion that the agency failed to assess the performance risks of E-TAS’ price is a price realism challenge in all but name. See DynCorp Int’l LLC, supra. Accordingly, we find no merit to the protester’s argument, and this allegation is denied.

Past Performance Evaluation of E-TAS

SMSI also challenges the evaluation of E-TAS' past performance. The protester contends it was improper for the agency to consider the past performance of E-TAS' parent company, Pro2Serve, when evaluating the awardee's proposal. Protest at 49-54; Supp. Protest at 28-29.

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 discretion which we will not disturb unless the assessment is unreasonable or inconsistent with the solicitation criteria. BillSmart Solutions, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 at 4; Jacobs Tech., Inc., B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 6. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. DynCorp Int'l, LLC, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 14; Falcon Envtl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 4-5; Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

The RFP's past performance factor established the agency would evaluate the relevance and favorability of an offeror's prior work on contracts currently being performed or completed within 5 years of the date proposals were due. RFP § M.5(a). The RFP also stated as follows:

Newly formed entity. If the Offeror . . . [is] a newly formed entity with no record of relevant past performance, the evaluation of past performance may be based on the past performance of any parent organization(s) or member organizations in a joint venture, LLC, or other similar entity consistent with the evaluation described in paragraphs (a) and (b) above. Past performance of predecessor companies resulting from mergers and acquisition may also be considered. Past performance information of a parent or affiliated company may also be considered provided the Offeror's proposal demonstrates that the assets or resources, such as personnel and/or other corporate resources, of the parent or affiliated company will be provided or relied upon in order to affect the performance of the Offeror.

RFP § M.5(c).

The solicitation, however, provided no definition for the term "newly formed entity." Additionally, as part of the discussions, when SMSI inquired whether the agency agreed with its definition that a "newly formed entity" was one formed within 12 months of the

RFP's closing date (i.e., August 31, 2017), the agency merely restated the existing proposal instruction provisions and neither provided a definition for the term in question, nor agreed with SMSI's suggestion. AR, Tab C.4, SMSI Discussion Questions and Answers at 6.

E-TAS submitted a total of seven past performance references--three for itself and two each for its major subcontractors. AR, Tab F.3, SEB Report at 230. The SEB also considered seven additional "non-reference" contracts for E-TAS and its major subcontractors as part of its evaluation. Id. at 230-231. All references for E-TAS itself involved work performed by its parent company Pro2Serve. Id. at 232-249. The contracting officer determined, however, that E-TAS, which was established on October 27, 2015--approximately 8 months before the "sources sought" notice and 22 months before the RFP's issuance--was a "newly formed entity," such that the contracts performed by Pro2Serve could be considered as part of past performance evaluation of E-TAS. AR, Tab F.2, Contracting Officer's Memorandum for Record, July 15, 2019, at 1-2. The SEB assessed the relevance and favorability of each E-TAS reference and concluded that the awardee merited a "substantial confidence" rating. AR, Tab F.3, SEB Report at 228.

SMSI does not dispute the SEB's relevance or favorability assessments of E-TAS' past performance references. Rather, SMSI argues that E-TAS is not a "newly formed entity"--as the company was established in 2015 almost 4 years before the filing of the protest here--and DOE's reliance on any such assertion by E-TAS unreasonable.¹¹ Id. at 49-50. By contrast, the agency argues that its interpretation of the term "newly formed entity" was a reasonable one and the protester's challenge here is untimely. Id. at 76-78. We agree with the agency.

As set forth above, an ambiguity exists where two or more reasonable interpretations of the solicitation are possible, Colt Def., LLC, supra, and an ambiguity is a patent one if it is an obvious, gross, or glaring error in the solicitation. A-P-T Research, Inc., supra. Here, the RFP stated that the past performance evaluation of a "newly formed entity" could be based on that of a parent company, but then left completely undefined what a "newly formed entity" was. We find that because this term was subject to multiple reasonable interpretations--including those advanced by the parties here--it was ambiguous. Moreover, the ambiguous nature of this provision was obvious; it was essentially a term of art without any established meaning. The fact that SMSI itself asked, during discussions, how the agency was interpreting this provision is evidence of the patent nature of the ambiguity. Further, although the agency elected not to clarify the "newly formed entity" term when asked, it is clear that the agency did not indicate agreement with SMSI's interpretation of the term. If SMSI found the agency response to be unacceptable, either because it failed to accept SMSI's offered definition or

¹¹ SMSI also implicitly contends here that a reasonable interpretation of the term "newly formed entity" was the one SMSI suggested during discussions, i.e., a company formed within 12 months of the solicitation's closing date. See Protest at 52.

because it failed to clarify the meaning of this patently-ambiguous term, SMSI was required to raise these concerns prior to the next closing date. See Intermarkets Global, B-400660.12, B-400660.13, May 6, 2011, 2011 CDCP ¶ 130 at 7. As SMSI instead waited until after contract award to challenge this apparent solicitation defect, its allegation now is untimely and is dismissed on that basis. DCR Servs. & Constr., Inc., supra; 4 C.F.R. § 21.2(a)(1).

Evaluation of Offerors' Key Personnel

SMSI also challenges the evaluation of offerors' key personnel. Specifically, the protester maintains that the evaluation of SMSI's key personnel was improper, the evaluation of E-TAS' key personnel was unreasonable, and the agency's evaluation was disparate. Protest at 64-67; Supp. Protest at 17-21.

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency regarding a proposal's relative merits, as the evaluation of proposals is a matter within the agency's discretion. Peraton, Inc., B-417088, B-417088.2, Feb. 6, 2019, 2019 CPD ¶ 190 at 5; Del-Jen Educ. & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations, and adequately documented. Management Sys. Int'l, Inc., B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 5; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's disagreement with the agency's evaluation judgments, without more, is insufficient to establish that an evaluation was improper or lacked a reasonable basis. Lanmark Tech., Inc., B-408892, Dec. 19, 2013, 2013 CPD ¶ 295 at 5.

The RFP established five key personnel positions--program director, Portsmouth project manager, Paducah project manager, DUF6 project manager, and information technology (IT) manager. RFP attach. J-3, Key Personnel, at 1-6. The solicitation also established minimum and preferred qualifications for each key personnel position.¹² Id. The RFP stated the evaluation of key personnel would be based on the education, experience, and record of past accomplishments of offerors' proposed personnel. RFP § M.3.

Evaluation of E-TAS' Key Personnel

SMSI argues the evaluation of E-TAS' key personnel was improper. The SEB, as part of its evaluation, identified E-TAS' program director as a significant strength, and its

¹² For example, the Portsmouth project manager and Paducah project manager positions each had four preferred qualifications, including a project management professional (PMP) certification. Id. at 3-4.

Portsmouth, Paducah, and DUF6 project managers as strengths. AR, Tab F.3, SEB Report at 113-130. SMSI points to the fact that the agency evaluators, during their initial evaluation, found E-TAS' program director to be a strength rather than a significant strength; SMSI likewise notes the SEB elevated its assessment of E-TAS' Paducah project manager, which had not been considered a strength in the initial evaluation. SMSI contends the agency's evaluation here was unreasonable because it differed from the earlier evaluation. Supp. Protest at 17.

We recognize that the views of agency evaluators--both individual views and group views--may change over time, including during a reevaluation performed as part of corrective action. Indeed, an agency's review of its evaluation findings and award decision is the ultimate purpose of corrective action. Likewise, we are unaware of any requirement that the evaluation record document the various changes in evaluators' viewpoints. SRA Int'l, Inc., B-407709.5, B-407709.6, Dec. 3, 2013, 2013 CPD ¶ 281 at 11; J5 Sys., Inc., B-406800, Aug. 31, 2012, 2012 CPD ¶ 252 at 13 n.15. The overriding concern, for our purposes, is not whether an agency's final evaluation conclusions are consistent with earlier evaluation conclusions, but rather, whether they are reasonable and consistent with the stated evaluation criteria, and reasonably reflect the relative merits of the proposals. See, e.g., SRA Int'l, Inc., supra ("there is simply no requirement that agencies document why evaluation judgments changed during the course of the evaluation process"); URS Fed. Tech. Servs., Inc., B-405922.2, B-405922.3, May 9, 2012, 2012 CPD ¶ 155 at 9 (finding that a consensus rating need not be the same as the rating initially assigned by the individual evaluators); Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 11 (denying protest that agency reevaluation and technical ratings were unreasonable because agency did not explain why evaluations differed between the initial evaluation and reevaluation undertaken during corrective action).

Here, we find DOE's evaluation of E-TAS' key personnel to be reasonable and consistent with the stated evaluation criteria. The record reflects the SEB fully considered the proposed individuals' qualifications, and then documented in textbook fashion why it assigned a significant strength to E-TAS' program director and a strength to its Paducah project manager. AR, Tab F.3, SEB Report at 113-117, 121-125. In sum, SMSI hasn't shown the agency's evaluation to be unreasonable, only different from an earlier evaluation, which does not establish a basis on which to sustain the protest. SRA Int'l, Inc., supra.

Evaluation of SMSI's Key Personnel

SMSI also challenges the evaluation of its own key personnel. The SEB identified SMSI's program director and DUF6 project manager as significant strengths, its IT manager as a strength, and assigned an overall "outstanding" rating to SMSI's key personnel proposal. Id. at 149-162. The protester contends, however, that it should have also received strengths for its Portsmouth and Paducah project managers. SMSI argues that both individuals satisfied many of DOE's preferred qualifications, which "by

definition exceeded the minimum requirements and [therefore] merited strengths and/or significant strengths.” Protest at 66.

The agency argues the evaluation was reasonable, and that an offeror was not automatically entitled to a strength because a proposed key person met minimum requirements and one or more preferred qualifications. COS/MOL at 69. The agency also contends that while the SEB determined that each individual here had adequate qualifications for the proposed position, and met various preferred requirements, the individual’s qualifications and experience did not rise to the level of a strength.

We find the agency’s evaluation of SMSI’s key personnel here to be reasonable. First, nothing in the solicitation required that a strength be assigned simply for meeting any of the preferred qualifications. Rather, the record reflects that the evaluators considered whether, for each key personnel position, the individual’s qualifications as a whole “increase[d] the probability of successful contract performance.” COS/MOL at 69, citing AR, Tab F.3, SEB Report at 39. The record also reflects that the evaluators were aware and considered the qualifications—including the preferred qualifications—of each SMSI individual proposed.¹³ Further, there is no dispute that neither proposed individual met all preferred qualifications, and that each lacked the PMP certification preferred qualification. While SMSI argues the individuals should nonetheless have been assigned strengths, we find this amounts to disagreement with the agency’s evaluation judgments, which does not demonstrate that those judgments were unreasonable or provide a basis on which to sustain the protest. Computer Scis. Corp., B-409386.2, B-409386.3, Jan. 8, 2015, 2015 CPD ¶ 34 at 4.

We also find no merit in SMSI’s assertion that the agency employed a more stringent standard when evaluating its key personnel than E-TAS’ personnel. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation’s requirements and evaluation criteria. Cubic Applications, Inc., B-411305, B-411305.2, July 9, 2015, 2015 CPD ¶ 218 at 7; Rockwell Elec. Commerce Corp., B-286201 et al.,

¹³ SMSI also argues that DOE’s “post-protest position” here constitutes an improper post-hoc rationalization. SMSI Comments at 47. We disagree. As a preliminary matter, we do not expect an agency’s evaluation report (here, some 375 pages in length) to “prove a negative,” and also document why something was not found to be a strength or a weakness. See BillSmart Solutions, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 at 14 n.19. We find the contracting officer’s statement here to be consistent with the contemporaneous evaluation record, and note that it provides additional details regarding the SEB’s previous findings and conclusions, of which she was a part. We therefore view the statement to be a post-protest explanation of contemporaneous conclusions, and not a post-hoc rationalization. Compare NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158, with Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91.

Dec. 14, 2000, 2001 CPD ¶ 65 at 5. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offerors' proposals. Raytheon Co., Space & Airborne Sys., B-411631, Sept. 16, 2015, 2015 CPD ¶ 361 at 8.

As discussed above, the SEB assigned strengths to E-TAS' Paducah and DUF6 project managers, but not to SMSI's Portsmouth and Paducah project managers. While SMSI tries to demonstrate the equal qualifications--and thus unequal agency evaluation--of these individuals, Supp. Protest at 19-20, we find its comparison both cursory and selective. First, there is no dispute that E-TAS' proposed DUF6 project manager met all preferred qualifications (including PMP certification), while SMSI's proposed individuals here did not. Id. at 20; AR, Tab F.3, SEB Report at 125-130; RFP attach. J-3, Minimum Position Qualifications at 5. Further, SMSI's comparison looks only at the amount of each individual's experience, while the agency's evaluation also considered the types of experience each individual possessed. COS/MOL at 74-76; AR, Tab F.3, SEB Report at 121-130. In our view, SMSI's disparate treatment argument is premised on an improper "apples and oranges" comparison of the offerors' proposals and not unequal treatment. See AMTIS-Advantage, LLC, B-411623, B-411623.2, Sept. 16, 2015, 2015 CPD ¶ 360 at 6.

In sum, we find no merit to any of SMSI's allegations regarding the agency's evaluation of offerors' proposals and award decision, and no basis on which to sustain the protest.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel