U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

Decision

Matter of: Second Street Holdings, LLC; 600 Second Street Holdings LLC; and Seven Hundred 2nd Street Holdings LLC

File: B-417006.4; B-417006.5; B-417006.6; B-417006.7

Date: January 13, 2022

Seamus Curley, Esq., Chelsea Goulet, Esq., and Gregory Jaeger, Esq., Stroock & Stroock & Lavan LLP, for the protester.
Alex D. Tomaszczuk, Esq., J. Matthew Carter, Esq., Alexander B. Ginsberg, Esq., and Dinesh C. Dharmadasa, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Cayre Jemals Nick LLC, the intervenor.
Elizabeth H. Johnson, Esq., and Daniel Cutler, Esq., General Services Administration, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency's requirements have materially changed since the solicitation was issued is dismissed as untimely where the protester learned of the bases for the alleged changes months in advance of its protest; the protester was required to file its protest within 10 days of when it knew or should have known of the basis of its protest.

2. Protest alleging that the agency failed to make award with reasonable promptness is denied where the record demonstrates that the agency pursued the procurement with reasonable diligence.

3. Protest alleging that the agency failed to comply with the terms of the prospectus approved by Congress pursuant to 40 U.S.C. § 3307 is dismissed because it raises matters outside of our bid protest jurisdiction. Although GAO will consider alleged violations of non-procurement statutes that have a direct bearing on a challenged procurement, the protester's allegations that the agency failed to negotiate sufficient holdover leasing rights with the protester (the incumbent landlord) are not directly relevant to the selection decision in the challenged procurement.

4. Protest alleging that the agency unreasonably evaluated the awardee's non-price proposal and erred by finding the awardee responsible is denied because the record reflects that the agency's evaluation was reasonable, or, to the extent that the agency did commit any errors, any such errors were not competitively prejudicial.

5. Protest alleging that the agency unreasonably evaluated proposed prices is dismissed in part and denied in part. Protest alleging that the agency failed to conduct an adequate price realism evaluation is dismissed because the solicitation did not provide for a price realism evaluation. Protest alleging that the agency unreasonably calculated present value is denied because the protester's argument is based on the addition of costs not contemplated by the solicitation's net present value formula.

6. Protest alleging that the agency conducted unequal discussions is denied where the record reflects that the agency's discussions were meaningful, adequately tailored to each offeror, and otherwise were not inconsistent with applicable procurement law or the terms of the solicitation.

DECISION

Second Street Holdings, LLC, 600 Second Street Holdings LLC, and Seven Hundred 2nd Street Holdings LLC (hereinafter collectively, Second Street), of Washington, D.C., protests the award of a lease to Cayre Jemals Nick LLC (CJN), of Washington, D.C., under request for lease proposals (RLP) No. 5DC0392, which was issued by the General Services Administration (GSA), to provide office space for the headquarters for the Securities and Exchange Commission (SEC). Second Street essentially challenges every aspect of the agency's conduct of this procurement and evaluation of proposals.

First, Second Street alleges that the agency failed to amend the solicitation to reflect material changes in the government's requirements, waived the solicitation's occupancy date requirement for the awardee, and failed to make award with reasonable promptness. Second, the protester alleges that GSA violated the requirements of 40 U.S.C. § 3307 by failing to comply with terms of the prospectus that was submitted to and authorized by Congress. Third, Second Street challenges the agency's non-price and price evaluations, and the agency's affirmative responsibility determination. Finally, the protester alleges that the agency conducted unequal discussions.

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

BACKGROUND

Currently, the government leases space from Second Street for the SEC's headquarters in a three-building complex located in the Capitol Hill neighborhood of Washington, D.C. Agency Report (AR), Tab 17, Second Street Initial Proposal – Vol. I, at 5[1]; *Second*

[1] References herein to page numbers of agency report exhibits are to the electronic pagination.

Street Holdings, LLC et al., B-417006, Jan. 17, 2019, 2019 CPD ¶ 63 at 1 (*Second Street I*). To date, the parties have negotiated lease extensions that will continue the SEC's occupancy through September 30, 2023. Protest (B-417006.5) at 14. In December of 2016, GSA submitted a prospectus to its Congressional oversight committees describing a proposed long-term lease of space for the SEC headquarters in accordance with 40 U.S.C. § 3307. AR, Tab 4, Prospectus PDC-11-WA17. The relevant committees of the Senate and House of Representatives indicated their assent to the prospectus on November 29, 2017, and April 12, 2018, respectively. *See id.*, Senate and House of Representatives Committee Resolutions.

On July 10, 2018, GSA issued the RLP on behalf of the SEC seeking to lease up to 1,274,000 square feet of office and related space for an initial term of 15 years, with a fixed-price option to renew the lease for 10 additional years, for a total potential term of 25 years.[2] AR, Tab 14, RLP, ¶¶ 1.02(A), (F). The RLP established that award would be made on a lowest-price, technically acceptable (LPTA) basis. *Id.*, ¶ 4.03.

As discussed in more detail herein, the RLP imposed specific requirements for the offerors' proposed spaces with respect to: (i) the surrounding neighborhood; (ii) parking; (iii) nearby amenities; and (iv) site security. *Id.*, ¶ 1.05, exh. D. Additionally, offerors were required to include specific types of supporting information demonstrating their capability to perform the lease. Relevant here, if the offeror was not the owner of the property proposed, the offeror was required to submit evidence of authorization from the ownership entity to submit an offer on the ownership entity's behalf. *Id.*, ¶ 3.06(A). Also, each offeror was required to submit sufficient evidence of its financial capabilities to perform the resulting lease. *Id.*, ¶ 3.06(C). As to price, the RLP established that GSA would calculate each offeror's price using a net present value formula. *Id.*, ¶ 4.09.

The RLP established a proposal deadline of September 4, 2018, and provided an estimated occupancy date of "2nd/3rd Quarter of 2023." AR, Tab 13, RLP Cover-Sheet, at 1. Although the RLP's cover-sheet provided an "estimated" occupancy date, the RLP directed that occupancy would be "required in accordance with the schedule outlined in the Schedule for Completion of Space paragraph under the Lease." AR, Tab 14, RLP, ¶ 1.02(G). Pursuant to that provision, if an offeror proposed new construction "all work required to prepare the Premises as required in this Lease [must be] ready for use not later than 1,050 Working days following Lease Award." AR, Tab 14, RLP, Draft Lease,

[2] As addressed herein, this procurement has been subject to extensive protest proceedings, including an agency-level protest, two prior protests filed before our Office, which were then subsequently protested at the United States Court of Federal Claims. *See Second Street I, supra*; *Second Street Holdings, LLC v. United States*, 144 Fed. Cl. 361 (2019) (*Second Street II*); *Poplar Point RBBR, LLC*, B-417006.2, B-417006.3, Sept. 3, 2019, 2019 CPD ¶ 301 (*Poplar Point I*); *Poplar Point RBBR, LLC v. United States*, 147 Fed. Cl. 201 (2020) (*Poplar Point II*). Our discussion herein of the procurement and those prior decisions is limited to those elements that are relevant to our resolution of this protest.

¶ 4.01(J); *see also* Tab 15, RLP, amend. No. 1, at 3 (increasing the required occupancy date to within 1,060 days after award).

Prior to the RLP's initial closing date for receipt of proposals, Second Street filed an agency-level protest challenging the terms of the solicitation on August 31, 2018. On October 4, GSA denied the protest. On October 12, Second Street then filed a pre-award protest challenging the terms of the solicitation with our Office. Specifically, Second Street challenged the requirement for fixed-price purchase options. During the pendency of the protest--and the applicable stay of contract award triggered thereby per 31 U.S.C. § 3553(c)(1)--GSA proceeded to evaluate the initial proposals. The agency then conducted oral discussions with offerors in October 2018, and subsequently followed those discussions with written discussions on December 20, 2018. *See, e.g.*, AR, Tabs 24 and 25, Discussions Letters to Second Street and CJN.

Also on December 20, GSA issued amendment 1 to the RLP. AR, Tab 15, RLP, amend. No. 1. On January 17, 2019, our Office denied Second Street's protest. *Second Street I*, *supra*. On January 25, GSA received revised proposals. *See, e.g.*, AR, Tabs 27 and 28, Revised Proposals of Second Street and CJN. On April 1, Second Street filed a protest with the Court of Federal Claims again challenging the RLP's terms. GSA voluntarily agreed to stay award during the pendency of Second Street's protest at the court. *See* Contracting Officer's Statement (COS) at 13.

As it had during the GAO protest, GSA continued with evaluating offers during Second Street's protest at the court. On May 20, the agency eliminated a third offeror from the competitive range, which then filed a protest with our Office challenging its exclusion from the competition. As with Second Street's protest, the third offeror's protest triggered the prohibition on contract award required by 31 U.S.C. § 3551(c)(1). While both protests were pending before the court and GAO, GSA requested final proposal revisions (FPR) from Second Street and CJN on June 10. AR, Tabs 31 and 32, Requests for FPRs from Second Street and CJN. On June 21, both the protester and awardee submitted their respective FPRs. AR, Tabs 33 and 34, Second Street and CJN FPRs. On July 11, the court denied Second Street's protest. *Second Street II, supra*.

On July 19, SEC wrote to GSA seeking a modification to the terms of the RLP. Specifically, although SEC did not object to inclusion of a purchase option (the option was the subject of Second Street's pre-award protests), SEC objected to GSA's proposed methodology for accounting for the price of the purchase option in GSA's price evaluation. In short, SEC objected to GSA evaluating the purchase price option on a cost basis, as opposed to a present value basis. AR, Tab 56(f), Letter from SEC General Counsel, at 1-4. On August 13, following discussions between SEC and GSA, SEC notified GSA that it was terminating the preliminary occupancy agreement that was previously negotiated between the agencies until such time as SEC's concerns with the RLP could be satisfactorily resolved. AR, Tab 56(g), Letter from SEC Chief Operating Officer.

On September 3, our Office denied the third offeror's protest. *Poplar Point I*, *supra*. On September 10, the third offeror filed a protest challenging its exclusion from the competitive range at the Court of Federal Claims. As it had with Second Street's protest before the court, GSA agreed to stay award pending the court's resolution of the third offeror's protest. *See* COS at 14. On March 2, 2020, the court denied the third offeror's protest. *Poplar Point II*, *supra*.

Upon resolution of the protest litigation before the court, GSA promptly notified CJN on March 2 that it was the apparent successful offeror as the firm had submitted the LPTA offer. *See* AR, Tab 57(l), Email from Contracting Officer; Tab 38, Apparent Successful Offeror Letter; Tab 38(a), Initial Proposed Lease. Among other activities, GSA and CJN began coordinating to address National Environmental Policy Act (NEPA) compliance requirements. *See, e.g.*, AR, Tabs 57(m), (n), (o), and (r), and 63(a), Email Correspondence between GSA and CJN re NEPA matters. In this regard, the RLP specifically stated that GSA would be responsible for ensuring compliance with NEPA requirements, including coordinating with applicable local, state, or federal regulatory entities, and that the apparent successful offeror would be responsible for cooperating with any necessary reviews and for incorporating any required mitigation. *See* AR, Tab 14, RLP, ¶¶ 2.11(B), 5.01.

On March 11, GSA notified SEC of its intent to award the lease to CJN, and requested reimbursable work authorizations from SEC while GSA prepared a final occupancy agreement incorporating the anticipated lease's terms. AR, Tab 56(k), Letter from GSA Contracting Officer, at 1-2. On March 17, SEC responded to GSA's March 11 letter and declined to provide the requested authorizations; SEC reiterated its concerns with respect to the RLP's methodology for accounting for the price of the potential purchase options and noted the potential impacts of the coronavirus pandemic on the SEC's ability to timely resolve any lease-related issues. AR, Tab 56(i), Letter from SEC, at 1. The two agencies continued to engage on this matter unsuccessfully for several months. *See, e.g.*, AR, Tabs 56 (k), (l), (m), Correspondence between SEC and GSA. On January 19, 2021, SEC notified GSA that, in light of the impending change of administrations, it would defer resolving the matter until the new administration took office. AR, Tab 56(n), Letter from SEC, at 1. Following meetings in the spring of 2021, SEC executed a new occupancy agreement based on the completed evaluation using GSA's proposed methodology for evaluating the price of the purchase options. *See* AR, Tabs 42 and 56(p), SEC Email & Accompanying Occupancy Agreement.

While GSA worked with SEC to secure an approved occupancy agreement, GSA continued its progress on the procurement. Throughout June 2020, GSA and CJN had a number of exchanges to clarify and correct the initial draft lease provided to CJN in March. *See* AR, Tabs 61(a) – (f), Correspondence between CJN and GSA; *see also* Tab 39, Aug. 30, 2020 CJN Executed Version of Lease. GSA's work on the procurement continued through 2021. For example, on April 19 and May 11, respectively, GSA requested and received supporting information that CJN had sufficient authorization to represent all of the owners of the awardee's proposed site. *See* AR, Tabs 57(p) and (s), Emails between GSA and CJN.

On April 22, the contracting officer notified GSA's Regional Historic Preservation Officer (RHPO) for the National Capital Region that CJN was the apparent successful officer. Pursuant to the requirements of the National Historic Preservation Act (NHPA), 50 U.S.C. § 306108, GSA is required to consider the direct and indirect efforts a project has on historic resources, including the effects on the structure or site where the work will take place, as well as the effect that the project may have on adjacent historic properties and districts. *See, e.g.*, Decl. of RHPO, ¶¶ 2, 4. Per RLP ¶ 2.12, National Historic Preservation Act Requirements – RLP, and ¶ 5.01, Cooperation with Government NEPA/NHPA Responsibilities, offerors were required to cooperate with GSA's compliance with applicable NHPA requirements. For example, offerors agreed to provide any necessary information about or access to the proposed site in order for GSA to comply with its responsibilities to coordinate with applicable local, state, or federal regulatory agencies. AR, Tab 14, RLP, ¶ 5.01. Additionally, offerors were instructed that GSA would provide the apparent successful offeror with written notice of any mitigation efforts that must be taken specifically related to its proposed site; the apparent successful offeror would then either need to accept and implement the proposed mitigation at no additional cost to the government or withdraw its offer. *Id.*; *see also id.*, ¶ 2.12(E).

On May 11, GSA and CJN met with the District of Columbia State Historic Preservation Officer (DC SHPO). Based on that discussion, it was determined that part of the awardee's proposed design--specifically, a proposed elevated bridge spanning O Street N.E.--would negatively impact the L'Enfant Plan, a historically significant district resource. The concern, however, could be mitigated by removing a proposed overhead bridge from the awardee's design. On May 28, the DC SHPO concurred that the proposed mitigation would result in a finding of no adverse impact as to above-grade historic resources. Decl. of RHPO, ¶ 4. Based on this proposed mitigation, CJN updated its design to remove the bridge at no cost to the government. *See, e.g.*, AR, Tabs 62(g) and (h), Email and Attachment from CJN to GSA.

On April 29, the contracting officer prepared a memorandum documenting his determination that CJN was financially responsible. Specifically, the contracting officer reviewed three potential lenders' term sheets and a letter of interest from a fourth potential lender, and concluded that the awardee would be able to obtain sufficient financing for the project. AR, Tab 40, Financial Responsibility Memo. Between May and September 15, GSA and CJN had multiple exchanges clarifying and updating the terms of the lease. *See, e.g.*, AR, Tabs 61(g) – (r), Email Exchanges Between GSA and CJN. For example, on July 29, CJN provided an updated project schedule. In this regard, CJN's previously submitted project schedule was based on a proposed award date of March 1, 2019; the awardee's revised project schedule was based on an anticipated September 1, 2021 award date. *Compare* AR, Tab 28, CJN First Revised Proposal, at 40 *with* Tab 57(v), CJN Updated Project Schedule, at 4.

On September 3 and 8, respectively, CJN provided an updated term sheet from one of its four proposed lenders, and a letter from another proposed lender expressing its

continued interest in providing financing for the project. *See* AR, Tabs 57(s) and (y), Emails with Attachments from CJN to GSA. On September 14, CJN's counsel provided GSA with a letter further clarifying the ownership of the proposed sites and CJN's authorization to represent all of the owners, along with supporting deeds and organizational charts. AR, Tab 57(z), Email with Attachments from CJN's Counsel to GSA. On September 27, the contracting officer prepared an updated memorandum for the file confirming his prior determination with respect to CJN's financial responsibility. On September 30, CJN and GSA executed the lease. AR, Tabs 48 and 57aa, Executed Lease and Transmittal Email. The total annual rent for the initial 15-year term is $66,240,186; the total annual rent and tenant improvement allowance for the 10-year option period is $33,131,075.[3] AR, Tab 48, Executed Lease, ¶¶ 1.03, 1.06 (prices round to nearest whole dollar). Thus, if the full 25-year lease term is exercised, the total value of the lease is approximately $1.3 billion.

After receiving notice of award, Second Street promptly requested a debriefing. On October 12, while awaiting its debriefing, Second Street filed its first protest (B-4175006.4) challenging alleged defects in the terms of the solicitation that it alleged only became apparent based on the proposed award to CJN. On November 2, after receipt of its debriefing, Second Street filed its second protest (B-417506.5) challenging, among other grounds, the agency's evaluation of proposals and resulting award decision. The protester subsequently amended its second protest twice (B-417506.6 and B-417506.7). Our Office consolidated the protests for resolution.

DISCUSSION

Second Street raises a multi-front set of objections to GSA's conduct of this procurement, nearly challenging every aspect of the acquisition. In an effort to streamline the protester's objections, we have grouped the protester's arguments into the following general categories: (1) changed, waived, or delayed requirements; (2) violation of 40 U.S.C. § 3307; (3) challenges to the evaluation of the awardee's non-price proposal; (4) challenges to the agency's price evaluation; (5) challenges to the agency's affirmative responsibility determination; and (6) unequal discussions. For the reasons that follow, we find no basis on which to sustain the protests.[4]

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[3] The approved prospectus included an estimated total annual rental rate ceiling of $63,7000,000 based on an anticipated award in fiscal year 2019. The prospectus also included a provision for escalation by 1.95 percent annually to the effective date of the lease to account for inflation. AR, Tab 4, Prospectus PDC-11-WA17, at 5 n.1. GSA determined, and Second Street does not contest, that CJN's proposed price fell within the prospectus's applicable adjusted ceiling. AR, Tab 45, Price Negotiation Memo. at 14.

[4] Second Street raises a number of collateral arguments. While our decision addresses the protester's more significant challenges, we have reviewed all of the protester's allegations and find that none provides a basis on which to sustain the protest.

Changed, Waived, or Delayed Requirements

Second Street raises a number of distinct, but related, allegations based on the length of time taken by GSA to complete this procurement. First, the protester alleges that GSA failed to reasonably consider the impacts of the intervening COVID pandemic on the government's requirements and offerors' respective technical and price proposals. In support of its allegations, the protester relied on various publically available materials including, for example: (1) a cancelled and subsequently re-released solicitation for a lease for space for another government agency reflecting a 30 percent reduction in sought square footage; (2) articles about SEC's COVID-related telework; (3) a U.S. Bureau of Labor Statistics article about potential implications for the labor market based on teleworking; and (4) articles about price increases for construction materials. *See* Protest (B-417506.4) at 20, and exh. J, Supporting Materials. The vast majority of the cited materials date from before August 2021, months before Second Street's October 12 protest filing. Second Street alleges that the agency should have considered these impacts and, at a minimum, allowed offerors the opportunity to submit revised proposals.

Our Office dismissed these allegations as untimely challenges to the terms of the solicitation. *See* Electronic Protest Docketing System (EPDS Dkt.) No. 20, Notice of Decision on Intervenor's Req. for Partial Dismissal. As we explained, when a protester challenges an agency's failure to amend a solicitation based on an agency's changed requirements, such a protest is analogous to a challenge to the terms of the solicitation. *Blue Origin Federation, LLC; Dynetcis, Inc.-A Leidos Co.*, B-419783 *et al.*, July 30, 2021, 2021 CPD ¶ 265 at 24. Our Bid Protest Regulations require that protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time; alternatively, if no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known. 4 C.F.R. § 21.2(a)(1). We have found that the alternative 10 day standard applies in situations when a solicitation impropriety becomes apparent after proposals have been submitted, but where there is no established closing time or no opportunity to submit revised proposals. *See, e.g.*, *Blue Origin Federation, LLC; Dynetics, Inc.-A Leidos Co.*, *supra* (dismissing as untimely post-award protest allegation that the government's requirements materially changed as a result of lower-than-requested program appropriations that were appropriated after proposals were submitted, but prior to award); *Peraton, Inc.*, B-416916.11, Feb. 8, 2021, 2021 CPD ¶ 88 (same, where protester knew or reasonably should have known of alleged changes in the agency's requirements, including those related to the COVID pandemic).

The central thesis of Second Street's argument is that GSA was obligated to amend the solicitation, and that the protester had no obligation to raise its concerns during the pendency of the procurement.[5] The protester's arguments, however, are fundamentally inconsistent with our regulations and decisions requiring an offeror to timely challenge an alleged solicitation defect. As we explained recently in *Peraton, Inc.*, "[p]ermitting a protester to, in effect, hold solicitation challenges in reserve until it becomes clear that they are unlikely to prevail in a competition is antithetical to the idea that allegations of solicitation improprieties should be resolved as early as possible in the procurement process." *Peraton, Inc.*, *supra*, at 6; *see also Del-Jen Education & Training Grp./Fluor Fed. Solutions, LLC*¸ B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 7 ("While [the protester] may have had no responsibility to notify the agency that its needs appeared to have changed, as the protester argues, we find that it was incumbent upon [the protester] to protest this issue, which concerns the fundamental ground rules of the procurement, within 10 days of when the basis of protest was known or should have been known."); *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (holding that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest").

We also note the potential impacts of the COVID pandemic on short- and long-term commercial leasing needs and telework prospects (as reflected in the publically-available sources cited in the protest) were not obscure considerations, unknowable to Second Street prior to award. Indeed, such considerations have been widely addressed across the federal government and in the media for many months during the COVID pandemic. *See, e.g.*, *COVID-19 Federal Agencies' Initial Reentry and Workplace Safety Planning*, GAO-22-104295, Oct. 2021; OMB, OPM, and GSA, *Integrating Planning for a Safe Increased Return of Federal Employees and Contractors to Physical Workplaces with Post-Reentry Personnel Policies and Work Environment*, Memo. M-21-25 (Washington, D.C.: June 10, 2021); *OPM Wants to See More Telework, Remote Work and 'Maxiflex' Schedules Post-COVID*, Gov't Exec. (July 27, 2021), available at https://www.govexec.com/workforce/2021/07/opm-guidance-highlights-post-covid-telework-retention-recruitment-tool/184090/ (last visited Jan. 12, 2022); *How Federal Agencies Will Proceed With Hybrid Workplaces*, Bloomberg Law (July 8, 2021), available at https://news.bloomberglaw.com/us-law-week/how-federal-agencies-will-proceed-with-hybrid-workplaces (last visited Jan. 12, 2022). Because an offeror such as Second Street, "exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the award[was] made,"

[5] We also note that Second Street did not, after receiving the full, unredacted version of the executed lease, file any supplemental protest allegations alleging that the government in fact waived any space or other requirements as a result of alleged pandemic or other telework-related bases. Similarly, the protester does not allege that CJN proposed a higher proposed fixed-price or that award was otherwise made at a price other than the one in CJN's final revised proposal.

Second Street's post-award objections are untimely, and, therefore, are dismissed.[6] *Inserso Corp. v. United States*, 961 F.3d 1343, 1352 (Fed. Cir. 2020).

Second Street next contends that GSA waived a material solicitation requirement by not requiring CJN to propose an occupancy date within the RLP's estimated occupancy dates of "2nd/3rd Quarter of 2023." AR, Tab 13, RLP Cover-Sheet, at 1. The protester alleges that SEC's announced move to the awardee's facilities in 2025 violates the RLP's mandatory occupancy date requirements. GSA counters that the estimated occupancy date on the RLP's cover-sheet was only an estimate, and that the RLP clearly established an occupancy date within 1,060 days of the date of lease award. The agency submits that CJN's proposed occupancy date is consistent with the RLP's terms, and that an occupancy date within calendar year 2025 complies with the RLP's terms based on the September 30, 2021 lease award date.

When a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *ERP Servs., Inc.*, B-419315, Feb. 24, 2021, 2021 CPD ¶ 85 at 5. For the reasons that follow, GSA's interpretation of the RLP is the only reasonable interpretation, while Second Street's contrary interpretation, which is facially inconsistent with the RLP's plain terms, is not.

The RLP unambiguously directed that "[o]ccupancy is required in accordance with the schedule outlined in the Schedule for Completion of Space paragraph under the Lease." AR, Tab 14, RLP, ¶ 1.02(G). The applicable Schedule for Completion of Space paragraph of the accompanying lease established deadlines for when an offered space must be ready for the government's use, depending on whether the offered space was existing or would be the result of new construction. Relevant here, the provision stated that "[i]f Lease requirements are being satisfied through the construction of a new building(s), all work required to prepare the Premises as required in this Lease [must be] ready for use not later than 1,060 Working days following Lease Award."[7] AR, Tab 15, RLP amend. No. 1, at 3. Therefore, the RLP and lease unequivocally require occupancy for new construction by 1,060 days from the date of award. Based on the

[6] Second Street also alleged that the agency unreasonably failed to amend the RLP to incorporate an updated wage determination issued by the Department of Labor in December 2020. *See* Protest (B-417006.4) at 23. We similarly dismissed this untimely post-award challenge to the terms of the solicitation. *See Central Texas College*, B-309947, Oct. 12, 2007, 2007 CPD ¶ 187 at 6 n.2 (dismissing as untimely post-award protest allegation that the solicitation failed to incorporate the correct wage determination).

[7] The lease defined a "Working day" as a weekday, excluding Saturdays, Sundays, and Federal holidays. AR, Tab 14, RLP, Draft Lease, ¶ 2.01(S).

September 30, 2021 award date, there is no credible dispute that an occupancy date within calendar year 2025 would comply with the RLP's terms.

Notwithstanding the plain text of the RLP, Second Street argues that the cover-sheet's estimated occupancy date, the only actual date included in the RLP materials, has to be controlling because "it would be utterly nonsensical for the RLP not to have a required occupancy date for offerors to prepare for and submit plans and schedules in accordance with." Supp. Protest & Comments at 10. This argument is patently unreasonable. Contrary to the protester's objections, the RLP in fact established an occupancy date, *i.e.*, award plus 1,060 Working days. In this regard, there is nothing "nonsensical" with the agency having declined to include a fixed occupancy date in the RLP where it established definite occupancy date requirements based on when award would be made. Indeed, the history of this procurement--including no less than 5 prior protests--demonstrates the reasonableness of the agency's decision to use milestones as opposed to firm dates for the purposes of project scheduling. Moreover, the protester's interpretation would elevate an estimate over a firm, unambiguous requirement. Stated simply, the protester's proffered interpretation, which is inconsistent with the plain language of the RFP, is not reasonable. *Constructure-Trison JV, LLC*, B-416741.2, Nov. 21, 2018, 2018 CPD ¶ 397 at 3; *BICALLIS LLC*, B-415639, Feb. 1, 2018, 2018 CPD ¶ 90 at 4. Thus, Second Street's objections, which are based on a patently unreasonable interpretation of the solicitation, fail to provide a basis to conclude that the agency waived a material solicitation requirement.

Finally, Second Street alleges that GSA violated its statutory obligation to make a reasonably prompt award. Specifically, federal agencies are generally required to award contracts with "reasonable promptness." 41 U.S.C. § 3703(c). Notwithstanding the foregoing, however, we have recognized that a delay in meeting procurement milestones generally is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement. *See, e.g.*, *Federal Sales Servs., Inc.*, B-237978, Feb. 28, 1990, 90-1 CPD ¶ 249; *American Fuel Cell and Coated Fabrics Co.*, B-234395, Feb. 21, 1989, 89-1 CPD ¶ 183; *Tri-Flite, Inc.*, B-229926, B-229926.4, July 28, 1988, 88-2 CPD ¶ 124.

We have further explained that we generally will not review such challenges absent a showing of improper conduct on the part of the procuring agency. For example, we have found no basis to consider a protest that the agency failed to act with reasonable promptness where delays were the result of protests and litigation. *See, e.g., Trim-Flite, Inc.*, *supra*; *McDonald Welding & Machine Co.*, B-227004, Apr. 14, 1987, 87-1 CPD ¶ 409. Similarly, we declined to consider a protest challenging a 12-month delay due to the agency's need to complete necessary audits. *Federal Sales Servs., Inc.*, *supra*. We similarly found no basis to infer bad faith on the part of the agency where the procurement was delayed due to the need to comply with small business set-aside rules and as the result of discovering asbestos during building renovations. *Logistical Support, Inc.*, B-230190.2, Oct. 19, 1988, 88-2 CPD ¶ 369.

As in the foregoing examples, we find no basis to infer that unreasonable or improper agency conduct unreasonably delayed the agency's award. Despite Second Street's allegations of dilatory conduct on the part of GSA, the record reflects the opposite; notwithstanding several impediments and obstacles, GSA appears to have diligently pursued the successful completion of this procurement. First, the record reflects that GSA successfully defended its procurement against no less than five prior protests, including three filed by the protester. Notwithstanding successfully defending itself in litigation, including simultaneous litigation before two different forums, GSA continued with the evaluation of proposals and conduct of discussions.

The record also reflects that GSA was required to coordinate with several government agencies, including, as addressed above, negotiating a new occupancy agreement with SEC and coordinating NHPA issues with the DC SHPO. These activities were further complicated both by the change in administration in January 2021 as well as the impacts of the COVID pandemic. On balance, the record reflects that GSA utilized reasonable diligence to complete the procurement, and the protester has failed to point to any contrary evidence that GSA acted unreasonably or improperly. Therefore, we find no basis on which to sustain the protest.

Violation of 40 U.S.C. § 3307

Per 40 U.S.C. § 3307(a)(2), an appropriation to lease any space at an average annual rental in excess of $1,500,000 for use for public purposes may be made only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose. To secure consideration for the above-described approval, GSA is required to submit to Congress a prospectus of the proposed facility, including certain specific information about the proposed leasing action. *Id.* at (b). As addressed above, GSA submitted--and Congress approved--a prospectus for this procurement. *See* AR, Tab 14, RLP, ¶ 3.05(A) (stating that the "RLP is subject to an approved Prospectus PDC-11-WA17").

Second Street alleges that GSA violated the terms of the prospectus. Specifically, the protester contends that the agency has failed to execute sufficient leasing arrangements for the SEC in accordance with the prospectus's requirement that "[t]he Government will execute such interim leasing actions as are necessary to ensure continued housing of the tenant agency prior to the effective date of the new lease." AR, Tab 4, Prospectus, at 6 ("It is in the best interest of the Government to avert the financial risk of holdover tenancy."). Relevant here, Second Street, the incumbent landlord, and GSA have currently negotiated an extension of the incumbent lease only through September 2023. Based on the SEC's proposed occupancy of CJN's site sometime during 2025, the protester contends that GSA violated the terms of the prospectus by failing to have secured adequate interim leasing for SEC. For the reasons that follow, we dismiss this aspect of the protest because it raises matters outside of our bid protest jurisdiction.

Our Office is authorized to decide bid protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552(a). Although protests usually involve alleged violations of statutes that are indisputably procurement statutes, such as the Competition in Contracting Act (CICA), 31 U.S.C. § 3551-3557, we will hear protests alleging violations of other statutes or regulations when those statutes or regulations have specific procurement-related provisions. *See, e.g.*, *Stone Hill Park, LLC*, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 1 (addressing provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207); *Caddell Constr. Co., Inc.*, B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 1 (addressing provisions of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852); *Crane & Co., Inc.*, B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 1 (addressing provisions of statute concerning paper procurement, 31 U.S.C. § 5114(c)); *see also Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship*, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 4 (explaining that "our jurisdiction under CICA is based on whether the protest concerns a procurement for property or services by a federal agency, and that in exercising that jurisdiction we could properly consider the requirements of non-procurement statutes and regulations when they '*directly bear upon federal agency procurements*'") (emphasis added; quotations omitted).

Specifically as to the prospectus requirements of 40 U.S.C. § 3307,[8] we have considered protests alleging violations of the prospectus requirements when such requirements directly bear on a proposed lease or property transaction.[9] *Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship*, *supra*.

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[8] The prospectus requirements were originally codified at 40 U.S.C. § 606, but were subsequently moved to 40 U.S.C. § 3307 as part of a revision to Title 40 of the United States Code. *See* Revision of Title 40, United States Code, "Public Buildings, Property, and Works," Pub. L. No. 107-217, Aug. 21, 2002, 116 Stat. 1062.

[9] The intervenor and agency direct our attention to the United States Court of Appeals for the Federal Circuit's intervening decision in *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (Fed. Cir. 2018), *petition for panel rehearing and rehearing en banc denied*, 897 F.3d 1332 (Fed. Cir. 2018). In *Cleveland Assets*, the Federal Circuit affirmed the dismissal of a pre-award protest alleging a violation of 40 U.S.C. § 3307. The Federal Circuit held that the prospectus statute is an appropriations statute, not a procurement statute, and an alleged violation of an appropriations statute does not fall within the Court of Federal Claims's bid protest jurisdiction under 28 U.S.C. § 1491(b)(1), which provides that the Court of Federal Claims only has jurisdiction over challenges to statutes or regulations "in connection with a procurement or proposed procurement." *Cleveland Assets*, 883 F.3d at 1381. The intervenor and agency argue that our Office should dismiss Second Street's allegations in light of this persuasive authority.

For the reasons discussed above, we need not address the impact of the Federal Circuit's decision regarding the Court of Federal Claims's protest jurisdiction over alleged violations of 40 U.S.C. § 3307 on our prior interpretation of our jurisdiction under

(continued...)

Our Office has not addressed a significant number of cases alleging violations of the prospectus requirements. Three prior decisions addressing such alleged violations involved allegations that the government either failed to submit and obtain approval of its prospectus, or that the proposed award would exceed the prospectus ceiling approved by Congress. *See The Charles E. Smith Cos.*, B-277391, Sept. 25, 1997, 97-2 CPD ¶ 88 (dismissing post-award protest allegation as untimely because the protester alleged that an allowance would result in the lease exceeding the prospectus ceiling, but the agency's methodology was disclosed in the solicitation and therefore should have been raised prior to award); *440 E. 62nd St. Co.*, B-276787, July 24, 1997, 97-2 CPD ¶ 30 (denying protest allegation that agency failed to submit a prospectus to Congress because the anticipated lease value was below the statutory threshold); *Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship*, *supra* (denying protest when award was made within the prospectus ceiling). In the fourth decision, we denied a protest alleging that a solicitation's inclusion of permit requirements violated the adopting House resolution's call for "full and fair consideration of lease construction proposals" because nothing in that language, in our view, precluded the inclusion of reasonable permitting requirements. *JBG/Naylor Station I, LLC*, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 6 n.5.

Thus, our decisions exercising jurisdiction over alleged violations of 40 U.S.C. § 3307 specifically, have looked at whether an agency has complied with procurement requirements applicable to the specific procurement at issue. In this regard, our review was limited to the impact of procurement provisions that had a direct bearing on the procurement at issue. Second Street's argument, however, is of a fundamentally different variety.

Specifically, Second Street alleges that GSA has failed to comply with the terms of the prospectus by failing to negotiate either a continuation lease with the protester (the incumbent landlord) or another landlord for the period between the end of Second Street's incumbent lease and the SEC's occupancy of the awardee's proposed site. Even assuming that the protester's allegations are correct, they have no bearing on the RLP at issue or the agency's evaluation of proposals and award decision for the challenged lease.[10] Whether or not GSA has complied with collateral obligations to enter into a separate, unrelated contractual agreement(s) for interim leasing is unrelated to the procurement at issue, and, therefore, are not for our consideration as part of the protester's challenge to the award of the lease to CJN. Therefore, we dismiss this aspect of the protest.

(...continued)
CICA because we find that our Office does not have jurisdiction over the protester's specific allegations in this case for different reasons.

[10] As addressed below, the protester argues that the agency was required to account for any additional potential holdover or other rent in its present value price evaluation. For the reasons addressed herein, we find no merit to those arguments.

Challenges to Evaluation of Non-price Proposals

Second Street next alleges that GSA unreasonably evaluated CJN's non-price proposal. Specifically, the protester contends that the awardee failed to satisfy at least four distinct requirements, and, therefore, should have been evaluated as technically unacceptable and/or non-responsible, and ineligible for award. In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. *MMI Capital, LLC*, B-419335, B-419335.2, Jan. 21, 2021, 2021 CPD ¶ 326. For the reasons that follow, we find no basis on which to sustain the protest.

Neighborhood

The RLP required that the offered "[s]pace shall be located in a prime commercial office district with attractive, prestigious, and professional surroundings with a prevalence of modern design and/or tasteful rehabilitation in modern use." AR, Tab 14, RLP, ¶ 1.05(A). Second Street contends that the awardee's proposed site fails to satisfy this requirement because the surrounding neighborhood "is a heavily residential area, with limited retail," and "overall is run-down, and is not well maintained or particularly modern." Protest (B-417006.5) at 21 and exh. N (District of Columbia Zoning Map).

GSA disagrees with the protester's characterization, pointing to multiple factors. For example, the contracting officer notes that the proposed facility is in proximity to a number of amenities, has access to public transportation, has appropriate zoning for the property, and is located in the RLP's delineated central employment area. Next, the contracting officer notes that GSA has multiple office leases and properties located within close proximity, including the headquarters of the Peace Corps and Bureau of Alcohol, Tobacco, and Firearms, and the District of Columbia government leases 350,000 rentable square feet (RSF) of office space in a nearby building. The contracting officer further explained that the property is directly adjacent to or across from a Hyatt hotel and a 200-unit condo building (which will help promote the continued presence of various amenities). *See* COS at 5-6; AR, Tab 26, Amenities Analysis Memo., at 7-8 (providing a map of the adjacent neighborhood reflecting amenities and other government and commercial offices).

On this record, we find that the contracting officer has provided a reasonable and adequate explanation supporting his determination that the neighborhood satisfied the RLP's minimum requirements. While we find that the agency's contemporaneous analysis and response to the protest is sufficient to demonstrate the reasonableness of its evaluation, we additionally note that Second Street's invitation for us to review publically available information from the District of Columbia further supports the reasonableness of the agency's evaluation. In this respect, the awardee's proposed site is located in the NoMa area of the city, which is located near the NoMa-Gallaudet U Metro station. AR, Tab 26, Amenities Analysis Memo., at 7. According to publically

available information maintained by the NoMa Business Improvement District,[11] within the broader NoMa area there is approximately 14.3 million of office square footage occupied by a variety of federal and District of Columbia government agencies and private businesses, more than 420,000 RSF of retail space, and 31 Leadership in Energy and Environmental Design-certified buildings (including 19 at the platinum or gold level). *See* NoMa Development Map (Nov. 2021), available at https://www.nomabid.org/mapstudies (last visited Jan. 12, 2022). Thus, the protester's disagreement with the contracting officer's judgment, without more, provides no basis on which to sustain the protest.[12]

Amenities

The RLP required offerors to demonstrate that sufficient amenities "currently exist" or "will exist by the Government's required occupancy date," and "are substantially likely to remain active and viable at that location throughout the terms of the Lease." AR, Tab 15, RLP, Amend. No. 1, at 2. Specifically, the RLP provided that:

> To meet the needs of SEC's employees, and the significant number of out of town and local visitors to SEC, amenities are to be located within the immediate vicinity of each offered building, but not to exceed 2,640 [walkable linear feet (WLF)][13] measured along accessibility compliant, paved pedestrian pathways from the main entrance of an offered building to the main entrance of the amenity, in sufficient size and number capable of accommodating the demand imposed by a facility of 4,500 employees and contractors, as well as guests consistent with events that may be held in the SEC Auditorium and other venues (or in the case of a multiple building solution, that building's proportional share of employees and guests) such as:

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[11] The NoMa Business Improvement District was created by the Council of the District of Columbia and Mayor in March 2007. *See "*About NoMA Bid," available at https://www.nomabid.org/about-noma-bid/ (last visited Jan. 12, 2022).

[12] Additionally, to the extent that Second Street objects to residential buildings being located near the awardee's proposed site, we note that the neighborhoods surrounding both the protester's and intervenor's proposed sites contain similar residential populations. *See* AR, Tab 26, Amenities Analysis Memo., at 2 (reflecting that the residential population within 1 mile of Second Street's proposed site is 54,539 compared to 60,928 for CJN's proposed site).

[13] 5,280 feet is one mile; therefore, 2,640 feet is one-half mile. "U.S. Survey Foot: Revised Unit Conversion Factors," *Nat'l Inst. Of Standards and Technology*, available at https://www.nist.gov/pml/us-surveyfoot/revised-unit-conversion-factors (last visited Jan. 12, 2022).

- A variety of fast-food, moderately priced dine-in, and table-service restaurants, operating during early morning and evening hours as well as during a normal business day so as to provide a variety of options for breakfast, lunch, and dinner

- USPS post office or mailing facility (*e.g.*, FedEx, UPS, etc.)

- Pharmacy

- Dry cleaners

- Coffee shop(s)

- Bank(s)

Id. at 1-2.

As to CJN's proposed site, the agency's contemporaneous amenities analysis found the following amenities within 2,640 WLF: (a) 26 food service options; (b) 1 post office or mailing facility; (c) 2 pharmacies; (d) 2 dry cleaners; (e) 5 banks; (f) 4 coffee shops; (g) 1 full service grocery store; (h) 4 hotels; (i) 10 automatic teller machines (ATM); and (j) 12 additional retail establishments. AR, Tab 26, Amenities Analysis Memo. at 1, 7-8. Based on these amenities, the agency concluded that the awardee's proposed site satisfied the RLP's minimum requirements. *See also* COS at 5-6 (explaining that the presence of hotels and condominiums would likely support the viability of amenities in the area).

Second Street attacks the reasonableness of the agency's evaluation. The protester primarily disagrees with the agency's conclusion that the awardee's site has access to a sufficient variety of food service and other amenity options, arguing that the location of the awardee's building is inferior to the location of the protester's building. The protester's disagreement with the agency's business judgment, however, provides no basis to object to the agency's decision. In this regard, we find our Office's analysis of a similar amenities provision in *Ralvin Pacific Dev., Inc.*, B-251283.3, June 8, 1993, 93-1 CPD ¶ 442, to be highly persuasive. In *Ralvin Pacific*, we found that the location of amenities requirement in that solicitation, as the one in this RLP, did not provide for a comparative assessment of competing offers, but, rather, "was simply a requirement that had to be met." *Id.* at 7.

As in *Ralvin Pacific*, the RLP in this case did not call for a comparison between Second Street's and CJN's proposed sites--the RLP provided for award on a LPTA basis. Thus, the RLP merely required the agency to evaluate whether there were adequate amenities near CJN's site. Although the protester raises a number of discrete challenges to the agency's underlying evaluation, Second Street does not challenge, and therefore effectively concedes, that CJN's site has access to at least multiple food service and coffee shop options, hotels, banks, and ATMs, as well as a pharmacy, a

mailing facility, and a grocery store. *See* Supp. Protest & Comments at 12-13 (raising discrete challenges, but not challenging all identified amenities). Additionally, the contracting officer considered that the presence of other buildings, including a hotel and condominium, would likely help maintain the viability of available amenities. COS at 5-6. Thus, even if we were to find that at least some of the protester's discrete objections had merit, the record would still support GSA's finding that multiple amenities are located near CJN's proposed site to satisfy the RLP's minimum technical acceptability requirements. On this record, the protester's disagreement with the agency's business discretion, without more, provides no basis on which to sustain the protest.

In addition to attacking the agency's contemporaneous evaluation, the protester also effectively invites our Office to conduct a reevaluation of the awardee's amenities based on alleged changes post-dating the agency's evaluation. In this regard, Second Street alleges that a number of the awardee's proposed amenities have closed. We decline the protester's invitation to conduct a new evaluation months after the agency's evaluation concluded. *Cf. Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc.*, B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 20 ("We find nothing objectionable in the agency's failure to consider information that was not available at the time it performed the past performance evaluation."). As addressed above, we do not reevaluate proposals as part of our bid protest review. *MMI Capital, LLC*, *supra*.

Parking

The RLP required "[o]n-site parking shall be available at a ratio of one (1) space for every 2,316 RSF of Space or contain at least 550 non-reserved spaces." AR, Tab 15, RLP, amend. No. 1, ¶ 2. Additionally, the RLP required 10 additional reserved spaces. AR, Tab 14, RLP, ¶ 1.02(C). CJN's final proposal identified 577 total parking spaces. AR, Tab 34, CJN FPR, at 93. Of these spaces, 564 are designated for the government, including 554 non-reserved spaces and 10 reserved spaces. AR, Tab 28, CJN First Revised Proposal, at 4, 65-66; *see also* Tab 48, Executed Lease, at 72-73.

Notwithstanding that CJN proposed an adequate number of reserved and non-reserved spaces consistent with the RLP's requirements, Second Street argues that CJN should have been evaluated as unacceptable because 13 of the 554 non-reserved spaces are "tandem" spaces, whereby two cars are proposed to park one in front of the other. The protester argues that such parking spaces "were not identified as acceptable." *See* Supp. Protest and Comments at 19. We find no merit to the protester's argument because there was no prohibition in the RLP against tandem parking spaces.

In this regard, we note that GSA expressly prohibited what it termed "stacked" parking for the 10 reserved spaces. Specifically, the RLP specified that the government "requires 10 structured/inside *non-stacked* parking spaces." AR, Tab 14, RLP, ¶ 1.02(C) (emphasis added); *see also id.*, Lease, ¶ 1.02(A) (incorporating the same requirement into the lease). In contrast, as addressed above, the non-reserved parking requirements did not include a similar prohibition. AR, Tab 14, RLP, ¶ 1.05(A). Thus,

GSA clearly indicated when "stacked" or "tandem" parking was prohibited in regard to the reserved spaces; we decline to infer, as argued by the protester, that the same prohibition applied by inference to the non-reserved spaces, which did not include such an express prohibition.

Security Requirements

The RLP incorporated applicable security requirements that "MAY BE INSTALLED IN THE LEASE SPACE." AR, Tab 14, exh. D, Security Requirements – Facility Security Level IV, at 112. Although offerors were tasked with pricing the requirements as part of their respective building specific amortized capital, the RLP further provided that "BECAUSE EACH BUILDING IS UNIQUE, THE FINAL LIST OF SECURITY COUNTERMEASURES WILL BE DETERMINED DURING THE DESIGN PHASE AND IDENTIFIED IN THE DESIGN INTENT DRAWINGS AND CONSTRUCTION DOCUMENTS." *Id.* After completion of the construction documents, the parties were to negotiate the costs for any such required measures. *Id.*

Second Street argues, based on its own purported analysis of CJN's proposed site, that it is questionable whether the awardee's building can comply with all of the applicable security requirements. We find no merit to the protester's challenge.

First, we note that the RLP does not establish that all of the listed security requirements will in fact be required for the awardee's site. As addressed above, the applicable security requirements document indicates that the requirements "may be installed," and that the "final list of security countermeasures will be determined during the design phase." Thus, the protester's allegations about what will be required and the awardee's ability to satisfy those requirements is based on speculation.

Regardless, even assuming that all of the security requirements will in fact be required for the awardee's site, we note that--other than the protester's analysis of the awardee's undeveloped proposed site--there is nothing in the awardee's proposal or otherwise in the record indicating that the awardee took exception to any of the requirements. In this regard, CJN explicitly confirmed--both in its proposal and in the executed lease--that it would comply with the RLP's applicable security requirements. *See* AR, Tab 19, CJN Initial Proposal, at 12 ("Pursuant to Exhibit D – Security Requirements, the Lessor agrees to comply with the latest Interagency Security Committee (ISC) requirements for Level 4 security, including but not limited to the requirements of Federal Security Level 4 attached to this Lease."); Tab 48, Executed Lease, ¶ 7.01 ("The Lessor agrees to the requirements of Federal Security Level 4 attached to this Lease in Exhibit E."). Second Street's speculation that CJN will not successfully perform its obligations under the lease presents matters of contract administration and/or the agency's affirmative responsibility determination, neither of which is properly for our consideration. *VariQ Corp.; Octo Consulting Grp., Inc.*, B-417135 *et al.*, Mar. 18, 2019, 2019 CPD ¶ 124 at 4 n.6; *Crown Point Sys.*, B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 10.

Financing

In the RLP section titled "Additional Submittals," offerors were required to include with their respective proposals:

> Satisfactory evidence of at least a conditional commitment of funds in an amount necessary to prepare the Space . . . and satisfactory evidence that Offeror's lender and all equity partners has approved the offered lease terms. . . . In addition, Offeror must identify with specificity satisfactory to the [leasing contracting officer] all information regarding proposed debt, as well as the total amount of equity invested in the building or project and its sources and applications, and provide evidence that all equity investors have approved the offered lease terms.

AR, Tab 14, RLP, ¶ 3.06(C).

In its first revised proposal, CJN included three detailed term sheets from financial firms proposing to provide financing for the project; the term sheets contemplated loan financing of at least $575 million. AR, Tab 28, CJN First Revised Proposal, at 13-34. Additionally, the awardee provided a letter from a fourth potential lender expressing its interest in providing financing of up to $690 million. *Id.* at 36. On April 29, 2021, the contracting officer prepared a memorandum to the file finding the awardee financially responsible.[14] Specifically, based on his review of the information provided by the potential lenders, he concluded that the awardee "will be able to obtain debt and equity financing in an amount large enough to cover all costs associated with delivering" the proposed space. AR, Tab 40, Financial Responsibility Memo. at 1. On September 3, CJN provided a new term sheet for one its original proposed lenders again confirming that firm's interest in providing financing of up to $625 million. AR, Tab 57(x), Updated Term Sheet. Additionally, on September 8, CJN provided a letter from another of its original proposed lenders confirming that it was still "extremely interested in pursuing this project," and indicating its willingness to provide financing of up to $625 million. AR, Tab 57(y), Letter from Proposed Lender to GSA. On September 27, the contracting officer prepared a second memorandum to the file confirming his determination that CJN was financially responsible. AR, Tab 46, Second Financial Responsibility Memo. at 1.

Second Street argues that the term sheets and letters provided by the awardee failed to satisfy the specific requirements set forth in ¶ 3.06(C) of the RLP. Specifically, the protester contends that the term sheets were only proposed terms subject to further negotiation and definitization, and, therefore, were neither "conditional commitments of funds" nor reflected that the lender has approved the offered lease terms. Even accepting for the sake of argument Second Street's contention that GSA waived certain

[14] In this regard, we note that a firm's financial resources to perform a contract, or its ability to obtain them, typically implicate the firm's responsibility. FAR 9.104-1(a).

discrete requirements for the proof of financing, we nonetheless find no basis on which to sustain the protest because the protester has failed to establish any reasonable possibility of competitive prejudice.

Competitive prejudice is an essential element of any 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, even if deficiencies in the procurement are found. *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 10; *HP Enter. Servs., LLC*, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6. We have explained that, even where an agency clearly should have amended a solicitation or otherwise apprised vendors that it had waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility it was prejudiced by the agency's actions. *Complete Packaging and Shipping Supplies, Inc.*, B-412392 *et al.*, Feb. 1, 2016, 2016 CPD ¶ 28 at 8; *see also Illustrious Consultants*, B-416914, Dec. 28, 2018, 2018 CPD ¶ 434 at 3 ("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 firms.").

Competitive prejudice from such a waiver of solicitation requirements exists only where (i) the requirement was not similarly waived for the protester, or (ii) the protester would have been able to alter its proposal to its competitive advantage if given the opportunity to respond to the relaxed term. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 7; *Phoebe Putney Memorial Hospital*, B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4. We have further clarified that, in cases where a protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. *Glem Gas S.p.A.*, B-414179, Feb. 23, 2017, 2017 CPD ¶ 60 at 4.

Here, Second Street cannot demonstrate a reasonable possibility of competitive prejudice. Based on the protester's response to RLP ¶ 3.06(C), Second Street will not rely on any debt financing to satisfy its obligations under the lease. *Cf.* Supp. Memorandum of Law at 9 (explaining that Second Street, as the incumbent landlord, will avoid an estimated $[DELETED] in tenant improvement and security costs). Rather, the protester appears to propose to have its indirect owners self-fund any associated performance costs. In this regard, Second Street submitted financial capacity information for two of the four members of the joint ventures that own the proposed

buildings; the two members at issue together own approximately 90 percent of the beneficial interest in the buildings.[15] AR, Tab 17, Second Street Proposal – Vol. I, at 58.

Thus, the parties submitted substantially different approaches to performing and financing for the project (*i.e.*, Second Street is proposing incumbent space and to the extent it will need to outlay additional costs it will effectively self-fund those requirements versus CJN proposing new construction funded by debt financing). In light of these material differences, it is not apparent how Second Street would have materially changed its proposal to its competitive advantage had it known that the agency would relax the financial capacity demonstration requirements applicable to potential debt financing. *See Blue Origin Federation, LLC; Dynetics, Inc.--A Leidos Co.*, *supra*, at 74 (finding no competitive prejudice from an agency's relaxation of a material performance requirement where the protester and awardee submitted materially different technical approaches such that the protester could not demonstrate how it would have similarly benefitted from the waiver); *see also Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1381 (Fed. Cir. 2009) ("Without a showing of harm specific to the asserted error, there is no injury to redress, and no standing to sue.'").

To the extent that Second Street argues that it was prejudiced because CJN should have been found technically unacceptable, such arguments are legally insufficient. As addressed above, the relevant inquiry is whether the protester would have submitted a more competitively advantageous offer had it known of the waiver, not whether the awardee would have been unsuccessful but for the waiver. *Glem Gas S.p.A.*, *supra*; *see also Gemini Tech Servs., Inc.*, B-418233.5, B-418233.6, Mar. 2, 2021, 2021 CPD ¶ 111 at 4 (denying protest for lack of prejudice where the protester alleged that the agency unreasonably waived the requirement for the awardee to itemize fringe benefit components where the protester failed to allege how waiver of the requirement would have resulted in the protester offering a lower proposed price, and only made a general allegation that it was prejudiced by the agency not excluding the awardee as technically unacceptable). Thus, on this record, we find no basis on which to sustain the protest.

Challenges to Price Evaluation

Second Street raises two primary objections to the agency's evaluation of CJN's proposed price. First, the protester alleges that the agency failed to conduct a price realism evaluation as required by the General Services Acquisition Manual (GSAM). Second, Second Street challenges the agency's net present value calculation, alleging that the agency failed to reasonably account for certain costs that will be incurred by the government. Most significantly, the protester argues that the agency failed to account, when calculating "move-related" costs, for the additional costs that the government will

[15] We note that nothing in the protester's proposal section responding to RLP ¶ 3.06(C) explicitly evidences that either "all equity partners" or "all equity investors" have approved the offered lease terms.

incur to house the SEC until the awardee's new construction is ready for occupancy. For the reasons that follow, we find no merit to either objection.

As to the price realism arguments, the provision of the GSAM relied on by Second Street requires the contracting officer to "[e]valuate prices and document the lease file to demonstrate that the proposed contract price is fair and reasonable," and "review the elements of the offeror's proposed rent to analyze whether the individual elements are realistic and reflect the offeror's clear understanding of the work to be performed." 48 C.F.R. § 570.306(b). The protester contends that this provision created a legal requirement for GSA to conduct a price realism evaluation.

Fatal to Second Street's arguments, however, is that the RLP neither provided that GSA would evaluate price in accordance with 48 C.F.R. § 570.306(b) nor otherwise provided for a price realism evaluation. Rather, the RLP only provides that award would be made to the LPTA offer, and includes a detailed present value price evaluation formula that does not include a price realism component.[16] AR, Tab 14, RLP, ¶¶ 4.03(A), 4.09. Thus, even assuming that the protester is correct that the GSAM required GSA to conduct a price realism evaluation, nothing in the RLP itself indicated that GSA would evaluate proposed prices in this manner. Rather, the RLP set forth the explicit method for how the agency would evaluate price, and to the extent the RLP's unambiguous methodology did not comply with the GSAM's requirements to evaluate proposed prices for realism as understood by Second Street, the protester was required to timely challenge prior to award this patent defect in the RLP's terms.

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[16] The RLP also incorporated 48 C.F.R. § 552.270-1, Instructions to Offerors – Acquisition of Leasehold Interests In Real Property, which reserved the government's right to reject a proposal as unacceptable if the prices proposed were materially unbalanced between line items or subline items. 48 C.F. § 552.270-1(e)(6). Second Street initially alleged that the awardee's proposal should have been rejected as unbalanced because "*all* of the prices proposed by Awardee are unrealistically low," or, alternatively, discrete elements were "materially *understated* and unbalanced." Protest (B-417006.5) at 28 (emphasis added).

We previously dismissed this argument as legally and factually insufficient. *See* EPDS Dkt. No. 43, Notice of Decision on Intervenor's Req. for Dismissal, at 1-2. Specifically, to prevail on an allegation of unbalanced pricing, a protester must show that one or more prices in the allegedly unbalanced proposal are overstated; it is insufficient for a protester to show simply that some line item prices in the proposal are understated. *First Financial Assocs., Inc.*, B-415713, B-415713.2, Feb. 16, 2018, 2018 CPD ¶ 76 at 7. Therefore, in the absence of any allegation that the awardee proposed any overstated line items, we dismissed the protester's allegation as a legally and factually insufficient derivative of its price realism challenge. EPDS Dkt No. 43, Notice of Decision on Intervenor's Req. for Dismissal.

We have repeatedly explained that where a protester fails to challenge an obviously flawed evaluation scheme, including a price evaluation scheme, prior to the time for receipt of initial proposals or quotations, we will consider a post-award challenge to the scheme as untimely. 4 C.F.R. § 21.2(a)(1); *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 10; *NaphCare, Inc.*, B-406695, B-406695.2, Aug. 3, 2012, 2012 CPD ¶ 246 at 8-9; *Ball Aerospace & Techs. Corp.*, B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 5. Thus, we dismiss Second Street's untimely post-award challenge to the RLP's pricing evaluation scheme.

Second Street also alleges that GSA erred in calculating the present value of proposals because the agency did not account for the holdover or additional rent that the government will incur between the end of SEC's current lease in September 2023 and the proposed 2025 occupancy for the awardee's new building. Specifically, the protester argues that GSA was required to increase the present value of CJN's proposal to account for the holdover or additional rent that the government will need to pay either to Second Street or another landlord after the existing lease with Second Street expires in September 2023 and when SEC takes occupancy of CJN's buildings in 2025. To support its position, Second Street argues that the RLP required GSA to account for "[t]he cost of relocation of furniture, telecommunications, replication costs, and other move-related costs, if applicable." AR, Tab 14, RLP, ¶ 4.09(C)(7)(e).

GSA disagrees with the protester's interpretation of the RLP. The agency argues that the cited provision required GSA to only account for the costs actually incurred in the physical moving of the SEC to new facilities, including associated costs to prepare the property. GSA argues that the clause's natural interpretation is limited to similar moving-related costs as those specifically enumerated (*i.e.*, costs to relocate furniture, establish telecommunications, replicate the prior space), and would not include additional leasing costs that will be incurred by the agency during the period between when the protester's incumbent lease expires and when the awardee's site is ready for occupancy in accordance with the RLP's award plus 1,060 working days occupancy requirement. In this regard, the agency argues that the protester's interpretation would allow Second Street to maintain an unfair incumbent competitive advantage.

As addressed above, when a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *ERP Servs., Inc.*, *supra*. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.* For the reasons that follow, we do not find Second Street's interpretation to be reasonable.

As an initial matter, we agree with the agency that the term "other move-related costs" should be interpreted in light of the specifically enumerated associated costs preceding such other costs in the operative RLP provision.[17] The specifically enumerated costs preceding the term "other move-related costs" all pertain to the costs necessary to physically move the SEC from its existing space to the new space and to standup the SEC's operations. The protester's proffered interpretation would unreasonably seek to expand that term to include costs not specifically related to physically moving and standing up the SEC's operations at the new site.

Additionally, we find the protester's interpretation is unreasonable because it would set up an improper apples-to-oranges comparison of offerors' proposed prices. In this regard, the agency's interpretation established a reasonable means to compare the costs associated with the initial 15-year term of CJN's proposal versus the initial 15-year term of Second Street's proposal. In contrast, the protester's interpretation would result in an unequal comparison. Specifically, Second Street argues that the present value of its 15-year initial term should have been compared the present value of CJN's initial 15-year term *plus* either Second Street's (or another landlord's) proposed rent for the approximate 15 months between the date of award to CJN and SEC's proposed 2025 occupancy of CJN's space. Thus, Second Street argues for a scenario where its initial 15-year term present value would be compared to a longer term for CJN. Such a result would not result in a fair comparison of the lease prices here. Therefore, we find that Second Street's proposed interpretation is not reasonable.

Challenge to Agency's Affirmative Responsibility Determination

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will only hear a protest challenging an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. We have further explained that the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *VSE Corp.*, B-417908, B-417908.2, Nov. 27, 2019, 2019 CPD ¶ 413 at 6; *United Capital Investments Grp.,* B-410284, Nov. 18, 2014, 2014 CPD ¶ 342 at 2.

Second Street challenges the agency's affirmative responsibility determination for CJN, arguing that the contracting officer failed to reasonably consider federal criminal

[17] The *ejusdem generis*, or "of the same kind or class," principle of contract and statutory interpretation provides that, where a general word or phrase follows a list of specific terms, the general word will be interpreted to include only items of a similar nature to the terms specified. *Ejusdem Generis*, Black's Law Dictionary (11th ed. 2019); *Administrative Office of the U.S. Courts-California E-Waste Recycling Fee*, B-320998, May 4, 2011, at 16 (quotation omitted).

convictions for one of CJN's principal owners and its chief financial officer (CFO). In this regard, the protester points to the principal's 2006 conviction for wire fraud and the CFO's 2007 conviction for tax evasion. *See* Supp. Protest (B-417006.6), exh. O, News Articles Regarding Convictions, at 88-96. We find no basis to sustain the protest on this basis.

As an initial matter, we have explained that a criminal conviction, in and of itself, will not necessarily preclude an affirmative determination of responsibility. *Nilson Van & Storage, Inc.*, B-310485, Dec. 10, 2007, 2007 CPD ¶ 224 at 5. In this regard, we have recognized that it is within a contracting officer's discretion to consider the passage of time between the conviction and proposed award. For example, in *Nilson Van & Storage, Inc.*, we dismissed an allegation that a contracting officer unreasonably failed to consider a prior criminal conviction that was outside of the FAR's mandatory 3-year disclosure period. *Id.; see also* FAR provision 52.209-5(a)(1)(i)(B) (requiring certification with respect to whether the "Offeror and/or any of its Principals" have, "within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for" enumerated offenses).[18]

In any event, in response to the protest, the contracting officer explained that he was generally aware of the convictions. However, his responsibility determination took into account other factors that ultimately supported his decision to find the awardee responsible, including: (i) the passage of time since the convictions; (ii) that neither the offeror nor the principal at issue are on the suspended or debarred excluded parties list; (iii) that there were no mandatory disclosures in the offeror's representations and certifications with respect to the awardee or its principals during the preceding three-year period pursuant to FAR provision 52.209-5; and (iv) that the awardee's corporate family currently holds multiple leases with GSA. COS at 12-13; *see also* AR, Tab 44, System for Award Management Exclusion & Responsibility Checks. To the extent that the protester disagrees with the substantive judgment of the contracting officer, such disagreement provides no basis to challenge the contracting officer's affirmative responsibility determination. *Precision Standard, Inc.*, B-310684, Jan. 14, 2008, 2008 CPD ¶ 32 at 4; *Nilson Van & Storage, Inc.*, *supra*, at 3.

Unequal Discussions

Second Street raises two distinct lines of objections to the agency's conduct of discussions, alleging that GSA engaged in unequal and disparate discussions. First, the protester alleges that the agency impermissibly encouraged CJN to reduce its price,

[18] Although the FAR's suspension and debarment rules are not directly applicable, we additionally note that those procedures generally provide that a debarment from federal contracting should generally not exceed 3 years. *See* FAR 9.406-4(a)(1). Further, while that period may be extended, any such extension should not be based "solely on the basis of facts and circumstances upon which the initial debarment action was based." *Id.* at (b).

which was the determinative factor in this LPTA procurement. Second, Second Street alleges that GSA unreasonably engaged in post-FPR discussions only with CJN. The protester contends that such discussions resulted in the awardee making material proposal revisions in order to make its proposal technically acceptable. For the reasons that follow, we find no merit to the protester's objections.

Agencies have broad discretion to determine the content and extent of discussions, and we limit our review of the agency's judgments in this area to a determination of whether they are reasonable. *InfoPro, Inc.*, B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 9. Discussions must be meaningful, equitable, and not misleading. *Integrated Medical Solutions, LLC*, B-418754, B-418754.2, Aug. 20, 2020, 2020 CPD ¶ 287 at 5. In this regard, although discussions may not be conducted in a manner that favors one offeror over another, discussions are not required to be identical among offerors and need only be tailored to each offeror's proposal. *HP Enter. Servs., LLC; Aon Nat'l Flood Servs.*, B-413967 *et al.*, Jan. 17, 2017, 2017 CPD ¶ 26 at 9.

Second Street first alleges that GSA "improperly prompted" the awardee to reduce its proposed price. The protester implies that the agency improperly disclosed sensitive information to CJN. In support of its assertion, the protester points to an agency memorandum noting with respect to CJN's proposal that: "[t]his offer is pretty close to the $50/RSF prospectus max. Assuming that we have a compliant offer from the incumbent landlord, do they believe this rate is competitive enough to win?" AR, Tab 23, Discussion Agenda/Negotiation Objectives Memo. at 3. The protester's complaints are without merit.

First, the cited document was an internal planning document that was not disclosed outside of the government. *See* Supp. COS at 3. There is nothing in the record to suggest that GSA engaged in any improper conduct by disclosing Second Street's pricing information or agency source selection sensitive information to CJN. Rather, the record reflects that the agency merely encouraged the awardee to reduce its price--and in the same way it encouraged Second Street to reduce its price. *See, e.g.*, AR, Tab 32, Request for Final Proposal Revision to CJN, at 1 ("This is the final opportunity to review your proposed offer and to address downward movement in your pricing so as to provide the Government with your most competitive rental rate and option prices."); *see also* Tab 31, Request for Final Proposal Revision to Second Street, at 1 (containing the identical price-reduction invitation).

In any event, this was an LPTA procurement where award would ultimately turn on price. The record reflects that both offerors were encouraged by the agency to reduce their respective proposed prices. Indeed, GSA appears to have provided Second Street with significantly more detailed discussions with regard to pricing than it provided to CJN. *See, e.g*, AR, Tab 24, Discussions Letter to CJN, at 1 (raising specific price concerns as to Second Street's high proposed (i) parking prices, (ii) renewal rates, (iii) lessor project management for tenant improvement construction rate, (iv) overtime heating, ventilation, and air conditioning rate, and (v) purchase prices).

Thus, under these circumstances where the agency encouraged both offerors to "sharpen [their] pencil[s]" and reduce their proposed prices, we find no basis to conclude that GSA acted unreasonably. *Science and Tech. Corp.*, B-254405 *et al.*, Dec. 14, 1993, 93-2 CPD ¶ 318 at 4. To the contrary, it appears that the protester's independent business judgment not to heed GSA's invitations to reduce its own price was why Second Street failed to submit the LPTA offer, not any improper conduct on the part of GSA.

The protester next alleges that the agency engaged in unequal post-FPR discussions only with CJN. Second Street alleges that, but for these unequal discussions, CJN's proposal would have been technically unacceptable and/or CJN would have been found non-responsible, and the awardee would have therefore been ineligible for award. The protester alleges without any supporting evidence or declarations that had the agency provided Second Street with an additional opportunity to submit a revised proposal, the protester would have meaningfully reduced its proposed price. For the reasons that follow, we find no basis on which to sustain the protest.

Second Street first complains that the agency unreasonably allowed CJN to clarify its parking plan. The record reflects that CJN provided an updated parking plan that merely numbered the spaces; no other changes to the previously submitted parking plan (*e.g.*, the number, composition, or location) were requested or proposed. *See, e.g.*, Tab 64(a), Email from CJN Counsel, at 1 ("Please note parking is the same. We added numbers to each space to make Exhibit clearer."). We fail to see how such an exchange that resulted in no material changes to the awardee's proposal was improper.

Second Street next contends that the agency impermissibly allowed CJN to submit an updated project schedule and evidence of potential financing. The protester argues that the agency could not have made award to CJN on the basis of its original proposed project schedule or financing information. Contrary to Second Street's allegations, however, the information requested was not to correct a deficiency or otherwise make CJN's previously submitted proposal technically acceptable, nor did it result in any change to the offeror's proposed price or compliance with the RLP's requirements.

In this regard, CJN's previously submitted project schedule was fully compliant with the RLP's occupancy date requirement because it proposed occupancy within 1,060 days of award. AR, Tab 28, CJN First Revised Proposal, at 40 (reflecting a proposed schedule from contract award of March 1, 2019 to tenant move-in of December 30, 2022, or approximately 954 working days). That schedule, however, was based on an award date of March 1, 2019. Due to the passage of time, GSA sought an updated schedule based on a significantly delayed award date in September 2021. CJN confirmed, via an updated project schedule, that it would still comply with the RLP's occupancy date requirements of delivering the building within 1,060 working days. *See* AR, Tab 57(v), Updated Project Schedule, at 4 (reflecting a proposed schedule from contract award of September 1, 2021 to GSA final acceptance on October 23, 2025, or approximately 1,031 working days). Thus, this verification of the awardee's commitment to complying with the RLP's occupancy date requirements had no impact

on the technical acceptability of its previous commitment to complying with the occupancy requirement or its total proposed price. It also bears repeating that this was a LPTA procurement and CJN's proposed schedule was not qualitatively assessed, but, rather, was merely evaluated to ensure compliance with the RLP's minimum requirements.

Similarly, the original financing documentation provided was sufficient for the government to determine that CJN was financially responsible. *See* AR, Tab 40, Financial Responsibility Memo. To the extent that the contracting officer elected to conduct further due diligence to confirm his prior financial responsibility determination, these actions did not constitute impermissible discussions or proposal revisions. In this regard, as addressed above, we note that a firm's financial resources to perform a contract, or its ability to obtain them, typically implicate the firm's responsibility. FAR 9.104-1(a). We have consistently stated that the rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility. *Engility Corp.*, B-413202, B-413202.2, Sept. 2, 2016, 2016 CPD ¶ 251 at 8. In this regard, the fact that an agency requests information regarding responsibility matters from only one offeror, does not establish that the agency engaged in improper or unequal discussions. *Cargo Transport Sys. Co.*, B-411646.6, B-411646.7, Oct. 17, 2016, 2016 CPD ¶ 294 at 8. We have explained that questions pertaining to an offeror's capacity and capability involve issues of responsibility that "may be requested or provided without resulting in conduct of discussions." *Advance Gear & Mach. Corp.*, B-228002, Nov. 25, 1987, 87-2 CPD ¶ 519 at 3. Communicating with an offeror concerning its responsibility does not constitute discussions, so long as the offeror does not change its proposed cost or otherwise materially modify its proposal.[19] *Cargo*

[19] Second Street also alleges that the agency unreasonably allowed CJN to provide information following the submission of final proposal revisions supporting its authorization to represent Cayre Jemal's Gateway L.L.C. (CJG), an affiliated company that owns part of the awardee's proposed project site. In this regard, the RLP required that, "[i]f the offeror is not the owner of the Property," the offeror had to submit "authorization from the ownership entity to submit an offer on the ownership entity's behalf." AR, Tab 14, RLP, ¶ 3.06(A); *see also id.*, ¶ 3.06(E) (requiring sufficient "[e]vidence of ownership or control of the Building(s) or site(s)"). As with the requirement to demonstrate financial capability to perform, demonstrating that an offeror has the ability to obtain necessary property or facilities is generally a matter of the firm's responsibility, as such supporting information does not change the specific property or facility proposed by the offeror. *See* FAR 9.104-1(f) (requiring a prospective contractor to "[h]ave the necessary production, construction, and technical equipment and facilities, or the ability to obtain them" in order to be found responsible"). The record reflects that CJN had CJG's authorization to represent the firm in connection with the proposal and the resulting lease. *See, e.g.*, AR, Tab 57(s), Joint Authorization & Confirmation Agreement, at 10 ("Each Owner hereby stipulates that [CJN] has been and shall continue to be fully authorized to act in its own name on behalf of both Owners in submitting and pursuing the Proposal, pursuing negotiations with the GSA, and, as

(continued...)

Transport Sys. Co., *supra*; *see also NFI Mgmt. Co.*, B-238522, June 12, 1990, 90-1 CPD ¶ 548 (denying protest alleging that post-final proposal revision submission of proof of an architect's license, a local permit, and information in response to a solicitation amendment constituted improper unequal discussions because the materials related to the awardee's responsibility).

Here, GSA, given the passage of time, reasonably requested continuing evidence of CJN's financial capacity, including its ability to obtain necessary funds. In confirming its potential lenders' ongoing willingness to fund the project, the awardee did not change its proposed price or otherwise materially modify its proposal. Therefore, on this record, we find no basis to conclude that the agency engaged in unequal or improper discussions.

Second Street also alleges that the agency improperly allowed CJN to update its proposed design following FPR submission in order to comply with NHPA historical preservation requirements. We disagree that this constituted impermissible unequal discussions. Specifically, paragraph 5.01 of the RLP, titled Cooperation with Government NEPA/NHPA Responsibilities, expressly contemplated that after the submission of FPRs, the apparently successful offeror might be responsible for implementing mitigations to come into compliance with environmental or historic preservation requirements. Specifically, the RLP notified offerors that:

> Prior to award, the Government will provide the intended awardee with written notice of mitigation measures that must be taken specifically related to its site. Such notice shall not constitute award or notice of award, and the Offeror shall have 10 business days from the date of the notice to withdraw its offer in writing. If the Offeror does not withdraw its offer, the identified mitigation measures shall be incorporated into the Lease document that will be sent to the Offeror for execution.

AR, Tab 14, RLP, ¶ 5.01(S); *see also id.*, ¶ 2.12(E) ("Where new construction or exterior alterations, or both, are located within a historic district, may be visible from historic properties or may affect archeological resources, compliance may require tailoring the design of the improvements to be compatible with the surrounding area. Design review may require multiple revised submissions . . .").

Thus, the fact that the parties had post-FPR communications regarding necessary historical preservation mitigation efforts and such required mitigation was subsequently

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(...continued)
applicable, entering into a lease with the GSA as a result of the Proposal and RLP."). For similar reasons as addressed above, we do not find that GSA's exchanges with respect to the awardee's capability to offer the proposed site involving CJN's responsibility establishes that the agency conducted unequal discussions.

incorporated into the lease was consistent with the RLP's terms.[20] Therefore, we find no merit to the protester's objection in this regard.

In sum, the record reflects that this was a difficult and complex procurement, involving various intergovernmental coordination and multiple rounds of protest litigation, and conducted during a pandemic. On balance, we find that GSA's evaluation was reasonable overall, and that any minor errors were not prejudicial to Second Street or the integrity of the procurement. For the reasons stated above, we find no basis on which to sustain Second Street's protests.

The protests are denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

[20] To the extent that the protester objects to GSA conducting post-FPR exchanges regarding NHPA compliance issues with the awardee as expressly contemplated by the RLP, such post-award objection is an untimely challenge to the terms of the solicitation. *Blue Origin Federation, LLC; Dynetics, Inc.--A Leidos Co.*, *supra* at 30-31; *VariQ-CV JV, LLC*, B-418551, B-418551.3, June 15, 2020, 2020 CPD ¶ 196 at 20-21.