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Decision

Matter of: Blue Origin Florida, LLC

File: B-417839

Date: November 18, 2019

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DIGEST

1. Protest challenging the solicitation's basis for award that will use a methodology predicated on the agency's determination of which combination of two independently developed proposals offers the best value to the government is sustained where the methodology does not provide an intelligible, common basis on which offerors will be expected to compete and have their proposals evaluated.
 2. Protest alleging that the agency's acquisition strategy will unduly restrict competition and result in de facto sole-source acquisition procedures is denied where the record shows that the terms of the solicitation are reasonably necessary to meet the agency's needs, and the protester's policy objections fail to state cognizable bases of protest within our Office's bid protest jurisdiction.
 3. Protest challenging the solicitation's price evaluation methodology as ambiguous is denied where the record shows that the terms of the solicitation provide sufficient information to allow offerors to intelligently prepare their proposals on a common basis.
 4. Protest challenging provisions in a commercial item solicitation as contrary to customary commercial practice is denied where the protester does not show that the provisions are inconsistent with customary commercial practice.
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DECISION

Blue Origin Florida, LLC, of Merritt Island, Florida, protests the terms of request for proposals (RFP) No. FA8811-19-R-0002, issued by the Department of the Air Force, for

the National Security Space Launch (NSSL) Phase 2 Launch Service Procurement, which seeks to procure commercial item launch services for NSSL missions. Blue Origin alleges that several terms of the RFP unduly restrict competition, are ambiguous, or are inconsistent with customary commercial practice.

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

BACKGROUND

It is the policy of the United States for the President to undertake actions appropriate to ensure, to the maximum extent practicable, that the United States has the capabilities necessary to launch and insert United States national security payloads into space whenever such payloads are needed in space. 10 U.S.C. § 2273(a). In order to ensure that space launch actions meet these assured access to space requirements, federal law dictates that, at a minimum, the President is to provide resources and policy guidance to sustain: (1) the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of Defense or the Director of National Intelligence as a national security payload; (2) a robust space launch infrastructure and industrial base; and (3) the availability of rapid, responsive, and reliable space launches for national security space programs to – (a) improve the responsiveness and flexibility of a national security space system; (b) lower the costs of launching a national security space system; and (c) maintain risks of mission success at acceptable levels. 10 U.S.C. § 2273(b).

Consistent with the above statutory provisions, the operational mission of the NSSL program--previously known as the Evolved Expendable Launch Vehicle (EELV) program--is to deliver functional national security space satellites into their intended orbits with high reliability, on schedule, and at a fair and reasonable price, while also meeting designated satellite customer mission unique objectives. Agency Report (AR), Tab 14, Acquisition Strategy for EELV Program Phase 2 Launch Service Procurement, at 7.¹ National security space satellites provide: “the nation’s eyes and ears” using intelligence community satellites; secure communications for the nation’s leaders via the Air Force’s communications satellites; reliable position, navigation, and timing via the Air Force’s global positioning system satellites; weather imaging; and other valuable warfighting capability. AR, Tab 11, Acquisition Strategy for EELV Research Development Test & Evaluation (RDT&E) Investment Under Other Transaction Authority (OTA) for Prototypes, at 5.

The NSSL program involves a multi-phase strategy that will be implemented by the Air Force between fiscal years (FY) 2013 and FY 2027. Although the protest here challenges the terms of the RFP for Phase 2, which is for competitive acquisition of launch services, a brief discussion of the history of the earlier NSSL program phases is

¹ References to page numbers for AR exhibits are to the Bates numbering provided by the agency.

necessary. In Phase 1, the Air Force acquired on a sole-source basis Delta IV heavy rockets from United Launch Alliance (ULA) to fulfill launch requirements while the Air Force transitions through the program's subsequent phases. Id. at 7. At the time the Air Force began implementing its multi-phase strategy, the Delta IV family of rockets, which is slated for discontinued production, was one of only three certified NSSL launch systems. Id. at 8. ULA also offered the Atlas V rocket, which uses Russian-manufactured RD-180 engines. Following Russia's February 2014 invasion of Crimea, Congress placed a number of restrictions on the use of Russian-manufactured rocket engines, including prohibiting launch services using such engines after FY 2022. Id. The third certified system, Space Exploration Technologies Corporation's (SpaceX) Falcon 9 Upgrade, was only capable of servicing four of the Department of Defense reference orbits. Id. The Phase 1 ordering period ended on September 30, 2017, and its associated missions will be launched by 2020. Contracting Officer's Statement (COS) at 3.

Concurrent with the Phase 1 acquisition, the Air Force also conducted Phase 1A competitions among NSSL certified providers for 15 missions, with SpaceX and ULA both receiving awards. Id. at 4. Following the imposition of statutory restrictions on the use of Russian manufactured engines, the Department of Defense had to reassess its NSSL overarching strategy because of limitations on the use of the Atlas V certified launch system. Id. As a result of that reassessment and to promote future competition for NSSL program needs, the agency initiated a launch service capability development investment approach using public-private partnerships. Id.

Specifically, the Air Force issued a request for proposals in October 2017 for the award of other transaction authority (OTA) agreements pursuant to 10 U.S.C. § 2371b to develop launch system prototypes, to include the development and testing of rocket propulsion systems, launch systems, and subsystems, infrastructure, manufacturing processes, test stands, and other items required for industry to provide domestic commercial launch services to meet NSSL requirements.² COS at 4, 6; AR, Tab 14, Acquisition Strategy for EELV Program Phase 2 Launch Service Procurement, at 12. The agency's acquisition planning documentation reflected that these launch service agreements were initially planned to be awarded in FY 2017, but the draft solicitation was not issued until February 2017, and the final solicitation was not issued until October 2017. See AR, Tab 11, Acquisition Strategy for EELV RDT&E Investment

² Under 10 U.S.C. § 2371b, the Secretary of the Air Force is authorized to enter into OTA agreements for prototype projects. As we have previously recognized, OTA agreements issued under this authority are not procurement contracts and do not fall under the provisions of the Federal Acquisition Regulation (FAR). MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 1 n.1. In addition to the OTA agreements discussed above, the government also entered into separate rocket propulsion OTA agreements in 2016 with SpaceX and Orbital ATK (now Northrop Grumman Innovation Systems (NGIS)), and ULA and Aerojet Rocketdyne. AR, Tab 11, Acquisition Strategy for EELV RDT&E Investment Under OTA for Prototypes, at 9.

Under OTA for Prototypes, at 7. In October 2018, the Air Force entered into OTA agreements with Blue Origin, ULA, and NGIS.³ COS at 8-9. As to Blue Origin's OTA agreement, the anticipated cost share between the parties is \$500 million from the Air Force and \$[DELETED] from Blue Origin, and the anticipated period of performance is October 2018 through July 31, 2024. AR, Tab 15, OTA Agreement No. FA8811-19-9-0001, at 1, 6.⁴

Phase 2 of the NSSL strategy contemplates the award of two competitive, fixed-price requirements contracts for launch services--delivering multiple national security space missions--with annual ordering periods from FY 2020 through FY 2024. RFP, attach. No. 6, Evaluation Criteria, at 2; id., amend. No. 1, attach. No. 5, Instructions to Offerors, at 2. The Phase 2 RFP, which was issued on May 3, 2019, and subsequently amended once, is an unrestricted competition, and offerors need not have received an award during one of the earlier acquisition phases to be eligible for a Phase 2 award. The Phase 2 acquisition is a negotiated commercial item procurement pursuant to the requirements of FAR parts 12 and 15.⁵

The RFP includes four evaluation criteria: (1) technical; (2) past performance; (3) small business participation; and (4) price. RFP, attach. No. 6, Evaluation Criteria, at 3. Factors 1 through 3 are significantly more important than factor 4, price; and factor 1, technical, alone is significantly more important than factor 4, price. Id. Factor 1, technical, also includes four major subfactors: (1.1) system capability; (1.2) category a/b missions; (1.3) category c missions; and (1.4) systems risks and mitigation. Id. Subfactors 1.1, 1.2, and 1.3 are equally important; subfactor 1.4 is more important than the other subfactors, but, when combined, any combination of two of the other subfactors are more important than subfactor 1.4. Id.

³ Blue Origin alleges, without any substantiation, that the resulting acquisition delays were "due to intense lobbying by a heritage engine supplier." Protest at 5. The record does not specifically address the cause of the initial slippage from the anticipated schedule in the initial acquisition planning documentation, but the record does suggest that delays between RFP issuance and award were the result of funding limitations. See AR, Tab 13, Solicitation No. FA8811-17-9-0001, amend. No. 3, Memo. to File, at 1. For the reasons discussed herein, the basis for the delay in awarding the OTA agreements in the prior acquisition phase is immaterial to our resolution of Blue Origin's protest of the Phase 2 solicitation. Therefore, we need not resolve the cause for any delays in the acquisition and execution of the Phase 1A OTA prototype agreements.

⁴ The Phase 1A OTA awards were subsequently the subject of a bid protest before the U.S. Court of Federal Claims. See Space Exploration Techs. Corp. v. United States, et al., 144 Fed. Cl. 433 (2019) (dismissing protest for lack of jurisdiction, and granting plaintiff's motion to transfer venue to the United States District Court for the Northern District of California).

⁵ For the purposes of applicable acquisition laws and regulations, space transportation services are considered by law to be a commercial item. 51 U.S.C. § 50132.

The Air Force does not contemplate performing a “typical source selection”, wherein the agency would rank the proposals and then conduct individual trade off determinations for the first and then second requirements contract. COS at 13-14. Rather, the RFP contemplates that award will be made to the two offerors that, “when combined, represent the overall best value to the Government.” RFP, attach. No. 6, Evaluation Criteria, at 2. In response to the protest, the contracting officer explains that the Air Force does not intend to conduct a tradeoff based on the individual merits of each individual proposal, but, rather, intends to conduct a tradeoff based on pairings of proposals. Specifically, the contracting officer stated that the Air Force anticipates receiving four proposals from offerors A, B, C, and D. The Air Force will then pair each of the proposals (that were separately developed and submitted) for comparison purposes; these pairings will be: (1) the proposals submitted by offerors A and B (AB); (2) the proposals submitted by offerors A and C (AC); (3) the proposals submitted by offerors A and D (AD); (4) the proposals submitted by offerors B and C (BC); (5) the proposals submitted by offerors B and D (BD); and (6) the proposals submitted by offerors C and D (CD). COS at 12-13.

As noted, the agency will not conduct tradeoffs between the individual proposals, for example, conducting a tradeoff between offeror A’s proposal and offeror B’s proposal, and then as between offeror A’s proposal and offeror C’s proposal. Rather, the Air Force intends to conduct a tradeoff between paired proposals, for example, the AB proposal pairing and the AC proposal pairing, and then between the AB proposal pairing and the AD proposal pairing. COS at 13. The contracting officer explained that this approach will provide “a little leeway in how the [source selection authority (SSA)] will actually decide which pair of proposals are the best value when combined.” Id. at 14. As an example of how this “leeway” might work, the contracting officer provided a hypothetical wherein the two highest individually ranked proposals might not be the best pair when taken in combination. In the hypothetical, notwithstanding that the two independently developed and submitted proposals, when individually assessed against the RFP’s specified evaluation criteria, would be the highest rated proposals, if the Air Force determined that the proposals did not offer complementary attributes (for example, the two highest rated offerors shared common weaknesses under one subfactor), and a third offeror, although generally not as highly rated, offered complementary attributes (for example, although perhaps being overall technically weaker, but not sharing common weaknesses) to the highest rated offeror, then the first and third rated proposals, when combined, would present the best value to the government. Id.

Once the SSA determines which combination of offers is found to offer the best value to the government, the SSA would then, among those two offerors, determine which one of the two offerors offers the best individual value to the government. Of the pair selected for award, the offeror that provides the overall best value to the government will be awarded the requirements for “requirement 1” (which correlates to approximately 60 percent of the requirements), and the other awardee will be awarded the requirements for “requirement 2” (which correlates to the remaining approximate

40 percent of the requirements). Id.; see also RFP, Model Contract, at 25-31 (delineating allocation of anticipated requirements). On September 9, Blue Origin filed this protest challenging the terms of the Phase 2 RFP.⁶

DISCUSSION

Blue Origin raises multiple challenges to the terms of the RFP, alleging that the RFP includes terms that unduly restrict competition, are ambiguous, or are inconsistent with customary commercial practice. We note at the outset that the determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency. ACME Endeavors, Inc., B-417455, June 25, 2019, 2019 CPD ¶ 224 at 2. Our Office will not sustain a protest challenging an agency's determination of its needs unless the protester presents clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. Instrument Control Servs., Inc.; Science Mgmt. Resources, Inc., B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 6. For the reasons that follow, we find that the Air Force's "when combined" basis for award fails to provide an intelligible basis upon which offerors are expected to compete, and therefore sustain the protest on that basis. We otherwise find no basis on which to sustain the protest.⁷

Basis for Award

Blue Origin argues that the Air Force's "when combined" best-value methodology is ambiguous, as it indicates that each proposal will not be evaluated based on the merits of its own proposal against the RFP's specified evaluation criteria, but rather, will be evaluated based on how well an individual proposal complements another unknown proposal with unknown qualities. The protester effectively argues the RFP's evaluation criteria, and their relative weightings, when applied to an individual proposal will be divorced from the agency's best-value analysis, which will be based on undisclosed and subjective evaluation considerations such as the relative strengths and weaknesses of paired proposals that were independently developed and submitted by different offerors. Without knowing the relative factors on how the combined proposals will be evaluated, or how an offeror can intelligently compete for award where it has no insight into, let alone the ability to align, complementary attributes with another independently

⁶ The final phase of the NSSL strategy, Phase 3, anticipates sustainable competition for future launch requirements beginning with the FY 2025 ordering period. AR, Tab 14, Acquisition Strategy for EELV Program Phase 2 Launch Service Procurement, at 17.

⁷ Blue Origin's initial protest challenged several other provisions of the RFP; following receipt of the agency report, the protester withdrew those protest grounds. See Comments at 11. Additionally, Blue Origin raises a number of collateral arguments. Although our decision does not specifically address all of the protester's arguments, we have carefully reviewed all of them and find that none provides a basis on which to sustain the protest.

developed and submitted proposal, Blue Origin argues that the RFP fails to provide an intelligible and common basis on which offerors are expected to compete.

The Air Force argues that the RFP's specified evaluation criteria are unambiguous, and provide an intelligible and common basis for offerors to prepare their individual proposals. In this regard, the agency argues that the RFP adequately specifies the relative evaluation factors and weighting upon which individual proposals will be evaluated, and the proposed pairing, or "when combined," approach to determining best-value will not rely on any unstated evaluation criteria, but merely is a methodology designed to "highlight[] the discretion afforded to the Government in deciding which offerors represent the best value." COS at 15. For the reasons that follow, we agree with the protester that the agency's proposed approach to conduct a tradeoff using paired proposals fails to provide an intelligible and common basis for competition.

The objective of source selection is to select the proposal that represents the best value. FAR § 15.302. The FAR requires that when using a tradeoff process, all evaluation factors and significant subfactors that will affect contract award and their relative importance must be clearly stated in the solicitation. FAR § 15.101-1(b)(1). Evaluation factors and significant subfactors must: (1) represent the key areas of importance and emphasis to be considered in the source selection decision; and (2) support meaningful comparison and discrimination between and among competing proposals. FAR § 15.304(b). An agency must evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. FAR § 15.305(a).

Consistent with these requirements, we have recognized that a solicitation must contain sufficient information to allow offerors to compete intelligently and on equal terms. Global Tech. Sys., B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 19. Our decisions have further recognized that intelligent competition assumes the disclosure of the evaluation factors to be used by the procuring agency in evaluating offers submitted and the relative importance of those factors. Only through such disclosure can an offeror know what factors the agency cares about and to what relative extent; competition is not served if offerors are not given any idea of the factors and their relative values, on which the government will select an offer for award. Richard S. Cohen, B-256017.4, B-256017.5, June 27, 1994, 94-1 CPD ¶ 382 at 6. The RFP here fails to provide an intelligible and common basis for award where the agency expressly anticipates not making the source selection decisions based on the evaluation of individual proposals as evaluated against the RFP's specified evaluation criteria, but rather anticipates evaluating pairings of proposals using the undefined criterion of whether two individually developed and submitted proposals are the most complementary of one another.

Contrary to the Air Force's argument that the only relevant evaluation factors, and their relative weightings, are those set forth in the RFP, it is not clear that the agency's "when combined" best-value analysis will actually be so restricted. For example, in the contracting officer's hypothetical discussed above where the top two individually rated proposals under the RFP's evaluation criteria may not ultimately be found to offer the

best value to the government “when combined,” the Air Force essentially submits that it has the discretion to deviate from the RFP’s evaluation criteria, or at least their relative weightings. In the contracting officer’s hypothetical, he identifies a potential scenario involving the top two rated proposals following the agency’s evaluation of individual proposals using the RFP’s enumerated evaluation criteria, and a third, lesser rated proposal. The contracting officer then suggests that if the top two proposals share common weaknesses (or ostensibly strengths) under certain evaluation factors or subfactors, the agency would look to whether the third ranked offeror, while individually lower rated than the second place offeror, had different weaknesses (or ostensibly strengths) that were not offered by the highest rated proposal. Under this scenario, the agency argues that award to the individually rated first and third proposals would be more advantageous to the government, when combined, because they offer complementary strengths or weaknesses, versus award to the two individually highest rated proposals, which offer overlapping strengths or weaknesses.

The problem with this approach, however, is that the second ranked offeror’s proposal is not actually being assessed for award based on the merits of its own proposal against the RFP’s specified evaluation criteria (or the specified weightings), or the relative merit of its proposal against the other offerors’ individual proposals. In this regard, the agency would be evaluating the second and third ranked offerors using a new, undefined evaluation criterion of whether those offerors offer sufficiently distinct or complementary attributes as compared to the highest individually ranked offeror. Thus, the agency’s own hypothetical application of its methodology highlights that the RFP’s enumerated evaluation criteria or their relative weight may not ultimately be the basis for the actual source selection. Therefore, we find that the RFP’s basis for award methodology fails to reasonably (1) represent the key areas of importance and emphasis to be considered in the source selection decision, and (2) support meaningful comparison and discrimination between and among competing proposals, as required by FAR § 15.304(b).

The Air Force repeatedly argues that it has informed offerors of the evaluation factors that will be used to evaluate their proposals, and thus, provided a common basis for competition. In other words, in order to improve its chances for receiving an award, the agency argues that an offeror should submit its strongest possible proposal in response to the RFP’s specified evaluation criteria. This line of argument, however, is unpersuasive because as addressed above, award may not primarily be based on whether an offeror submitted the strongest possible proposal in response to the RFP’s evaluation criteria. Rather, award may ultimately turn on whether the unique attributes of the offeror’s proposal sufficiently complement another offeror’s proposal so as to offer the government the most combined best value.

Offerors, of course, have no control over the proposal strategy or contents of another offeror’s proposal. Indeed, short of colluding with other potential offerors to coordinate their respective proposals, it is not apparent how an offeror could intelligently compete when its ability to receive a contract award is not predicated on the merits of its own proposal, but rather, is dependent on its general compatibility with a proposal

independently developed and submitted by another offeror. See FAR § 3.301(a) (noting anticompetitive practices can include collusive bidding or sharing of the business); id. at § 3.303(c)(1) (identifying as a practice that may evidence violation of federal antitrust laws the filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance). On this record, we cannot conclude that the RFP's basis for award is sufficient to provide an intelligible and common basis for competition, and therefore we sustain the protest on this basis.

Unduly Restricting Competition

Blue Origin next alleges that the solicitation unduly restricts competition in two primary ways. First, Blue Origin alleges that the Air Force is not obtaining "full and effective competition" by moving forward with the Phase 2 competitive procurement before recipients of the Phase 1A OTA prototype agreements have completed sufficient development and certification activities under those agreements for new launch systems. Protest at 23. The protester argues that the agency's initial NSSL strategy planning documents anticipated that OTA agreement recipients would have at least 18 months between authorization to proceed and the Phase 2 competition, but, as a result of Phase 1A acquisition delays, the actual time has been truncated to less than 12 months. Blue Origin contends that the Air Force's actions limit the competitiveness of offerors, such as the protester, that are still in the process of developing new launch systems with the OTA funding, and unduly favor incumbent providers that already have certified launch systems.

Second, Blue Origin complains that the Air Force's decision to acquire five years of its requirements at this time will unduly restrict future competition, and, therefore, the RFP's requirements should be found to unreasonably exceed the government's minimum needs. The protester argues that by abandoning an incremental acquisition approach, the Air Force will stifle further development and new entrants to the commercial space launch market, thereby limiting the number of potential competitors for future requirements. For the reasons that follow, we find that neither line of objection provides a basis on which to sustain the protest.

At the outset, we note that Blue Origin's legal arguments are predominately premised on arguments that equate the Air Force's actions with non-competitive, sole-source procedures. See, e.g., Protest at 23 (citing HEROS, Inc., B-292043, June 9, 2003, 2003 CPD ¶ 111 at 7, for the proposition that: "contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole-source situation when they could reasonably take steps to enhance competition") (emphasis added); id. at 29 ("Here, the Agency makes two effectively 'sole-source' purchases on a requirements contract basis beyond its immediate needs, when greater competition will be available in the future.") (emphasis in original). The agency, however, is clearly not using sole-source procedures.

The Competition in Contracting Act of 1984 (CICA) generally requires procuring agencies to obtain full and open competition. 10 U.S.C. § 2305(a)(1)(B)(ii). CICA defines full and open competition as permitting all responsible sources to submit competitive proposals. 10 U.S.C. § 2302(3)(D) (incorporating definition from 41 U.S.C. § 107). Here, the RFP for Phase 2 contracts is an unrestricted procurement open to all eligible offerors, and the Air Force currently anticipates receiving more proposals than the RFP's anticipated two contract awards. Thus, the majority of Blue Origin's arguments, which rely on statutory and regulatory limitations and decisions addressing sole-source procurements, are simply not relevant to the circumstances here.

Turning to the merits of the remaining allegations, as noted above Blue Origin argues that the Air Force's decision to move forward with the Phase 2 competitive procurement prior to completing the Phase 1A prototype OTA agreements precludes "full and effective" competition and favors incumbent launch providers. This argument fails to state a basis on which to object to the agency's actions. While Blue Origin may be at a disadvantage because it is currently working to develop, test, and certify its launch system as compared to firms that have already secured certification, this does not mean that the agency is improperly restricting competition. In this regard, the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs. Contract Servs., Inc., B-411153, May 22, 2015, 2015 CPD ¶ 161 at 3. And, while a contracting agency must solicit proposals in a manner designed to achieve full and open competition, an agency does not have to delay satisfying its own needs in order to allow a particular offeror time to develop the ability to meet the government's requirements. Bannum Inc., B-415227, Dec. 1, 2017, 2017 CPD ¶ 372 at 4; Wescam, Inc., B-285792, Oct. 11, 2000, 2000 CPD ¶ 168 at 7; OPS, Inc., B-271835, July 31, 1996, 96-2 CPD ¶ 50 at 3.

Furthermore, while we recognize that offerors with fully certified launch systems may have advantages under these circumstances, this does not compel the conclusion that the agency is unduly biased in favor of an incumbent provider, or that the agency is unduly restricting competition. There is no requirement that the government equalize an incumbent contractor's advantage where that advantage is not the result of preferred treatment or other unfair action by the government. AdaRose, Inc., B-299091.3, Mar. 28, 2008, 2008 CPD ¶ 62 at 4-5; Digital Sys. Grp., Inc., B-257899, Nov. 15, 1994, 94-2 CPD ¶ 188 at 6; Neshaminy Valley Info. Processing, Inc., B-214867, July 24, 1984, 84-2 CPD ¶ 105 at 3.

We find no basis here to conclude that the agency's decision to move forward with Phase 2 competition based on the original NSSL strategy planning schedule, despite the delay in awarding the Phase 1A OTA agreements, constitutes unfair action by the government. In this regard, Blue Origin does not contend that the government does not need the launch services being procured in this Phase 2 procurement. Cf. Coulson Aviation (USA), Inc., B-411306 et al., July 8, 2015, 2015 CPD ¶ 214 at 7 (denying protest alleging that the government did not have an urgent need for the requirements being procured merely because the agency's internal planning documentation

anticipated a delay associated with the filing of a protest triggering a mandatory stay of the award or performance of the underlying contract). Rather, Blue Origin effectively complains that it was deprived of the expected “benefit-of-its-bargain” under its Phase 1A OTA agreement where it did not receive the anticipated development time and government cost-sharing to attain certification of its launch system prior to the commencement of the Phase 2 competition. Blue Origin also speculates that the Air Force had ulterior motives to stifle the competitiveness of new market entrants by delaying the award of the Phase 1A OTA agreements. These arguments, however, present questions regarding whether the Air Force is reasonably administering the OTA agreements, which are not matters for consideration as part of our Office’s bid protest function. 4 C.F.R. § 21.5(a).

We also find no basis to sustain Blue Origin’s complaints that the Air Force’s current acquisition of 5-years of launch ordering requirements will unlawfully hinder future competition. Blue Origin argues the agency should instead make incremental purchases of 2-years of launch requirements, to allow new market entrants, such as Blue Origin, to develop and secure certification for their launch systems and then compete for future requirements. Blue Origin argues that by awarding two, 5-year requirements contracts, the government is making “effectively ‘sole-source’ purchases” beyond its minimum needs, and that such actions will dis-incentivize new market entrants from making the investments necessary to compete for future government requirements. Protest at 29.

As an initial matter and as discussed above, Blue Origin’s arguments are primarily based on legal requirements that apply when the government is procuring its requirements in a sole-source environment. The line of decisions relied upon by Blue Origin stands for the proposition that where only one source is currently capable of furnishing the required goods or services, but other firms are developing capability to meet the agency’s requirements, the agency should only procure its immediate needs using noncompetitive procedures. See, e.g., Raytheon Co.--Integrated Defense Sys., B-400610, et al. Dec. 22, 2008, 2009 CPD ¶ 8 (denying protest where the agency did not extend sole-source contracts’ periods of performance past the time at which competitive procurements would be feasible to meet the Navy’s needs); Honeycomb Co. of Am., B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209 (sustaining protest where the agency proposed to issue a sole-source contract with a 4-year period of performance where the urgency basis was not well supported, and the agency acknowledged it could take steps to improve competition). In other words, we have explained that in a situation where competition does not exist but will exist in the near future, CICA requires agencies to purchase, in the noncompetitive environment, only what is necessary to satisfy needs that cannot await the anticipated competitive environment. Ricoh Corp., B-234655, July 5, 1989, 89-2 CPD ¶ 3 (sustaining protest where agency issued a de facto sole source award for four years of requirements where at least four firms were currently developing compliant products and anticipated being able to offer the products in less than 10 months).

Thus, the concern in this line of decisions is with an agency circumventing CICA's competition requirements by exploiting a sole-source procurement environment to acquire more than its immediate needs where competition is imminent. This line of decisions, however, is inapposite to the current situation where the Air Force is competitively procuring its requirements and anticipates receiving proposals from at least four offerors, including from the protester. In this regard, there is no basis to conclude that the Air Force is making de facto sole-source awards; the protester points to no preconditions or restrictive provisions that are implemented to preclude potentially eligible firms from competing. Rather, Blue Origin is complaining that only making the minimum two awards required by statute will be insufficient to incentivize firms to continue to develop launch systems to compete for future awards. CICA's competition requirements, however, seek to ensure full and open competition for the government's requirements; they do not mandate that the government make multiple contract awards in order to incentivize future private investment necessary to satisfy the government's fulfillment of its future requirements.

Once the Air Force's procurement is properly recognized as an unrestricted, full and open competition, the protester's complaints fail to advance a sufficient basis to object to the agency's actions. As addressed above, contracting agencies have broad discretion in identifying their needs and determining what characteristics will satisfy those needs. We will not disturb an agency's determination as to the best method of accommodating its needs, absent a clear showing by the protester that the decision was unreasonable. James Foos & Assocs., B-249496.2, Jan. 6, 1993, 93-1 CPD ¶ 22 at 2-3. Blue Origin does not argue that the Air Force lacks a need for five years of launch requirements, or that a 5-year ordering period violates any applicable procurement law or regulation. Rather, the protester argues what amounts to a policy disagreement with the Air Force; that is, Blue Origin believes that the long term industrial base interests of the government would be better suited by an incremental procurement approach that would encourage private investment to develop viable commercial launch alternatives. These arguments, however, are beyond the scope of our bid protest function, which is to ensure that the government's discrete procurement actions are reasonable and in accordance with applicable procurement laws and regulations.⁸ On this record, Blue Origin's mere difference of opinion concerning

⁸ Blue Origin cites to GAO audit reports recommending that the Air Force utilize an incremental acquisition approach for its NSSL requirements. See, e.g., U.S. Gov't Accountability Office, GAO-15-623, Evolved Expendable Launch Vehicle: The Air Force Needs to Adopt an Incremental Approach to Future Acquisition Planning to Enable Incorporation of Lessons Learned, at 22 ("When planning for the next phase of [NSSL], Phase 2, we recommend the Secretary of the Air Force consider using an incremental approach Planning for acquisitions on a short term basis will help ensure that the Air Force does not commit itself to a strategy until the appropriate amount of data is available to make an informed decision, and will allow for flexibility in responding to a changing space industry."). Whether the Air Force has fully adopted GAO's audit recommendations does not provide a basis to sustain Blue Origin's protest. In this

(continued...)

whether a 2-year ordering period is superior to the proposed 5-year ordering period is not sufficient to upset the agency's determination. Mills Mfg. Corp., B-224004, B-224005, Dec. 18, 1986, 86-2 CPD ¶ 679 at 2-3 (denying protest challenging an agency's decision to procure multi-year requirements contracts), recon. denied, Mills Mfg. Corp.--Recon., B-224004.2, B-224005.2, Apr. 10, 1987, 87-1 CPD ¶ 393.

Price Evaluation Methodology

Blue Origin next objects to the RFP's price evaluation scheme. The protester first argues that the RFP is ambiguous because it does not disclose the relative weighting for each mission type that the agency will use to calculate offerors' total evaluated prices (TEP). Second, Blue Origin contends that the agency's proposed methodology of calculating weighted average prices is insufficient to adequately apprise the agency of the anticipated costs of performance, and will otherwise result in misleading results. For the reasons that follow, we find no basis on which to sustain the protest.

Agencies must consider cost to the government in evaluating proposals, 10 U.S.C. § 2305(a)(3)(A)(ii), and while it is up to the agency to decide on some appropriate and reasonable method for evaluating offerors' prices, an agency may not use an evaluation method that produces a misleading result. Labatt Food Serv., LP, B-408790, Nov. 25,

(...continued)

regard, GAO's audit function, which evaluates--and makes policy and legislative recommendations to improve the responsiveness, efficacy, and affordability of--federal programs, is broader in scope than GAO's bid protest function, which is limited to deciding challenges to whether an agency's actions with respect to a specific procurement are reasonable and in accordance with applicable procurement laws and regulations. Specifically, we have explained that:

GAO's role in resolving a bid protest is an adjudicative process that differs significantly from the audits and evaluations conducted by GAO's audit teams Unlike GAO audit reports, bid protest decisions do not address broad programmatic issues, such as whether a weapons program is being managed effectively and within costs Rather, the decision produced in response to a protest addresses the specific allegations raised by the parties about whether a particular government action was contrary to procurement law or regulations, or contrary to the evaluation scheme the procuring agency established in the solicitation.

Report to Congress on Bid Protests Involving Defense Procurements, B-401197, Apr. 9, 2009, 2009 CPD ¶ 101 at 5.

Thus, an agency's failure to implement specific recommendations from a GAO audit does not, by itself, establish that a procuring agency has violated applicable procurement law or regulation, or otherwise acted unreasonably, in connection with a specific procurement that is the subject of a protest before our Office.

2013, 2013 CPD ¶ 279 at 3. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4.

Also, as addressed above, a solicitation generally must be drafted in a fashion that enables offerors to intelligently prepare their proposals and must be sufficiently free from ambiguity so that offerors may compete on a common basis. WorldWide Language Resources, Inc., B-412495.2, Mar. 23, 2016, 2016 CPD ¶ 97 at 3. However, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided that the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. Plateau Software, Inc., B-416386, Aug. 24, 2018, 2018 CPD ¶ 291 at 5.

Here, the RFP anticipates that the agency will evaluate proposed prices for reasonableness and balance. RFP, attach. No. 6, Evaluation Criteria, at 13. The RFP anticipates that the total number of launches to be divided between the two requirements contracts over the resulting contract's 5-year ordering period is between 20 and 50 launches, with the government estimating that the actual number of launches will be 34. RFP, amend. No. 1, Model Contract, at 29. Additionally, to ensure that the agency received and evaluated pricing for all potential launch mission types, including those that may not be anticipated during the five-year ordering period, the agency solicited pricing based on 35 launch missions. See AR, Tab 68, Memo. to File re TEP Methodology, at 3. As discussed above, the RFP anticipates a 60-40 split between the two awarded requirements contracts; for the purposes of submitting price proposals, offerors were instructed to anticipate 60 percent of the requirements (or 21 missions). AR, Tab 71, Notional Pricing Template.

The RFP requires offerors to submit pricing for nine areas of the contractors' requirements. The nine areas have varied fixed-pricing approaches. For example, certain areas, such as launch service support, require offerors to propose a fixed annual price for the base and each option years. For these areas, the annual proposed fixed prices will be used to calculate the TEP. RFP, attach. No. 6, Evaluation Criteria, at 14. Another area, quick reaction and anomaly resolution/special studies, is to be priced based on an hourly composite rate. For the purposes of the TEP, the Air Force will multiply the fixed hourly composite rate by 100,000 hours. Id. at 15.

Relevant to the issues in this protest, certain areas are to be priced on a fixed-unit price basis. As an example, we address the Air Force's basic launch service requirements. The RFP identifies nine different orbits (i.e., a regular repeating path that one object in space takes around another object) for which the NSSL contractor may be tasked to launch satellites, which the RFP refers to as "reference orbits." AR, Tab 10, EELV Program System Performance Requirements Document (Rev. B), at 30, 34. Within

certain of the nine reference orbits, the RFP permits offerors to propose different launch vehicle configurations and price inputs depending on the launch vehicle's mass-to-orbit (MTO) capability.⁹ AR, Tab 68, Memo. to File re TEP Methodology, at 5. For example, for the medium earth orbit direct reference orbit, offerors are to price launches of both 5,571 and 7,292 MTO pounds mass, respectively. AR, Tab 71, Notional Pricing Template. Thus, accounting for these permitted alternative pricing scenarios, offerors were asked to provide pricing for a total of 12 reference missions. Id.

For each of the 12 reference missions, offerors were asked to provide fixed unit launch prices for the base and option years. Id. Although the Air Force disclosed details regarding each mission type and its overall estimate of 35 total launch missions, the agency elected not to release its estimate for each specific mission type. The Air Force, in consultation with government subject matter experts and based on the President's FY 2020 Budget project manifest and historical data, calculated a relative weighting percentage for each of the 12 mission types based on its internal estimate of the composition of the 35 mission launches. For example, if a mission type was estimated to be [DELETED] of the 35 total anticipated launches, then that mission type was assigned a weighting factor of [DELETED] percent [DELETED]. In cases where a specific mission type was not anticipated among the 35 total estimated launches, the government nevertheless determined that it was necessary to obtain pricing information for the mission in the event the need for that specific mission type arises, and therefore assigned a weighting percentage of [DELETED] percent [DELETED]. Id. at 4-7. The Air Force argues that the purpose of not disclosing the precise mission weightings is to "limit strategic manipulation of [offerors'] pricing to 'game' the weighting system" by forcing offerors to submit their most competitive line item pricing. AR, Tab 68, Memo. to File re TEP Methodology, at 1.

The Air Force will then apply its weighting factor to the offeror's proposed unit prices for each of the 12 mission types, and will sum the weighted unit prices to calculate a weighted average unit price for basic launch services. The basic launch services weighted average unit price will then be used as the basis for calculating total evaluated price by (1) applying the basic launch services weighted average unit price (and the other applicable weighted average unit prices) to each of the 21 anticipated missions under the larger of the two anticipated requirements contracts, and (2) adding those sums to the other proposed line item fixed prices discussed above. AR, Tab 71, Notional Pricing Template.

Blue Origin attacks the reasonableness of the agency's proposed methodology of using weighted average prices on two principal grounds. First, the protester argues that the agency is improperly withholding its internal estimates regarding the composition of the

⁹ Launch vehicle MTO capability is defined by the maximum payload mass, including associated adapters and interfaces, a launch vehicle is capable of delivering to a given orbit, subject to EELV performance requirements and while maintaining necessary flight performance reserve. Id. at 34.

35 anticipated launches. Blue Origin argues that an agency must generally release the basis for any estimates that it intends to use for evaluation purposes, and alleges, without any further substantiation, that the undisclosed weights that will be used for evaluation purposes will “unnecessarily distort[] prices by preventing offerors from receiving information they need to accurately determine their fixed costs and prices.” Comments at 12. We find no merit to the protester’s arguments.

Here, the RFP discloses adequate information for offerors to formulate their respective line item pricing for each reference mission type. Indeed, Blue Origin does not allege that there is any ambiguity with respect to the requirements of any individual reference mission. Thus, Blue Origin’s allegations that it cannot adequately determine its fixed prices for the basic launch services are unpersuasive.

Blue Origin also suggests that without knowing the agency’s anticipated mission composition, it cannot structure its proposal in the manner the protester believes is most competitively advantageous. Such competitive strategies could include, for example, offering economies of scale on more frequent mission types, or below cost “buy-in” pricing for less frequently anticipated mission types. This, however, is the type of competitive “gamesmanship” that the agency is specifically seeking to avoid. The Air Force desires offerors to submit their most competitive line item pricing for each reference mission type, and it is apparent that offerors can competitively and intelligently offer a price per mission type based on the information in the RFP. While undoubtedly the Air Force’s evaluation scheme places some risk on offerors by forcing them to provide their best individual line item pricing for each launch mission type, the agency has no obligation to minimize risk to the offerors.

In this regard, this case presents facts similar to those that we addressed in CACI, Inc.-Fed.; Booz Allen Hamilton, Inc., B-413028 et al., Aug. 3, 2016, 2016 CPD ¶ 238. In CACI, the procuring agency sought to award multiple indefinite-delivery, indefinite-quantity contracts. One of the protesters alleged that the solicitation’s cost/price evaluation scheme was defective because it did not disclose the labor hours that the agency would use to calculate each offeror’s total proposed price. The procuring agency there argued that it did not disclose the anticipated labor hours for each of the solicitation’s labor categories because it wanted competitive rates for each category. We found no merit to the protester’s arguments that withholding the information was improper because the solicitation included detailed descriptions for each of the 116 labor categories to allow offerors to prepare intelligent proposals on an equal basis. We rejected the protester’s contention that withholding the information was improper because the protester could propose discounted rates through volume utilization if it knew the estimated hours for each labor category. In this regard, we found reasonable the agency’s explanation that not disclosing the labor hours to be used in the price evaluation would mitigate the risk that offerors could inflate or unbalance their offered price. CACI, Inc.-Fed.; Booz Allen Hamilton, Inc., supra, at 5 n.2. On this record, we find nothing unreasonable with the agency’s decision not to disclose the weightings that it will use in calculating offerors’ TEPs.

Blue Origin next alleges, without any explanation or substantiation, that the agency's proposed use of a weighted average basic launch services price will distort the relative price differences between proposals and result in a misleading evaluation result. We find no merit to this argument because Blue Origin's protest fails to explain how in fact the agency's proposed evaluation scheme will distort the agency's understanding of the relative price differences between the proposals or otherwise result in misleading results. Indeed, this is not a case where the agency's proposed use of a weighted average price ignores anticipated line item quantities, see, e.g., Veterans Eval. Servs., Inc. et al., B-412940 et al., July 13, 2016, 2016 CPD ¶ 185, or otherwise anticipates pricing for requirements that are inconsistent with the resulting contract's anticipated requirements, see, e.g., AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117. Rather, the agency specifically is using its weighting methodology to account for the anticipated composition of launch missions under these requirements contracts, and its methodology appears to result in a reasonable and common basis for the evaluation of each proposal's relative anticipated costs of performance to the government.¹⁰

Provisions Inconsistent With Customary Commercial Practice

Blue Origin next argues that the RFP, which is for commercial item launch services, includes provisions relating to launch rescheduling and secondary objectives that are inconsistent with customary commercial practice in violation of FAR § 12.301(a). For the reasons that follow, we find that the protester does not clearly demonstrate that the provisions are inconsistent with customary commercial practice, and therefore, we find no basis on which to sustain the protest.

In procurements involving the acquisition of commercial items, FAR § 12.301(a) requires that contracts shall, to the maximum extent practicable, include only those clauses: (1) required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) determined to be consistent with customary commercial practice. In establishing acquisitions for commercial items, agencies must conduct market research to address, among other things, customary practices regarding the provision of the commercial items. FAR § 10.002(b); Northrop Grumman Technical Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. Consistent with this approach, FAR § 12.302(c) bars the tailoring of solicitations for commercial

¹⁰ To the extent Blue Origin also argues, without elaboration, that the use of a weighted average could mask unbalanced pricing, we find no merit to this argument as the Air Force represents that it will evaluate each separate price input in the pricing tables for reasonableness and balance. RFP, attach. No. 6, Evaluation Criteria, at 14 ("Unbalanced pricing exists when, despite an acceptable Total Evaluated Price (TEP), the price of one or more price inputs in the pricing tables is significantly over or understated as indicated by the application of cost or price analysis techniques."); id. at 15 ("The reasonableness and unbalanced pricing is a different evaluation [than the TEP analysis], which involves the evaluation of every price in the NSSL Phase 2 Attachment 8 Pricing Tables.").

items in a manner inconsistent with customary commercial practice unless a waiver is approved in accordance with agency procedures.

The Model Contract, incorporated as an attachment to the RFP, includes a tailored version of FAR clause 52.212-04, Addendum to Contract Terms and Conditions-- Commercial Items. Although the clause includes several tailored provisions, only two are relevant to the issues in the protest. First, under section (w), Launch Schedule Determination and Adjustments, the provision sets forth conditions relating to the scheduling, rescheduling, and consequences for missing scheduled launches. Germane here, the provision includes various grace periods within which the Air Force or contractor may delay a scheduled launch date without incurring damages or fees. RFP, amend. No. 1, Model, Contract, at 18. The contract specifies the following applicable standards for each party:

Table 1: Contractor Liquidated Damages and Grace Periods

Time Frame	Liquidated Damages	Grace Period
Authority to Proceed (ATP) through L-6 months	\$3,000 per day	90 days
L-6 months through L-3 months	\$5,000 per day	60 days
L-3 months through L-11 days	\$40,000 per day	30 days
L-10 days through Launch	\$200,000 per day	10 days*

*One request for up to ten (10) Grace Days available at L-10 will be granted regardless of whether cumulative totals in (4)(x) have been met.

Table 2: Government Postponement Fees and Grace Periods

Time Frame	Postponement Fees	Grace Period
ATP through L-12 months	\$1,000 per day	365 days
L-12 months through L-6 months	\$3,000 per day	90 days
L-6 months through L-3 months	\$5,000 per day	60 days
L-3 months through L-11 days	\$40,000 per day	30 days
L-10 days through Launch	\$200,000 per day	10 days*

*One request for up to ten (10) Grace Days available at L-10 will be granted regardless of whether cumulative totals in (4)(x) have been met.

Id. at 22.

The provision specifies that, using the above tables, for each corresponding time frame the number of available grace days for other than accelerated missions is the smaller of either: (1) the grace days specified in the grace period column; or (2) the remaining number of unused grace days from the previous timeframe. Id. at 18. For example, if the Air Force used 40 grace days during the period of L-12 months through L-6 months,

there would be 50 grace days available during the period of L-6 months through L-3 months. Id.

Second, under section (w), Secondary Objectives, the provision specifies that the government shall own all performance capability of the launch vehicle, to include any excess performance margin of the launch vehicle beyond the primary mission's requirements. Id. at 23. The RFP specifies that the contractor shall not use, without prior government consent, any excess performance margin of the launch vehicle for secondary objectives, which are any contractor proposed use of the excess margin of the launch vehicle beyond the primary mission's requirements, including, for example, recovery of certain launch vehicle hardware or commercial co-manifesting. Id. at 22-23.

As a threshold matter, although Blue Origin alleges that the rescheduling grace period and secondary objective provisions are inconsistent with customary commercial practice, the protester's submissions lack any evidentiary support identifying what the protester asserts are the customary commercial practices for rescheduling grace periods and secondary objectives, and thus, fails to demonstrate how the agency's provision is inconsistent with customary commercial practices. As we have explained, a protester asserting that a provision is contrary to customary commercial practice bears the initial burden of alleging how the provision is contrary to customary commercial practice. JRS Staffing Servs., B-410098 et al., Oct. 22, 2014, 2014 CPD ¶ 312 at 4; see also 4 C.F.R. § 21.1(c)(4) (requiring a protest to set forth a detailed statement of the legal and factual grounds of protest). Blue Origin's perfunctory assertions that the provisions in question are inconsistent with customary commercial are legally and factually insufficient.

For example, with respect to the rescheduling grace periods, Blue Origin merely asserts, without providing any substantiation, that the disparity in the parties' respective grace periods for the period of ATP through L-6 months is inconsistent with customary commercial practice, which "would provide flexibility that is equitable and tolerable to both parties taking into consideration the complexities of launch vehicle(s), satellites, and all related processes and coordination required to achieve mission success." Protest at 27; see also Comments at 17 (providing no additional clarification regarding what it believes customary commercial practice is, and summarily asserting that "[p]rovision (w) imposes an unequal burden that would be completely unacceptable in the commercial marketplace").

Blue Origin's assertions, which fail to even allege what it believes customary commercial practice is other than being more "equitable", is not supported by any corroboration, such as examples of commercial contracts, Blue Origin's standard commercial terms and conditions, or declarations. See, e.g., JRS Staffing Servs., supra (rejecting argument that a tailored provision was inconsistent with customary commercial practice where the protest included only perfunctory allegations without any support); Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 5 n.2, 7-9 (sustaining in part challenges to tailored provisions where the protester submitted evidence, including provisions from the Federal Supply Schedule and other

commercial agreements, to establish its interpretation of customary commercial practice, while rejecting an unsupported allegation that a clause requiring the tracking of certain metrics was inconsistent with customary commercial practice).

In the absence of any legally and factually sufficient arguments from Blue Origin establishing what customary commercial practices are for rescheduling grace periods or secondary objectives, we find no basis to object to the Air Force's explanations regarding why it believes the provisions are not inconsistent with customary commercial practice and otherwise are reasonable. As to the rescheduling grace periods, the Air Force persuasively argues that Blue Origin does not establish that any asymmetry between the parties' permissible grace periods or the mere fact that the agency, as the procuring customer, needs greater launch schedule flexibility is inherently non-commercial. See COS at 33. Contracting parties may negotiate allocation of risk provisions, and the mere fact that the Air Force enjoys greater schedule flexibility in and of itself does not establish that such a risk allocation is contrary to customary commercial practice.

Similarly, the Air Force argues that the limitation on secondary objectives is consistent with the fact that the contract at issue is a requirements contract, which is a commercial contracting approach. See, e.g., Uniform Commercial Code, § 2-306, Output, Requirements, and Exclusive Dealings. The agency argues that its mission requirements may include the need to launch multiple small satellites, and it intends to leverage any and all of the procured excess capacity for NSSL missions. COS at 33. Also, the Model Contract does not include a blanket prohibition on secondary objectives, as the Model Contract explicitly contemplates that the Air Force, upon the contractor's request, may release excess capacity for use by the contractor. Id. at 34. Again, in the absence of any legally or factually sufficient arguments demonstrating that the agency's approach to effectuating this requirements contract is inconsistent with customary commercial practice, we find no basis to object to the agency's actions here.

RECOMMENDATION

In summary, we find that the RFP's anticipated "when combined" best-value methodology fails to provide offerors with an intelligible and common basis for competition. We recommend that the Air Force amend the solicitation consistent with our decision and the requirements of applicable procurement law and regulation. We also recommend that the agency reimburse the protester its respective costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at (f).

The protest is sustained in part and denied in part.

Thomas H. Armstrong
General Counsel