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Decision

Matter of: ENGlobal Government Services, Inc.

File: B-419612.3

Date: December 15, 2021

Alexander J. Brittin, Esq., Brittin Law Group, PLLC; and Mary Pat Buckenmeyer, Esq., Dunlap Bennet & Ludwig PLLC, for the protester.
Seth H. Locke, Esq., Julia M. Fox, Esq., and Paul M. Korol, Esq., Perkins Coie LLP, for Kellogg, Brown & Root Services, Inc., the intervenor.
Rachel M. Noble, Esq., Defense Logistics Agency, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging various aspects of the agency's evaluation and award decision is dismissed where the arguments are either an untimely request for reconsideration of a prior decision or an untimely challenge to the scope of the agency's corrective action taken in response to another protest.
 2. Protest arguing that the agency improperly engaged in discussions with the awardee is denied where, while the record shows that the agency did engage in discussions with only the awardee, the protester fails to demonstrate competitive prejudice.
 3. Protest challenging the agency's evaluation of the awardee's professional compensation plan is denied where the record demonstrates that the agency's evaluation was reasonable, consistent with the solicitation, and in accordance with Federal Acquisition Regulation provision 52.222-46.
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DECISION

ENGlobal Government Services, Inc. (EGS), of Tulsa, Oklahoma, protests the award of a contract to Kellogg, Brown & Root Services, Inc. (KBR),¹ of Houston, Texas, under request for proposals (RFP) No. SP4702-20-R-0014, issued by the Defense Logistics

¹ In its proposal, the awardee refers to itself as "KBR Services, LLC (formerly named Kellogg, Brown & Root Services, Inc.)." Agency Report (AR), Tab 59, KBR Total Compensation Plan and Supporting Documents at 1.

Agency (DLA) for maintenance of automated fuel handling equipment. The protester challenges various aspects of the agency's evaluation and source selection decision. The protester also contends that the agency engaged in unequal discussions.

We deny the protest.

BACKGROUND

This protest follows EGS's prior protests of the same procurement: the first protests were denied by our Office on May 14, 2021, and the second protest was dismissed by the Court of Federal Claims (COFC) on July 15, 2021. By way of background, on June 17, 2020, the agency issued the RFP pursuant to Federal Acquisition Regulation (FAR) part 12, acquisition of commercial items, and part 15, contracting by negotiation. AR, Tab 1, RFP.² The RFP sought a contractor to support the maintenance and sustainment of all automated fuel handling equipment (AFHE) sites worldwide. The RFP explains that the AFHE system is an industrial control system with "real-time data acquisition/control and inventory management," and its "primary purpose is to automate both transfer and inventory functions in order to reduce the risk of spills and leakage of petroleum." AR, Tab 2, RFP Performance Work Statement (PWS) at 1. The contractor would be required to provide all personnel, equipment, materials, a maintenance program manager, and necessary services, and be able to respond to multiple requests simultaneously and work at multiple locations worldwide. *Id.*

The RFP contemplated the award of a single, fixed-price, indefinite-delivery, indefinite-quantity contract. AR, Tab 6, RFP § M at 2. The contract would be performed over five years with a guaranteed minimum amount of \$100,000 and a maximum amount of \$49,500,000. RFP at 3; RFP PWS at 1.

The RFP provided for award on a best-value tradeoff basis considering five evaluation factors: technical approach; maintenance program management approach/personnel qualifications ("management approach"); past performance; cybersecurity; and price. RFP § M at 1-2. The RFP provided that the technical approach factor was "significantly more important" than the other non-price factors; that all of the non-price factors, when combined, were "significantly more important" than price; and that, "[a]s the non-price ratings become more equal among proposals, the evaluated price becomes more important." *Id.* at 2.

The agency received initial proposals on or before August 11, 2020, from EGS (the incumbent contractor) and KBR.³ After an initial evaluation, the agency established a competitive range, conducted discussions, and requested, received, and evaluated final

² The agency amended the RFP eight times. All citations are to the Adobe PDF page numbers of the documents provided by the agency in its report.

³ The agency also received a proposal from a third offeror, which was later withdrawn. AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 1.

proposal revisions. The agency selected KBR for award, and EGS filed its first protests with our Office, challenging various aspects of the agency's evaluation and award decision. On May 14, 2021, we denied EGS's protests. *ENGlobal Gov't Servs., Inc.*, B-419612, B-419612.2, May 14, 2021, 2021 CPD ¶ 214.

EGS then filed a protest with the COFC where it challenged, for the first time, "the [a]gency's failure to properly evaluate the price realism of KBR's professional employees under FAR 52.222-46." Protest at 1. By way of background, FAR provision 52.222-46, Evaluation of Compensation for Professional Employees, states:

As a part of their proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract. The Government will evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation.

* * * * *

[P]roposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees.

FAR provision 52.222-46(a), (b); see AR, Tab 5, RFP § L at 1.

The agency proposed to take corrective action, which, as explained to the court, included issuing an amendment to the solicitation that "notified offerors that DLA is taking corrective action to evaluate price proposals in accordance with FAR 52.222-46 and Sections L and M of the solicitation and that, as part of its corrective action, DLA will make a new source selection decision." The court then dismissed the protest. AR, Tab 50, COFC Order of Dismissal; AR, Tab 51, COFC Judgment.

Amendment 7, issued by the agency on July 15, permitted EGS and KBR to submit "a total compensation plan in accordance with FAR 52.222-46" and specified that "[n]o other changes to proposals are permitted." AR, Tab 52, RFP amend. 0007 at 2. Specifically, the amendment advised:

Offerors are now being afforded the opportunity to submit a total compensation plan in accordance with FAR 52.222-46. The total compensation plan is separate and distinct from the previously submitted informal cost breakdowns and statements made in the price and non-price proposals. Neither party submitted a total compensation plan with the

supporting narrative and data required by FAR 52.222-46 to permit the price realism analysis required by the clause. Ensure the total compensation plan is accompanied with a cover letter and narrative explaining the plan.

Id. The offerors were required to include certain information in the narrative, including to “detail the salary and fringe benefits for professional (non-SCA [Service Contract Act] covered) employees and provide a narrative summary of the salary and what is included in the fringe benefits.” *Id.* The agency then issued another amendment to address questions about the prior amendment. AR, Tab 55, RFP amend. 0008.

On or before July 26, the agency received submissions from EGS and KBR. On July 29, the agency engaged in an exchange with KBR that it labeled as a “clarification,” in which KBR provided a revised submission. AR, Tab 60, Email with KBR--Total Compensation Plan with Clarification at 2; AR, Tab 60A, Attachment--Total Compensation Plan with Clarification at 1-3. The agency evaluated the submissions and again selected KBR for award. The agency’s selection decision included the following:

	EGS	KBR
Technical Approach	Good	Good
Management Approach	Good	Acceptable
Past Performance	Satisfactory Confidence	Satisfactory Confidence
CyberSecurity	Acceptable	Acceptable
Price	\$46,749,493	\$38,109,181

AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 6. With respect to the agency’s evaluation of the offerors’ compensation for professional employees under FAR provision 52.222-46, the source selection authority stated:

The Total Compensation Plans submitted by EGS[] and KBR provided sufficient documentation to demonstrate that its total compensation plan is realistic for the work to be performed. The non-Service Contract Act (SCA) covered positions and the salaries with fringe benefits indicate the capability of the proposed compensation structure to obtain and keep suitable qualified personnel to meet mission objectives. In addition, the differences in skills, the complexity of various disciplines, and professional job difficulty have been evaluated and considered.

AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 6.

On September 1, EGS was notified of the agency’s award to KBR. After a debriefing, this protest followed.

DISCUSSION

The protester challenges many aspects of the agency's evaluation and source selection decision. For example, EGS contends that the agency engaged in unequal and improper discussions when the agency conducted an exchange with KBR that allowed that firm to revise its proposal after the common cutoff for all offerors to submit final proposal revisions. EGS also argues that the agency failed to properly evaluate the price realism of KBR's proposed compensation for professional employees under FAR provision 52.222-46.

As explained below, while we find that the agency engaged in discussions with the awardee, this issue, standing alone, is insufficient to sustain the protest because we also conclude, the protester was not competitively prejudiced by the agency's actions. Competitive prejudice is an essential element of a viable protest. *SRA Int'l Inc.*, B-410973, B-410973.2, Apr. 8, 2015, 2016 CPD ¶ 32 at 7. Moreover, in its various protest submissions, EGS has raised arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically address all of EGS's arguments, we have considered all of them and find that they afford no basis on which to sustain the protest.

Untimely Issues

As a preliminary matter, EGS raises a number of arguments that, we conclude, are untimely. These arguments, filed on September 10, pertain to the agency's prior evaluation and award decision; were addressed in our prior decision dated May 24, denying EGS's protest; and were clearly unaffected by the agency's corrective action following EGS's subsequent protest at COFC. Under the unique procedural history of EGS's protests of this procurement, in our view, these arguments are either a request for reconsideration of our prior decision, which is untimely, or a challenge to the scope of the agency's corrective action taken in response to the protest at COFC, which is also untimely.

As a representative example, EGS challenges the agency's past performance evaluation by claiming that "[t]his protest ground was raised in EGS's initial protest but not addressed in the GAO decision." Protest at 3, 36-39. That decision acknowledged EGS's many challenges to the non-price evaluation factors and stated that, "[w]hile we do not specifically address all of EGS's arguments, we have considered all of them and find that they afford no basis on which to sustain the protest." *ENGlobal Gov't Servs.*, *supra* at 4. This is consistent with the statutory mandate that our bid protest forum provide for "the inexpensive and expeditious resolution of protests." See 31 U.S.C. § 3554(a)(1). In further keeping with our statutory mandate, our Office does not issue decisions in response to reconsideration requests to address a protester's dissatisfaction that a decision does not address each of its protest issues. See *Ahtna Facility Servs., Inc.--Recon.*, B-404913.3, Oct. 6, 2011, 2012 CPD ¶ 270 at 3.

This argument, in essence, is a request for reconsideration that, to be timely, had to be filed not later than 10 days after the issuance of our decision. Our Bid Protest Regulations contain strict rules for the timely submission of protests, as well as for requests for reconsideration. Under these rules, a request for reconsideration must be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b), (c); see, e.g., *New Tech Sols., Inc.*, B-417956.3, Mar. 6, 2020, 2020 CPD ¶ 98 at 1-3 (dismissing protest as untimely where it is essentially a request for reconsideration of a prior decision filed more than 10 days after the issuance of that decision). In other words, to the extent EGS now wishes to challenge our prior decision, those arguments are untimely.

Moreover, as EGS acknowledges and as the record shows, the agency did not reevaluate past performance as part of its later corrective action. As noted above, the agency took corrective action after EGS filed a protest with the COFC where it challenged, for the first time, “the [a]gency’s failure to properly evaluate the price realism of KBR’s professional employees under FAR 52.222-46.” Protest at 1. The agency’s corrective action was limited to asking offerors to submit professional employee compensation plans for the agency to evaluate; this was clear from amendment 7, issued on July 15, which permitted EGS and KBR to submit “a total compensation plan in accordance with FAR 52.222-46” and specified that “[n]o other changes to proposals are permitted.” AR, Tab 52, RFP amend. 0007 at 2; see also AR, Tab 50, COFC Order of Dismissal; AR, Tab 51, COFC Judgment.

Therefore, to the extent EGS now argues that the agency should have reevaluated past performance as part of its corrective action, that argument is untimely. Pursuant to our Bid Protest Regulations, a protest based on alleged solicitation improprieties that are apparent prior to the deadline for submitting proposals must be filed before that deadline. 4 C.F.R. § 21.2(a)(1). A protest allegation that challenges the ground rules that the agency has announced for performing corrective action and recompetition is analogous to a challenge to the terms of the solicitation and must be filed prior to the deadline for submitting revised proposals. *Veterans Evaluation Servs., Inc., et al.*, B-412940.26 *et al.*, Jan. 5, 2017, 2017 CPD ¶ 17 at 11; *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7. The protester did not challenge the scope of the agency’s corrective action prior to the July 26 due date for revised submissions and, therefore, arguments in this regard are untimely.

In sum, many of EGS’s arguments are untimely and, therefore, are dismissed.

Discussions

We next address the merits of some of the remaining arguments. The protester contends that the agency engaged in unequal discussions after the deadline for receipt of final proposal revisions by allowing KBR, and not EGS, to revise its proposal in a material way. Protest at 31-36; Comments at 11-17. In response, the agency maintains that its post-final proposal revision exchange with KBR was merely a request for clarification. Memorandum of Law (MOL) at 8-11.

As noted above, amendment 7 permitted EGS and KBR to submit “a total compensation plan in accordance with FAR 52.222-46” and specified that “[n]o other changes to proposals are permitted.” AR, Tab 52, RFP amend. 0007 at 2. The record shows that, when KBR submitted its 15-page total compensation plan, it included a table titled “Exhibit 1. Detailed Salary and Fringe Benefits Compensation for Professional (non-SCA Employees),” which had the following six columns:

Project Labor Title	Base Hourly Rate	Applied Hourly Rate (Escalated)	Annual Pay	Annual Fringe Benefits	Total Annual Compensation

AR, Tab 59, KBR Total Compensation Plan and Supporting Documents at 2-3.

On July 29, the agency engaged in an exchange with KBR that it labeled as a “clarification.” AR, Tab 60, Email with KBR--Total Compensation Plan with Clarification at 2. The agency asked KBR the following:

Based on the supplemental data that was provided by KBR, the hourly rates for the project labor title match but the annual pay does not match. For example, the MPM [Maintenance Program Manager] shows in Exhibit 1 an annual pay of \$[REDACTED] but on page 9 of the narrative, the salary shown for the MPM is \$[REDACTED]. This should be a simple clarification with KBR to understand the Exhibit 1 annual pay column.

AR, Tab 60, Email with KBR--Total Compensation Plan with Clarification at 2.

KBR responded the next day by email with an attached revised submission, which included a revised Exhibit 1 with the following eight columns:

Project Labor Title	Base Hourly Rate	Applied Hourly Rate (Escalated)	Annual Pay (Productive Hours)	Annual Pay (Non-Productive Hours)	Annual Pay (Productive + Non-Productive Hours)	Annual Fringe Benefits (Excluding Non-Productive Hours)	Total Annual Compensation

AR, Tab 60A, Attachment--Total Compensation Plan with Clarification at 1-3. The revised Exhibit 1 also included revised values for the “total annual compensation” column. *Id.* For example, for the Maintenance Program Manager position’s Year 1 total annual compensation, KBR’s original Exhibit 1 listed a value of \$[REDACTED] while KBR’s revised Exhibit 1 listed a value of \$[REDACTED]. *Compare* AR, Tab 59, KBR

Total Compensation Plan and Supporting Documents at 2-3 *with* AR, Tab 60A, Attachment--Total Compensation Plan with Clarification at 1-3.

KBR's email response also included a narrative, as follows:

KBR acknowledges that the base pay shown in screen shots does not equate to the annual pay shown in the table previously submitted in KBR's Total Compensation Plan. Below we provide clarification on calculations used to derive total annual compensation and have included additional columns in Exhibit 1 of our Total Compensation plan (attached to this email), to explain how the total compensation is calculated.

* * * * *

In reviewing the salaries to provide clarification to the Government, we noticed that the compensation for Year 1 only, did not correlate with the final pricing files previously submitted to the Government. As such, we have made corrections to Year 1, correlating to our submitted final pricing, which is included in the attached Total Compensation Plan.

AR, Tab 60, Email with KBR--Total Compensation Plan with Clarification at 1.

KBR's email narrative also included two detailed paragraphs and a table explaining its calculations. *Id.* The agency evaluated and incorporated KBR's revised submission in its evaluation documents. AR, Tab 20, Price Evaluation Team Report at 18-19, 21; see *also* AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 8; AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 6.

In conducting exchanges with offerors, agency personnel may not "engage in conduct that . . . [f]avors one offeror over another," FAR 15.306(e); in particular, agencies may not engage in what amounts to disparate treatment of the competing offerors. *Front Line Apparel Grp.*, B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4. Where an agency reopens discussions with one offeror after the receipt of final proposal revisions, it must afford all offerors in the competitive range an opportunity for reopened discussions. *Lockheed Martin Simulation, Training & Support*, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 8.

The agency's characterization of a communication as clarifications or discussions is not controlling; it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. *Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. As we have consistently stated, the test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for proposals to be materially changed. *Id.*

In contrast, clarifications are limited exchanges that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical issues. See FAR 15.306(a)(2). Therefore, clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. See, e.g., *Res Rei Dev., Inc.*, B-410466.7, Oct. 16, 2015, 2015 CPD ¶ 320 at 10; *International Waste Indus.*, B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5.

Here, in response to the agency's communication, KBR submitted a revised proposal that was evaluated by the agency in reaching its decision to select KBR for award. The agency and KBR's arguments that the communications were labeled as a "clarification" and "limited to address a potential mathematical error," and that "KBR was not permitted to revise its proposal," are belied by the record. MOL at 10; Intervenor's Comments at 10. KBR's contemporaneous response included, as discussed above, a revised exhibit with additional columns, pricing information, and revised pricing totals, and a narrative in an email detailing how its prices were calculated. That revised exhibit and the accompanying narrative were reviewed and incorporated by the agency in its evaluation documents. Under these circumstances, we conclude that the communications here ultimately constituted discussions.

Having conducted a post-corrective action round of discussions with KBR regarding its professional employee compensation plan, the agency also should have opened discussions with EGS. However, we also conclude that the agency's failure to do so, under these circumstances, is insufficient to sustain the protest because the agency's conduct of post-corrective action discussions did not prejudice the protester.

Competitive prejudice is an essential element of a viable protest. *SRA Int'l Inc., supra* at 7. 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. *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 6. In the context of unequal discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. *Id.*

Here, the record shows that the agency did not identify any concerns with EGS's professional compensation plan that it would have been required to raise had it opened discussions with EGS. See AR, Tab 20, Price Evaluation Team Report at 11-12, 15; AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 8. The record reflects that the agency found EGS's professional compensation plan to be "realistic for the work to be performed." AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 6.

Yet, EGS contends that, had it been afforded the opportunity for a post-corrective action round of discussions, it would have revised its proposal in other ways. For example, the

protester argues that the agency should have raised, and EGS would have addressed, its proposed transition-in costs.⁴ Protest at 32-34; Comments at 14-16.

EGS's argument, however, misconstrues the scope of the agency's corrective action that led to the submission of proposal revisions under these circumstances. An agency's discretion when taking corrective action extends to the scope of proposal revisions. See, e.g., *Computer Assocs. Int'l., Inc.*, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5; *Rel-Tek Sys. & Design, Inc.--Modification of Remedy*, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. *System Planning Corp.*, B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3.

As noted above, the agency permitted the offerors to submit, only, professional compensation plans for the purposes of evaluating in accordance with FAR provision 52.222-46 and specified that "[n]o other changes to proposals are permitted." AR, Tab 52, RFP amend. 0007 at 2. Even if the agency had also opened discussions with EGS, as it did with KBR, the protester has not established that the agency would have been required to allow EGS to revise other areas of its proposal, such as its proposed transition-in costs. Therefore, while we find that the agency engaged in discussions with the awardee, this issue is insufficient to sustain the protest because of a lack of competitive prejudice to the protester.

Price Evaluation Pursuant to FAR Provision 52.222-46

Having concluded that EGS was not prejudiced by the agency's conduct of discussions with KBR, we next turn to the protester's challenges to the agency's evaluation of the

⁴ We note that our prior decision specifically addressed EGS's concerns about the conduct of a prior round of discussions with respect to its transition-in costs. See *ENGlobal Gov't Servs.*, *supra* at 10 n.7. There, we rejected EGS's allegation that the agency conducted improper discussions when the agency "did not advise EGS during discussions that it could have reduced its transition-in costs." *Id.* We reiterated that discussions, when conducted, must identify proposal deficiencies and significant weaknesses and should discuss other aspects that reasonably could be addressed in order to materially enhance the offeror's potential for receiving award. FAR 15.306(d)(3); *Serco Inc.*, B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11.

Agencies, however, are not required to "spoon-feed" an offeror during discussions by identifying every possible area where a proposal might be improved or suggesting alternative approaches. *Vizada Inc.*, B-405251 *et al.*, Oct. 5, 2011, 2011 CPD ¶ 235 at 11. To the extent EGS now wishes to challenge that decision, such a challenge is untimely. 4 C.F.R. § 21.14(b), (c); see Protest at 32-34 (referencing the prior GAO decision).

awardee's professional employee compensation plan. On this record, we find no basis to sustain this protest ground.⁵

Provision 52.222-46 of the FAR, at issue here, states that the “[r]ecompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees.” FAR 52.222-46(a). The provision explains that “[t]he Government is concerned with the quality and stability of the work force to be employed on this contract” and a lowering of compensation can be detrimental to, and impair, a contractor’s “ability to attract and retain” professional service employees. FAR 52.222-46(a), (c). Accordingly, the provision requires the agency to evaluate each offeror’s ability to provide uninterrupted, high-quality work, considering “its impact upon recruiting, and retention, its realism, and its consistency with a total plan for compensation.” FAR 52.222-46(a). The provision specifies that the agency will evaluate proposals with “compensation levels lower than those of predecessor contractors . . . on the basis of maintaining program continuity,” among other considerations. FAR 52.222-46(b).

Our Office has stated that the purpose of a review of compensation for professional employees is to evaluate each offeror’s ability to provide uninterrupted, high-quality work, considering the realism of the proposed professional compensation and its impact upon recruiting and retention. *L-3 Nat’l Sec. Sols., Inc.*, B-411045, B-411045.2, Apr. 30, 2015, 2016 CPD ¶ 233 at 7. In the context of a fixed-price contract, our Office has explained that FAR provision 52.222-46 anticipates an evaluation of whether an awardee understands the contract requirements and has proposed a compensation plan appropriate for those requirements; in effect, a price realism evaluation regarding an offeror’s proposed compensation. *Id.* at 7-8.

In addition to this price realism analysis, our Office has explained that, in recompetitions, FAR provision 52.222-46(b) requires the agency to compare the awardee’s proposed professional compensation to the incumbent contractor’s. *SURVICE Eng’g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 5-6; FAR 52.222-46. If the agency determines the awardee’s proposal envisions lower compensation levels compared to the incumbent contractor, then the agency must further evaluate the awardee’s proposed compensation plan on the basis of maintaining program continuity, among other considerations. *Id.* In short, our Office has identified two required analyses that the agency must perform under FAR provision 52.222-46, one based on the price realism of the compensation plan and the other considering

⁵ EGS challenges other aspects of the agency’s price evaluation. For a more robust discussion, see *ENGlobal Gov’t Servs.*, *supra* at 7-10 (concluding that “the agency reasonably considered the awardee’s lower price and concluded that it did not warrant an assessment of risk or rejection of the awardee’s proposal”). To the extent EGS now wishes to challenge that decision, such a challenge is untimely. 4 C.F.R. § 21.14(b), (c); see Protest at 27-28 (referencing the prior GAO decision and arguing that “GAO’s review of the [a]gency’s price realism evaluation is based upon flawed logic”).

whether the compensation plan will allow for program continuity through the retention of professional contractor employees.

Here, the record reflects that the agency conducted an evaluation that was reasonable, consistent with the solicitation, and in accordance with the requirements of FAR provision 52.222-46. The price evaluation team “reviewed the proposed [total compensation] plans, conducted an analysis based on the data and information available, and reviewed the supplemental documentation submitted to ensure the prices were fair, reasonable, and realistic for the work to be performed.” AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 8; see AR, Tab 20, Price Evaluation Team Report at 11-12, 15, 17-19, 21.

With respect to KBR’s proposal, the evaluators first noted the following, in general:

KBR’s proposal is both descriptive and demonstrated an understanding of the [contract line item number] CLIN structure and the cost elements in their proposals to be burdened against each CLIN. Furthermore, because KBR submitted a technically acceptable proposal (and no weaknesses or deficiencies remained), KBR has demonstrated a technical understanding of the performance requirements from a technical standpoint. The offerors’ respective pricing is consistent with the various elements of their technical proposals. EGS proposed to include technicians at [REDACTED] while KBR proposed to have the technicians [REDACTED] while meeting the technical requirements of the PWS, which explains why KBR’s price is lower than both the incumbent and the [independent government cost estimate] IGCE. The technical evaluation team was consulted after the disclosure of [REDACTED] the technicians, which the technical evaluation team found to be acceptable.

AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 8-9.

The evaluators then noted, with respect to KBR’s professional employee compensation plan, the following:

Additionally, KBR’s Total Compensation Plan for professional employees was reviewed and found to be realistic. Each offeror provided supporting data for their Total Compensation Plans demonstrating that the salaries and fringe benefits were in line with market conditions. Although there were differences in the offerors’ compensation for similar professional employees, the differences were not substantial and there was notable similarity in the fringe benefits. Although KBR proposed [REDACTED] % lower salary for the Project Manager than EGS and KBR proposed lower salaries than EGS for at least three of their professional employees, KBR’s proposed compensation was still within the range of similarly situated professionals in the commercial marketplace as evidenced by their supporting data. Also, eight of KBR’s ten professional employees are

already employed, mitigating any risk of KBR having the personnel necessary to perform when it replaces the incumbent. After reviewing each offeror's total compensation plan, there were no concerns about either offeror's ability to retain or hire the professionals necessary to perform the requirements of the PWS.

AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 9; *see also* AR, Tab 20, Price Evaluation Team Report at 17-19, 21.

In making the source selection decision, the source selection authority further noted:

The Total Compensation Plans submitted by EGS[] and KBR provided sufficient documentation to demonstrate that its total compensation plan is realistic for the work to be performed. The non-Service Contract Act (SCA) covered positions and the salaries with fringe benefits indicate the capability of the proposed compensation structure to obtain and keep suitable qualified personnel to meet mission objectives. In addition, the differences in skills, the complexity of various disciplines, and professional job difficulty have been evaluated and considered.

AR, Tab 61, Source Selection Authority Decision Following Corrective Action at 6.

In other words, the agency argues that it "conducted a reasonable analysis of KBR's professional employee compensation considered in terms of its impact on recruiting and retention, its realism, and its consistency," in accordance with the solicitation and FAR provision 52.222-46. MOL at 5. We agree.

Contrary to the protester's argument that "[i]t is clear that the agency did not consider the risk and impact associated with [KBR's] proposed incumbent employee capture using a wage reduction," Protest at 31, the record reflects that the agency did consider these aspects. For example, the evaluators noted where KBR proposed lower salaries than EGS and documented their finding that "KBR's proposed compensation was still within the range of similarly situated professionals in the commercial marketplace as evidenced by their supporting data." AR, Tab 62, Price Negotiation Memorandum Following Corrective Action at 9. While EGS continues to argue that this analysis is "deficient," Comments at 3, the protester has not established that the solicitation or FAR provision 52.222-46 required more from the agency. *See* FAR 52.222-46; *see also*, e.g., *GS4 Gov't Servs*, B-401694, B-401694.2, Nov. 4, 2009, 2009 CPD ¶ 236 at 6-7 (denying protest where the protester "essentially disagrees with the level of scrutiny applied by the agency to [the awardee's] proposal"; the nature and extent of the agency's price realism analysis ultimately are matters within the exercise of the agency's discretion).

Under these circumstances, EGS's protest fails to demonstrate that the agency's evaluation was unreasonable or inconsistent with the terms of the solicitation or the requirements of FAR provision 52.222-46. Accordingly, this protest ground is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel