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# Decision

**Matter of:** Blue Origin Federation, LLC; Dynetics, Inc.-A Leidos Company

**File:** B-419783; B-419783.2; B-419783.3; B-419783.4

**Date:** July 30, 2021

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## DIGEST

1. Significantly higher-priced offerors submitting proposals for a demonstration mission for a human landing system for lunar exploration, under a broad agency announcement (BAA) with a preference for two awards, argue that agency was required to advise them via an amendment or discussions (or otherwise cancel the BAA altogether) once the agency learned that it had less funding than it needed to support multiple awards for the effort. We deny the protests because the BAA expressly put all offerors on notice that the number of awards was subject to available funding and the agency could make multiple contract awards, a single award, or no award at all. See Discussion, Part II.

2. Protests challenging the agency's evaluation of proposals submitted in response to a BAA for research and development are denied because the agency's evaluation was consistent with applicable procurement law, regulation, and solicitation terms, and, to the extent there were any errors, the protesters cannot establish any reasonable possibility of competitive prejudice. See Discussion, Part III.

3. Protests alleging that the agency waived a material solicitation requirement for the awardee is denied because the protesters cannot establish any reasonable possibility of competitive prejudice as a result of the agency's decision to waive the requirement. See Discussion, Part III.

4. Subsequently withdrawn consultant application for admission to a protective order presented material concerns that the consultant engages in competitive decisionmaking, or, alternatively, presents an unacceptable risk of inadvertent disclosure of protected material, based on his employment as an executive officer of a non-profit entity that competes for federal contracts and other financial assistance agreements to conduct research and development in related space and aerospace fields. See Discussion, Part I.

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## **DECISION**

Blue Origin Federation, LLC, of South Kent, Washington, and Dynetics, Inc.-A Leidos Company, of Huntsville, Alabama, protest their non-selection for awards and the award of optional contract line item numbers to Space Exploration Technologies Corp. (SpaceX), of Hawthorne, California, under Option A to Appendix H of Broad Agency Announcement (Option A BAA) No. NNH19ZCQ001K, which was issued by the National Aeronautics and Space Administration (NASA), for a demonstration mission for a human landing system (HLS) for lunar exploration. The protesters primarily contend that the agency was required to open discussions, amend, or cancel the Option A BAA when NASA, after the receipt of proposals, determined that it had less funding than it needed to support multiple awards for the HLS program. The protesters also argue that NASA unreasonably evaluated proposals.

We deny the protests.

As set forth herein, the decision is organized as follows. First, in the "Background" section, we address relevant terms of the solicitation and pertinent facts regarding the procurement. Second, in the "Discussion" section, we address the protesters' allegations and our resolution of those issues. That section is divided into three parts. In Part I, we address our resolution of certain procedural matters involving the admission of the protesters' outside technical consultants to the protective orders issued for the respective protests. In Part II, we address the protesters' allegations that the agency unreasonably decided to make a single award, failed to allow offerors to compete on an equal basis to the agency's allegedly changed requirements, and failed to reasonably conduct discussions and post-selection negotiations. In Part III, we address the protesters' challenges to the agency's evaluation of proposals.

## **BACKGROUND**

In October 2019, to meet NASA's requirement for rapid end-to-end development and demonstration of a system to land humans on the surface of the Moon, NASA issued, pursuant to Federal Acquisition Regulation (FAR) part 35, the Appendix H: Human Landing System (HLS) broad agency announcement (BAA) under the omnibus Next

Space Technologies for Exploration Partnerships BAA. Agency Report (AR), Tab 2, HLS BAA.<sup>1</sup> The HLS BAA set forth NASA’s multi-phased approach to achieve a 2024 crewed HLS demonstration mission, and a 2026 HLS demonstration mission exhibiting increased sustainability. In the base period phase, NASA intended to award up to four, 10-month contracts for HLS design and development work. *Id.* at 1422-1423. In the Option A period phase, NASA would award optional contract line item numbers (CLIN) under the base period contracts for up to two of the base period contractors for: (i) further design, development, test, and evaluation (DDT&E) of their proposed HLS; (ii) a 2024 flight demonstration mission; and (iii) initial work in anticipation of the 2026 Option B sustainment demonstration mission. *Id.* In the Option B period phase, NASA anticipates funding the DDT&E necessary to further evolve one or both of the initial HLS designs developed through the Option A awards for a 2026 flight demonstration of a sustainable HLS. *Id.* at 1424.

NASA made three base period awards to Blue Origin, Dynetics, and SpaceX; the cumulative value of the three contracts was \$967 million. See, e.g., Contracting Officer Statement (COS) (B-419783) at 7; “NASA Names Companies to Develop Human Landers for Artemis Moon Missions,” Apr. 30, 2020, available at <https://www.nasa.gov/press-release/nasa-names-companies-to-develop-human-landers-for-artemis-moon-missions> (last visited July 25, 2021). On October 30, 2020, NASA issued the Option A BAA to the three base period contractors. On November 16, NASA issued an amended Option A BAA. See AR, Tab 3, Option A BAA.<sup>2</sup> Consistent with NASA’s acquisition strategy disclosed in the prior HLS BAA, the Option A BAA reconfirmed that NASA was “currently planning to award Option A CLINs for up to two of the Base period contractors, with a preference for awarding two, pending availability of funds.” *Id.*, ¶ 1.3.1; see also *id.*, ¶ 1.3.3 (“As noted above, NASA anticipates exercising Option A for up to two contractors.”); ¶ 4.4.3.1 (“Note that NASA anticipates awarding up to two contracts. . . .”).

Although the Option A BAA reiterated NASA’s preference for two awards, the solicitation in numerous places also included the caveat that the number of awards would be subject to available funding, which had not yet been appropriated. See, e.g., *id.* at ¶ 1.3.1 (representing that NASA “reserve[d] the right to change its HLS acquisition strategy at any time,” and stating that its preference for two awards was “pending availability of funds”); ¶ 5.2.2 (stating, consistent with FAR section 35.016(e), that the

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<sup>1</sup> We did not initially consolidate the protests during development, and, therefore, both cases included separate pleadings and records. For the purposes of this decision, references herein to agency report exhibits and their corresponding page numbers, will be to the exhibit numbers and Bates numbering included in the report submitted in response to Blue Origin’s protest. Where necessary to differentiate between the two records, we will denote references to the Blue Origin record with a citation to protest B-419783, and references to the Dynetics record with a citation to protest B-419783.2.

<sup>2</sup> References herein to the Option A BAA are to the conformed version incorporating amendment one.

primary basis for selecting one or more proposals for award would include “funds availability”); ¶ 5.3.1.3 (“[T]he [Source Selection Authority (SSA)] may consider whether the proposal allows the Agency to effectuate its acquisition strategy of making two awards, within the limits of NASA’s available funds . . . .”); ¶ 6.1 (“The overall number of awards will be dependent upon funding availability and evaluation results.”); ¶ 6.3 (“Any reduced appropriations or continuing resolution may affect NASA’s ability to award selected Offerors or award options.”); ¶ 6.4 (“Funds are not currently available for this solicitation, but are expected to become available on or before contract award. The Government’s obligation to make awards is contingent upon the availability of appropriated funds from which payments can be made and the receipt of proposals that NASA determines are acceptable.”).

Any resulting Option A awards would be awarded on a fixed-price basis, with a period of performance of up to six years for the Option A related portion of the work. *Id.*, ¶¶ 1.3.1, 6.2. For the purposes of evaluating and selecting proposals for award, NASA would not compare proposals or conduct a trade-off among proposals. *Id.*, ¶ 5.2.1. Rather, consistent with FAR section 35.016(e), the primary bases for selecting one or more proposals for award were technical considerations, importance to agency programs, and availability of funds. These bases for consideration were assessed in the context of the agency’s consideration of proposals under the following evaluation factors and areas of focus:

<b>Evaluation Factor</b>	<b>Areas of Focus</b>
<b>Factor 1: Technical Approach</b>	Technical Design Concept
	Development, Schedule, and Risk
	Verification, Validation, and Certification
	Insight
	Launch and Mission Operations
	Sustainability
	Approach to Early System Demonstrations
<b>Factor 2: Total Evaluated Price</b>	No focus areas
<b>Factor 3: Management Approach</b>	Organization and Management
	Schedule Management
	Risk Reduction
	Commercial Approach
	Base Period Performance
	Small Business Subcontracting Plan
	Data Rights

*Id.*, ¶ 5.2.2.

The technical approach factor was to be more important than the total evaluated price factor, which in turn was to be more important than the management approach factor; the non-price factors, when combined, were significantly more important than price. *Id.*, ¶ 5.2.3.

The Option A BAA contemplated a three step evaluation process. First, NASA would make responsibility determinations and evaluate proposals for compliance with the Option A BAA's domestic sourcing requirements. *Id.*, ¶ 5.3.1.1. Next, the source evaluation panel would evaluate the proposals of eligible offerors. For the technical and management approach evaluation factors, the evaluators would assign proposals, strengths and weaknesses and an overall adjectival rating.<sup>3</sup> *Id.*, ¶ 5.3.1.2. The evaluators would also calculate offerors' total evaluated prices, and evaluate the prices for reasonableness, balance, and to ensure that offerors did not include prohibited advance payments. *Id.*, ¶¶ 5.2.5, 5.3.1.2.

The third and final step consisted of the SSA's assessment of the proposals and evaluation findings, and final award decisions. As addressed above, the solicitation provided that the SSA would not conduct a comparative analysis or trade-off between proposals. Rather, the SSA was to consider each proposal on its own individual merits,

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<sup>3</sup> The solicitation advised that, for purposes of evaluating strengths and weaknesses, the agency would consider how an offeror's approach affects risk, such as technical risk, risk to meeting the offeror's proposed schedule, the need for increased government oversight, or the risk of likelihood of unsuccessful contract performance. AR, Tab 3, Option A BAA, ¶ 5.2.4.1. The solicitation also provided for the following adjectival rating definitions:

Outstanding	A thorough and compelling proposal of exceptional merit that fully responds to the objectives of the BAA. Proposal contains strengths that far outweigh any weaknesses.
Very Good	A competent proposal of high merit that fully responds to the objectives of the BAA. Proposal contains strengths which outweigh any weaknesses.
Acceptable	A competent proposal of moderate merit that represents a credible response to the BAA. Strengths and weaknesses are offsetting or will have little or no impact on contract performance.
Marginal	A proposal of little merit. Proposal does not clearly demonstrate an adequate approach to and understanding of the BAA objectives. Weaknesses outweigh strengths.
Unacceptable	A seriously flawed proposal that is not responsive to the objectives of the BAA. The proposal has one or more deficiencies, or multiple significant weaknesses that either demonstrate a lack of overall competence or would require a major proposal revision to correct. The proposal is unawardable.

*Id.*, ¶ 5.2.4.2.

and select one or more proposals that individually presented value to the government and that optimized NASA's ability to meet the Option A BAA's objectives.

The Option A BAA provided that the SSA, when evaluating whether a proposal presented value and met NASA's stated objectives, could consider whether the proposal would allow NASA to effectuate its acquisition strategy of making two awards, within the limits of NASA's available funds, to enable the further development of sustainable, cost-effective lunar transportation services for NASA's long-term needs. Additionally, the Option A BAA further provided that the SSA could make initial, non-binding selections of an offeror or offerors for the purpose of having the contracting officer engage in post-selection negotiations with one or more offerors.<sup>4</sup> *Id.*, ¶ 5.3.1.3; *see also id.*, ¶¶ 4.1 and 5.1 (providing the contracting officer could conduct post-selection negotiations if the contracting officer "determine[d] them to be necessary").

SpaceX, Blue Origin, and Dynetics timely submitted proposals by the December 8 proposal submission deadline. After the receipt of proposals, on December 21, Congress passed the Consolidated Appropriations Act for Fiscal Year (FY) 2021; the President signed the bill into law on December 27. *See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.* Congress appropriated NASA \$23.27 billion. With respect to the HLS program, Congress appropriated \$850 million.<sup>5</sup> *See COS (B-419783) at 23; 166 Cong. Rec. H7879, H7946 (Dec. 21, 2020) (explanatory statement).*

In addition to the \$850 million appropriated by Congress, NASA identified an additional potential \$96 million in FY2021 funds that it could use for HLS activities. Specifically, the agency identified additional potential funding from its FY2021 Advanced Exploration

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<sup>4</sup> The Option A BAA differentiated between discussions, which were defined as "exchanges with Offerors that occur after receipt of proposals but before selection," and post-selection negotiations, which were defined as "exchanges with Offerors who have been selected for potential contract award." *Id.*, ¶ 4.1.3. Additionally, NASA materially revised the scope of potential post-selection negotiations between the initial HLS BAA and the Option A BAA. Specifically, the HLS BAA limited the scope of post-selection negotiations to exchanges "that do not contemplate material proposal revisions and are intended to address outstanding contract terms and conditions." In contrast, the Option A BAA broadened the scope of post-selection negotiations to allow for exchanges where the contracting officer could invite the offeror "to revise only those specific portions of its proposal that have been identified by the Contracting Officer as open to revision." *Compare AR, Tab 2, HLS BAA, ¶ 4.1.3 with Tab 3, Option A BAA, ¶ 4.1.3.*

<sup>5</sup> The President's FY2021 budget request sought \$25.2 billion for NASA. Office of Management and Budget, "Budget of the United States Government, Fiscal Year 2021," available at <https://www.govinfo.gov/app/collection/budget/2021> (last visited July 25, 2021), at 101. In support of the HLS program, NASA requested \$3.4 billion for the development of lander systems. *Id.*

Systems budget and from funding “originally reserved but not yet committed” for HLS base period long lead items. COS (B-419783) at 24 n.5; AR, Tab 109, Internal NASA HLS Budget Analysis. Of the total potential available \$946 million for FY2021, however, NASA concluded that only approximately \$345 million would be available for FY2021 Option A contract payments. COS (B-419783) at 23-24 (explaining that approximately \$389 million was committed for milestone payments to the three HLS BAA base period awardees, approximately \$154 million was allocated for NASA’s internal HLS programmatic operations costs, and approximately \$48 million was reserved for other Option A related costs).

Subsequently, NASA evaluated the three proposals submitted in response to the Option A BAA as follows:

	<b>SpaceX</b>	<b>Blue Origin</b>	<b>Dynetics</b>
<b>Technical</b>	Acceptable	Acceptable	Marginal
<b>Management</b>	Outstanding	Very Good	Very Good
<b>Price</b>	\$2,941,394,557	\$5,995,463,651	\$9,082,209,433

AR (B-419783), Tab 93, Source Selection Statement, at 27776; AR (B-419783), Tab 92, Source Eval. Panel Rep. – Blue Origin, at 27739; AR (B-419783.2), Tab 70, Source Eval. Panel Rep. – Dynetics, at 18759 (prices rounded to nearest whole dollar).

Relevant to the issues in this protest, SpaceX’s initial proposal contemplated approximately \$[DELETED] in milestone payments from NASA during FY2021. See COS (B-419783) at 25; AR, Tab 121, SpaceX Initial Vol. IV Proposal, attach. 13, Proposed Milestone Payments Spreadsheet, at Payment Schedule Tab (summing proposed payment amounts for milestones with proposed completion dates before October 2021). In contrast, Blue Origin sought approximately \$[DELETED], and Dynetics sought \$[DELETED] in milestone payments during FY2021. See AR (B-419783), Tab 34, Blue Origin Vol IV Proposal, attach. 13, Proposed Milestone Payments Spreadsheet, at Milestones Tab (summing proposed payment amounts for milestones with proposed completion dates before October 2021); AR (B-419783.2), Tab 36, Dynetics Vol. IV Proposal, attach. 13, Proposed Milestone Payments Spreadsheet, at Payment Schedule Tab (same). Thus, all three offerors’ respective proposed milestone payments for FY2021 exceeded the \$345 million in available funding NASA identified for FY2021 as follows: SpaceX exceeded NASA’s available funding by \$[DELETED]; Blue Origin exceeded that amount by \$[DELETED]; and Dynetics exceeded that amount by \$[DELETED].

On April 2, 2021, after reviewing the evaluators’ reports and receiving a comprehensive briefing, the SSA decided that it was in NASA’s best interests to make an initial, conditional selection of SpaceX’s proposal for award. In reaching this decision, the SSA noted that it remained the agency’s “desire to preserve a competitive environment at this stage of the HLS Program,” but the SSA concluded that such an approach was not feasible because “at the initial prices and milestone payment phasing proposed by each of the Option A offerors, NASA’s current fiscal year budget did not support even a single

Option A award.” AR, Tab 93, Source Selection Statement, at 27772. The SSA determined that it was in NASA’s best interest to open post-selection negotiations with SpaceX, which was highly rated from a technical and management perspective, and “that also had, by a wide margin, the lowest initially-proposed price.” *Id.*; see also AR, Tab 190, Memo. from SSA to Contracting Officer re Initial Conditional Selection of SpaceX for the Purpose of Engaging in Post-Selection Negotiations. In this regard, the contracting officer advocated for post-selection negotiations with SpaceX because the contracting officer did not believe that the need to align SpaceX’s total price or milestone payment phasing with NASA’s available FY2021 budget and future anticipated funding levels was “an insurmountable situation.” COS (B-419783) at 25.

On April 2, the contracting officer opened post-selection negotiations with SpaceX. In addition to invoking the Option A BAA’s post-selection negotiation provision at paragraph 4.1.3 of the BAA, the contracting officer’s negotiations letter also invoked paragraph 4.4.6.13. AR, Tab 191, Negotiations Letter, at 35218. Under the latter provision, NASA reserved “the right to negotiate any aspect of an Offeror’s milestone payment amounts, schedule, and/or acceptance criteria prior to award of Option A.” AR, Tab 3, Option A BAA, ¶ 4.4.6.13. Consistent with the foregoing Option A BAA provisions, the contracting officer identified specific portions of SpaceX’s proposal that the firm was invited to revise. *Id.* (directing that any revisions beyond those invited by NASA would be discarded and not considered by the agency).

Specifically, the negotiations letter invited SpaceX to address two aspects of its proposal. First, SpaceX was invited to revise the proposed fixed-prices for CLINs 0005 and 0010 in spreadsheet Tab B in Volume II of the proposal, and SpaceX’s expenditure profile in attachment 34 of Volume IV of the proposal. *Id.* NASA invited best and final pricing “[i]n light of the ongoing Option A competitive procurement,” as well as requesting revised milestone payment phasing and expenditure profile to address NASA’s anticipated funding limitations. AR, Tab 191, Negotiations Letter, at 35220-35221.

Second, NASA requested that SpaceX revise the following attachments to volume IV of its proposal in order to include additional flight readiness reviews (FRRs) for supporting spacecraft: attachment 12, review plan; attachment 13, milestone acceptance criteria and payment schedule; and attachment 14, performance work statement. *Id.* at 35218. Relevant to this issue, the Option A BAA statement of work (SOW) established a requirement for FRRs, which are reviews designed to determine the system’s readiness for a safe and successful flight or launch and for subsequent flight operations. AR, Tab 8, Option A BAA, attach. G, SOW, at 15089. The SOW provided that FRRs must be completed two weeks before launch “of each HLS element.” *Id.* Although the SOW did not define an “HLS element,” it did include the following definitions:

- *Integrated Lander:* Any and all combinations of contractor elements (e.g., Ascent Element), including potentially a single element, which is integrated at any time crew are onboard.



- *Supporting Spacecraft:* Any contractor spacecraft that is not otherwise the Contractor's HLS Integrated Lander, Launch Vehicle, or [active-active docking adapter (AADA)], but that is otherwise required for the Contractor to execute its demonstration mission or any portion thereof in performance of this contract, including, but not limited to, rendezvous, proximity operations, docking and undocking [ ], propellant transfer, and orbital maneuvering and transfer.

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- *HLS:* All objects, vehicles, elements, integrated systems, systems, subsystems, or components thereof that are designed, developed, and utilized by the contractor, its teammates, subcontractors, and suppliers in performance of this contract, and which collectively comprise the contractor's Integrated Lander (or elements thereof), all Supporting Spacecraft, all launch vehicles necessary for launch and delivery of the contractor's Integrated Lander (or elements thereof) and its Supporting Spacecraft. . . .

*Id.* at 15065.

The SOW established a number of FRR acceptance criteria. *Id.* at 15089-15090. Relevant here, the first acceptance criterion stated that “[t]he flight vehicle, launch vehicle, and support spacecraft (such as propellant storage, propellant transfer, and/or upper stage vehicles that provide transportation capabilities beyond the standard for orbit insertion) are ready for flight.” *Id.* at 15089. Consistent with the SOW, the Option A BAA's milestone acceptance criteria and payment schedule template, which was incorporated as attachment O, stated that “[a]n FRR is required prior to each launch of an HLS element. Propose multiple FRRs as required.” AR, Tab 14, Option A BAA, Attach. 14, Milestone Acceptance Criteria & Payment Schedule Template, at Payment Schedule Tab.

After recounting these provisions from the SOW and milestone acceptance criteria, the contracting officer's negotiations letter to SpaceX invited the firm to make revisions to its proposed FRR milestones. The contracting officer noted that SpaceX's concept of operations anticipated multiple supporting spacecraft (SpaceX's Tanker Starship and [DELETED]) launches in addition to the launch of its integrated landing vehicle (SpaceX's HLS Starship). Although SpaceX's concept of operations will require multiple launches, SpaceX had only proposed one overarching FRR for its entire HLS system. The contracting officer requested that SpaceX incorporate additional FRRs to address each of the various launch types contemplated by SpaceX's concept of operations as follows:

Given the arguably ambiguous nature of this topic within the Option A solicitation, and the fact that its most stringent possible interpretation (FRR no later than two weeks prior to the launch of every supporting spacecraft;

every individual Tanker Starship is a Supporting Spacecraft) is logically inconsistent with the technical approach proposed by your firm (*i.e.*, fourteen launches, each spaced only twelve days apart from one another), it is NASA's assessment that in order to meet NASA's intent of its FRR requirement for supporting spacecraft, your firm must incorporate additional FRRs for the [DELETED] and Tanker Starship Supporting Spacecraft. . . .

Specifically, NASA requests that your firm's revised proposal include new additional FRRs as follows: (1) A single comprehensive Tanker Starship Supporting Spacecraft FRR no later than two weeks prior to the *first* launch of the Tanker Starship Supporting Spacecraft that will address flight readiness for the entire Tanker Starship Supporting Spacecraft launch campaign; (2) a [DELETED] FRR no later than two weeks prior to the launch of the [DELETED]; and (3) within Attachment 12 only, NASA also requests that your firm include potential "delta-FRRs" that would be triggered to occur in the event of anomalies, mishaps, configuration changes, or other issues directly relevant to flight readiness, if and when such issues arise. Such "delta-FRRs" must be completed prior to the next scheduled launch of your firm's Tanker Starship Supporting Spacecraft. Any such Tanker Starship delta-FRRs, if necessary after one or more of the above-listed triggering events, should be scheduled to take place no later than three days prior to the next applicable Tanker Starship Supporting Spacecraft launch in the offeror's proposed launch sequence. It is NASA's assessment that a single, comprehensive Tanker Starship FRR and a [DELETED] combined with additional delta-FRRs that are triggered only in specific circumstances meets the intent of the applicable solicitation language and otherwise strikes the appropriate balance between NASA's flight readiness needs and the unique attributes of your firm's proposed Supporting Spacecraft concept of operations.

AR, Tab 191, Negotiations Letter, at 35222.

On April 7, SpaceX submitted a revised proposal. SpaceX's revised proposal changed the proposed milestone payment phasing to fit within NASA's understanding of its current budget, as well as including the additional FRRs requested by the agency. See, *e.g.*, AR, Tab 194, SpaceX Cover Letter to Revised Proposal, at 35229-35230 (summarizing accompanying proposal revisions); AR, Tab 198, SpaceX Revised Proposal Vol. IV, attach. 13, Milestone Acceptance Criteria & Payment Schedule Template, at Payment Schedule Tab (adding requested FRRs and restructuring milestone payments to [DELETED], such that addition of requested FRRs was at no cost to the government).

On April 16, after reviewing SpaceX's revised proposal and conferring with the contracting officer and source evaluation panel chairperson, the SSA decided to make a single award to SpaceX, finding that it was not in the agency's best interest to engage in price negotiations with Blue Origin or Dynetics. AR, Tab 93, Source Selection Statement, at 27776 ("However, when considered in conjunction with the Total

Evaluated Prices for each Option A offeror, NASA's fiscal year 2021 appropriations and appropriations indications for future fiscal years that span the Option A period of performance are incongruent with NASA's Option A acquisition strategy [of making two awards]."). In support of the decision, the SSA set forth a detailed analysis.

First, with respect to SpaceX, the SSA concurred with the evaluators' technical approach rating of acceptable. The SSA then discussed the most significant positive attributes, and potential risks with SpaceX's technical approach. *Id.* at 27777-27781. In sum, the SSA found that SpaceX's technical approach had "several attractive technical attributes," but also some "countervailing weaknesses," which together presented a proposal of moderate merit in light of the BAA's objectives. *Id.* at 27781.

Under the price factor, the SSA concurred that SpaceX's proposed pricing was reasonable and balanced, and that SpaceX's revisions to its milestone payment phasing placed the proposal within NASA's available funding. *Id.*

Under the management approach factor, the SSA concurred with the evaluators' rating of outstanding. The SSA reviewed the most significant evaluated strengths, and concurred with the evaluators' conclusion that SpaceX's management approach was of exceptional merit and fully responsive to the objectives of the solicitation. The SSA found that the "qualitative attributes of SpaceX's aggregated strengths," and strong base period past performance, "far outweigh the qualitative attributes of its evaluated weaknesses, which were relatively minor." *Id.* at 27781-27782.

The SSA then explained the selection rationale. Based on the results of the evaluation across all three evaluation factors, and in light of the agency's currently available and anticipated future funding for the Option A effort, the SSA found that SpaceX's proposal "was meritorious and advantageous to the Agency," and provided "abundant value for NASA at its Total Evaluated Price." *Id.* at 27782-27783. Significantly, the SSA explained that SpaceX's revised milestone payment phasing following post-selection negotiations, allowed NASA to make an award to SpaceX that was within NASA's existing budget constraints. *Id.* at 27783.

Next, with respect to Blue Origin, the SSA concurred with the evaluators' technical approach rating of acceptable. The SSA then summarized and concurred both with the positive assessed attributes of Blue Origin's technical approach, as well as assessed significant weaknesses. *Id.* at 27783-27786. In sum, the SSA concluded that Blue Origin's technical approach was "competent, of moderate merit, and represents a credible response to the BAA's objectives," but that the qualitative attributes of its aggregated strengths were offset by the countervailing qualitative attributes of its aggregated weaknesses. *Id.* at 27786.

Under the price factor, the SSA concurred with evaluators' assessment that Blue Origin's proposed pricing was reasonable and balanced. *Id.* at 27787. The SSA, however, noted that there were two instances where Blue Origin proposed advance payments in contravention of the stated prohibition against such payments in the Option

A BAA. *Id.* Although the advance payments would have rendered the proposal unawardable, the SSA noted that if discussions otherwise would have been appropriate, the SSA would have asked the contracting officer to address the matter with Blue Origin. *Id.*

Under the management approach factor, the SSA concurred with the evaluators' rating of very good. As she did for the technical approach factor, the SSA summarized both significant positive attributes of Blue Origin's proposed management approach, as well as assessed weaknesses. *Id.* at 27787-27788. In sum, the SSA concurred with Blue Origin's rating of very good, finding that Blue Origin's management approach "is of high merit and fully responsive to the objectives of the solicitation," and that the "qualitative attributes of Blue Origin's aggregated management strengths," including its strong base period past performance, "far outweigh the qualitative attributes of its aggregated management weaknesses." *Id.* at 27789.

The SSA then summarized the selection decision. While the SSA found that Blue Origin's proposal "has merit and is largely in alignment with the technical and management objectives" of the Option A BAA, she found that the proposal did "not present sufficient value to the Government when analyzed pursuant to the solicitation's evaluation criteria and methodology." *Id.* at 27789. In this regard, she explained that engaging in price negotiations with Blue Origin would not likely result in Blue Origin receiving an additional award due to NASA's available HLS program budget. Specifically, the SSA explained as follows:

After accounting for a contract award to SpaceX, the amount of remaining available funding is so insubstantial that, in my opinion, NASA cannot reasonably ask Blue Origin to lower its price for the scope of work it has proposed to a figure that would potentially enable NASA to afford making a contract award to Blue Origin. As specified in section 6.1 of the BAA, the overall number of Option A awards is dependent upon funding availability; I do not have enough funding available to even attempt to negotiate a price from Blue Origin that could potentially enable a contract award.

*Id.*

Third, with respect to Dynetics, the SSA concurred with the evaluators' marginal rating under the technical approach factor. The SSA first reviewed several positive attributes of Dynetics's approach, but then found that the approach "suffered from a number of serious drawbacks" that "meaningfully increase the risk to Dynetics's successful performance of this contract." *Id.* at 27790. The SSA ultimately concluded that "on balance, the nature of multiple problematic significant weaknesses, in tandem with other notable weaknesses, meaningfully outweigh the evaluated meritorious attributes of Dynetics's proposal." *Id.* at 27791-27792.

Under the price factor, the SSA concurred that Dynetics's proposed pricing was reasonable and balanced. *Id.* at 27792.

Under the management approach factor, the SSA concurred with the evaluators' rating of very good. As the SSA did for the technical approach factor, the SSA summarized both significant positive attributes of Dynetics's proposed management approach, as well as an assessed weakness. *Id.* In sum, the SSA concurred with the evaluators' assignment of a rating of very good, finding that Dynetics's management approach "is of high merit and fully responsive to the objectives of the solicitation," and that the "qualitative attributes of Dynetics's aggregated management strengths," including its strong base period past performance, "far outweigh the qualitative attributes of its aggregated management weaknesses." *Id.* at 27793.

The SSA then summarized the selection decision, concluding that Dynetics's proposal "does have some meritorious technical and management attributes, [but] it is overall of limited merit and is only somewhat in alignment with the objectives" of the Option A BAA. *Id.*

On April 16, NASA notified Dynetics and Blue Origin of their non-selection for award, and provided the protesters with unredacted versions of their respective source evaluation panel reports and the source selection statement.<sup>6</sup> See, e.g., Dynetics Protest, exh. C, Non-Selection Notice. Also on April 16 and after providing advance notice to the offerors, the agency also publically announced the selection of SpaceX. See, e.g., "As Artemis Moves Forward, NASA Picks SpaceX to Land Next Americans on Moon," NASA, Release 21-042 (Apr. 16, 2021), available at <https://www.nasa.gov/press-release/as-artemis-moves-forward-nasa-picks-spacex-to-land-next-americans-on-moon> (last visited July 25, 2021). These protests subsequently were filed with our Office on April 26.

## DISCUSSION

Blue Origin and Dynetics raise a number of arguments that largely can be divided into two distinct principle lines of protest. First, the protesters contend that NASA's decision

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<sup>6</sup> Additionally, NASA, pursuant to paragraph 5.3.3 of the Option A BAA, invited the protesters to request informal feedback from the agency with respect to their proposals. See, e.g., Dynetics Protest, exh. C, Non-Selection Notice, at 1. In this regard, the Option A BAA notified offerors that the agency would provide informal feedback in lieu of a formal debriefing, as no debriefing was required because this procurement was conducted pursuant to FAR part 35, and not pursuant to the procedures of FAR part 15. AR, Tab 3, Option A BAA, ¶ 5.3.3; see also *Millennium Space Sys., Inc.*, B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 4 (finding that a debriefing provided in a procurement conducted as a BAA pursuant to FAR section 35.016 does not fall within the exception to our general timeliness rules at 4 C.F.R. § 21.2(a)(2), because such a procurement is not a procurement conducted on the basis of competitive proposals, under which a debriefing is requested and, when requested, is required).

to make a single award to SpaceX was unreasonable. In support of this line of argument, the protesters first contend that a single award is inconsistent with NASA's stated preference for two Option A awards. The protesters further contend that making a single award is anticompetitive and unduly risky because it will effectively limit future competitions for the HLS requirements to a single contractor (SpaceX). Additionally, the protesters contend that NASA's requirements materially changed when the agency concluded that its current and anticipated future funding for the HLS program would be unable to support more than one award. The protesters contend that the agency was required to either conduct discussions with all offerors or amend (or cancel) the Option A BAA to allow all offerors the opportunity to compete for NASA's materially changed requirements.

As the second line of protest, the protesters challenge NASA's evaluation of their respective proposals. The protesters both challenge several of their evaluated weaknesses and risks under the technical and management approach evaluation factors. Additionally, the protesters challenge the agency's evaluation of SpaceX's proposal, and complain that the evaluators engaged in a disparate evaluation when they failed to penalize SpaceX for similar weaknesses or risks as the agency identified in the protesters' respective proposals.<sup>7</sup>

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<sup>7</sup> The protesters also assert several corollary arguments. Although our decision does not address every argument, we have reviewed all of the protesters' arguments and find that none provides a basis on which to sustain the protests. For example, the protesters both allege that NASA's focus on its available funding effectively converted this procurement, which contemplated an integrated analysis of price and two qualitatively assessed non-price evaluation factors, into a lowest-priced, technically acceptable (LPTA) competition in contravention of the Option A BAA's enumerated evaluation criteria and weighting.

This argument fails for several reasons. First, the LPTA source selection process is on the best-value continuum for procurements conducted on the basis of competitive proposals in accordance with FAR part 15. See, e.g., FAR 15.101-2(a) ("The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price."). As addressed herein, however, this procurement was not conducted in accordance with FAR part 15, but, rather, was conducted pursuant to the procedures set forth in FAR section 35.016. As addressed herein, such procurements do not include a comparative assessment of proposals, and FAR section 35.016 specifically contemplates that award decisions will consider the agency's "fund availability." FAR 35.016(e).

In any event, the protesters' arguments are without any factual support. As recounted above, SpaceX and Blue Origin both received acceptable ratings under the most important technical approach factor (while Dynetics was rated marginal), SpaceX proposed a substantially lower price than the protesters (price was the second most important factor), and SpaceX was rated as outstanding under the third most important

For the reasons that follow in Part II, we deny the protesters' objections to the agency's decision to make a single award. Although the Option A BAA stated a preference for two awards, there is no basis for our Office to question NASA's decision to make a single award. The plain terms of the Option A BAA unequivocally put the protesters on notice that NASA could make multiple awards, a single award, or no award at all. Because NASA concluded that its available funds did not reasonably support the possibility of more than one award, we see no basis to find unreasonable the agency's decision to make a single award.

We also find no merit to the protesters' arguments that NASA's available funding which was significantly less than the agency initially forecasted for the HLS program, constituted a material change to the agency's requirements. At the time NASA issued the Option A BAA, it unequivocally warned the offerors that NASA did not currently have any available funding for the Option A BAAs, and any awards would be subject to subsequent appropriations. Finally, we reject the protesters' contentions that the agency was required to engage in discussions and/or post-selection negotiations with the protesters. The Option A BAA specifically made such exchanges discretionary and the agency reasonably concluded that engaging in such exchanges with the protesters was not in the government's best interests or would reasonably enable NASA to make an additional award.

In Part III, we address the protester's challenges to the agency's evaluation of proposals. In addressing these issues our Office, consistent with our established line of decisions addressing procurements conducted pursuant to FAR part 35, will limit our review only to protest grounds that allege legally and factually sufficient allegations that a procuring agency has violated applicable procurement law, regulation, or solicitation provision, or acted in bad faith.

Regarding the merits of their evaluation challenges, the protesters present four broad areas of concern. First, the protesters challenge the agency's evaluation of their own respective proposals. Second, and relatedly, the protesters allege that the agency engaged in an unequal and disparate evaluation of proposals. Specifically, the protesters contend that NASA unreasonably assessed weaknesses in their respective proposals without similarly assessing weaknesses for materially similar aspects of SpaceX's proposal. As addressed herein, we have reviewed these protest allegations and find no basis on which to sustain the protests.

Third, the protesters raise challenges to the evaluation of SpaceX's proposal that do not allege a violation of applicable law, regulation, or solicitation provision, or that NASA engaged in bad faith. Rather, the protesters complain that NASA's evaluation was

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factor, the management approach factor, while the protesters were only rated very good. Thus, contrary to the protesters' arguments, even assuming a comparative analysis was required, SpaceX's proposal appeared to be the highest-rated under each of the three enumerated evaluation criteria as well as the lowest priced.

unreasonable because the agency credited SpaceX with strengths for innovation and other considerations not expressly set forth in the Option A BAA, or otherwise failed to appropriately assess risk with SpaceX's proposed approach. We decline to consider these allegations in light of the deference due to NASA with respect to the evaluation of proposals submitted in response to a procurement conducted pursuant to FAR part 35.

Fourth, the protesters allege the agency waived a material solicitation requirement relating to required flight readiness reviews for SpaceX. Because these allegations raise legally and factually sufficient grounds of protest within our scope of review, we consider these arguments on the merits. As discussed below, while we agree with the protesters that NASA relaxed material solicitation requirements with respect to flight readiness reviews for SpaceX, we find no basis on which to sustain the protests because the protesters fail to demonstrate any reasonable possibility that they were competitively prejudiced as a result of the waiver.

Before addressing the merits, we address in Part I issues involving the applications for admission to the protective order submitted by certain outside technical consultants retained to assist protesters' respective counsel.

#### Part I - Consultant Protective Order Applications

As a preliminary matter, on April 27, 2021, our Office issued protective orders for the respective protests pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.4(a). Electronic Protest Docketing System (Dkt.) (B-419783) No. 3; Dkt. (B-419783.2) No. 2. Counsel for the protesters and intervenor were admitted to the protective order without objection. Both protesters then filed protective order applications for proposed technical consultants, with Blue Origin ultimately submitting applications for three outside technical consultants and Dynetics submitting a single application for a proposed technical consultant. Both NASA and SpaceX objected to the admission of all of the consultants. As addressed below, Blue Origin ultimately withdrew the application for its second proposed consultant, and we admitted Dynetics's consultant over the objections.<sup>8</sup>

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<sup>8</sup> NASA and SpaceX also objected to the admission of Blue Origin's first proposed technical consultant. Among other objections, the agency and intervenor noted that the consultant's application indicated that he is engaged in competitive decision making on behalf of clients, including assisting Blue Origin in connection with the very HLS technology at issue in this protest. See, e.g., Dkt. (B-419783) No. 27, Consultant App. For Admission, at 5 (representing that the consultant performed for Blue Origin "Human Landing System (HLS) architecture assessments, HLS proposal analysis, preparation, and review"); *id.* at 6 (representing his consultant work as including "formulating strategic mission goals, performing preliminary mission concept development and identifying technology investment options"). In response to the objections, Blue Origin withdrew the first proposed consultant's application. We ultimately admitted Blue Origin's third proposed consultant, a retired university professor, after the parties



In considering the propriety of granting or denying an applicant's admission to a protective order, we review each application in order to determine whether the applicant is involved in competitive decisionmaking and whether there is otherwise an unacceptable risk of inadvertent disclosure of protected information, should the applicant be granted access to protected material. See *Robbins-Gioia, Inc.*, B-274318 *et al.*, Dec. 4, 1996, 96-2 CPD ¶ 222 at 9-10 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)). With regard to the applications of consultants to a protective order, we consider and balance a variety of factors, including our Office's desire for assistance in resolving the specific issues of the protest, counsel's need for consultants to pursue the protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. *Harmonia Holdings Grp., LLC*, B-417475.3, B-417475.4, Sept. 23, 2019, 2019 CPD ¶ 333 at 7. An applicant's involvement in competitive decisionmaking creates an unacceptable risk of inadvertent disclosure of protected material, and an applicant can be involved in competitive decisionmaking by working with marketing, technical, or contracting personnel on procurements. *Id.* at 7-8. Our consideration of an applicant's involvement in competitive decisionmaking is not limited to the party an applicant represents in a given matter, and relates to both past and future activities. *Id.* at 8.

#### Blue Origin's Second Proposed Consultant

Blue Origin submitted an application on behalf of an outside consultant. Although his application indicated that his consulting services were being offered in the consultant's individual capacity, the application also reflected that the consultant is currently the President and Executive Director of a nonprofit institute that competes for contracts and other financial assistance agreements with NASA for research and development efforts involving space and aerospace fields of study. Among other objections, NASA and SpaceX opposed the consultant's admission on the basis that his employment as the chief executive officer of an entity that competes for competitive research and development opportunities and pursues patent protection for technology developed as a result of such efforts presents both competitive decisionmaking and material risk of inadvertent disclosure concerns.

Blue Origin did not contest that its proposed consultant is a competitive decisionmaker in his role as the chief executive officer of the institute. Rather, Blue Origin argued that he is not engaged in the type competitive decisionmaking prohibited under the *U.S. Steel* standard. In support of its interpretation, the protester relied on language in *U.S. Steel* that the protester contends requires a direct competitor relationship in order to

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negotiated mutually agreeable additional protections and future limitations on the consultant's post-protest activities, and, therefore, there were no objections to the consultant's admission.

trigger competitive decisionmaking concerns. Specifically, Blue Origin relies on the following emphasized text to support its interpretation:

The phrase [competitive decisionmaking] would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) *made in light of similar or corresponding information about a competitor.*

*U.S. Steel, supra*, at 1468 n.3 (emphasis added).

Based on its interpretation of prohibited "competitive decisionmaking," Blue Origin argued that SpaceX and the institute are not direct competitors because the institute primarily competes for basic research, while SpaceX largely competes for applied research and development opportunities, such as the Option A BAA.

Our Office expressed serious reservations with Blue Origin's narrow interpretation of competitive decisionmaking. In this regard, we note that recent federal court cases have explicitly rejected such a narrow interpretation of *U.S. Steel's* prohibition on competitive decisionmaking being limited only to direct competitors.<sup>9</sup> See, e.g., *Apeldyn Corp. v. AU Optronics Corp.*, No. 08-568-SLR, 2012 WL 2368796 at \*8 (D. Del. June 13, 2012) ("Further, the fact that [plaintiff] does not currently compete directly with Defendants does not eliminate" the risk associated with admission.); *Phoenix Solutions Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 580 (N.D. Cal. Oct. 22, 2008) ("[T]he fact that Wells Fargo and Phoenix are not direct competitors hardly forecloses the inquiry. Phoenix's allegation that Wells Fargo does not make or sell speech recognition systems awkwardly sidesteps the fact that Wells Fargo uses speech recognition systems."); *ST Sales Tech Holding, LLC v. Daimler Chrysler Co., LLC, et al.*, No. 6:07-CV-346, 2008 WL 5634214 at \*6 (E.D. TX Mar. 14, 2008) ("Moreover, it is somewhat disingenuous to argue [plaintiff] is not Defendants' competitor simply because [plaintiff] is in the business of acquiring and enforcing patents, while Defendants manufacture and design automobiles. Plaintiff and Defendants all seek to utilize, in one manner or another, intellectual property as part of a business model for pecuniary gain. . . . To the extent [plaintiff] and Defendants are not direct competitors in the traditional understanding of the term, competitor status is not the sole relevant inquiry, and it certainly is not determinative of the matter.").

Rather than determining whether parties are direct competitors, courts applying *U.S. Steel* have looked at whether disclosure of the information would allow disclosure to a

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<sup>9</sup> When resolving protective order disputes arising in patent cases subject to the United States Court of Appeals for the Federal Circuit's appellate jurisdiction, U.S. District Courts and the United States Court of Federal Claims similarly apply the standard established in the Federal Circuit's *U.S. Steel* decision. Therefore, we view such decisions as persuasive authority in resolving protective order disputes arising under the same *U.S. Steel* standard.

competitive decisionmaker who would be virtually unable to compartmentalize the information and not use the information to seek to gain an unfair competitive advantage. *MGP Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 501 (D. Kan. Apr. 25, 2007); see also *Hitkansut LLC v. United States*, 111 Fed. Cl. 228, 239 (2013) (“Even accepting that [the applicant] would make a conscious and sustained effort to comply with the terms of the protective order, the fallibility of the human brain is paramount. It is simply impossible for a human being to segregate, or ‘unlearn,’ certain pieces of knowledge.”).

Here, based on the consultant’s employment as the chief executive officer of an entity that competes for federal research opportunities involving space and aerospace fields of study and seeks patent protection for resulting technologies, we remained concerned that the consultant is engaged in competitive decisionmaking within the scope of *U.S. Steel’s* prohibition. Alternatively, even assuming for the sake of argument that the consultant’s other employment does not constitute “competitive decisionmaking” within *U.S. Steel’s* definition, we nevertheless thought that the risk of inadvertent disclosure was extremely high, thus making admission inappropriate. In this regard, we found Blue Origin’s distinction between basic and applied research and development to be insufficient to mitigate our concerns, especially where there is clear overlap in the research and development areas that both the institute and SpaceX are pursuing or may likely pursue. See, e.g., Dkt. (B-419783) No. 83, NASA Obj. to Consultant’s Application, at 2 (identifying areas of study recently or currently being performed by the institute under agreements with NASA that overlap or are otherwise directly relevant to the HLS program, including a “trade study, modeling, and analysis of lunar surface power distribution options,” “lunar meteoroid ejecta model review,” and a study related to the manufacture and study of boron nitride nanotubes).

Following briefing and in response to the protester’s request for expedited consideration of the consultant’s application, our Office conducted a conference call with the parties. During that call, the GAO attorney assigned to the protest explained this Office’s serious reservations with respect to the pending application. Following the call, Blue Origin withdrew the consultant’s application.

#### Dynetics’s Proposed Consultant

Dynetics submitted an application for admission to the protective order on behalf of a consultant who is a full-time professor of aerospace engineering. Neither NASA nor SpaceX alleged that the consultant is engaged in competitive decisionmaking. Rather, they raised a series of objections alleging that the consultant’s admission would pose an unacceptable risk of inadvertent disclosure of protected material. For example, the objectors alleged that there was a non-immaterial risk that the consultant could inadvertently disclose information learned during the protest to the consultant’s students in the course of his university lecturing or research activities. Additionally, the agency and SpaceX alleged that in light of the highly sensitive proprietary technical information to be disclosed during the protest, the need to protect such information should outweigh the protester’s need for a consultant. In this regard, the objectors suggested that our Office should rely on the technical opinions and analyses proffered by NASA without

needing to turn to the technical opinions or analyses of the protester's consultant. Alternatively, the agency and intervenor argued that if our Office were inclined to admit the consultant, we should require the consultant to agree to additional post-protest restrictions beyond the additional restrictions that the consultant had already agreed to abide by.

We admitted the consultant to the protective order over the objections (or, alternatively, requests for even more stringent post-protest restrictions) based upon our finding that the consultant's admission did not pose more than a minimal risk of inadvertent disclosure. As an initial matter, the intervenor's and agency's speculation that the consultant could inadvertently disclose information learned during the protest to the consultant's university students in connection with his teaching as a full-time professor or associated research activities in tangential fields of study is too remote to reasonably support more than a minimal risk of inadvertent disclosure. See *Systems Research & Applications Corp.; Booz Allen Hamilton, Inc.*, B-299818 *et al.*, Sept. 6, 2007, 2008 CPD ¶ 28 at 11 (admitting consultant over objection where "[t]here was no indication from the consultant's application or from anything presented by the parties that his future activities, given his full-time position as a university professor, would pose more than a minimal risk of inadvertent disclosure").

Additionally, we found the balance of the parties' competing interests favored admission under the circumstances. Undoubtedly, research and development for cutting edge space exploration technologies qualify as proprietary and highly sensitive information of the awardee. See *c.f. Ross-Hime Designs, Inc. v. United States*, 109 Fed. Cl. 725, 732 (2013) (noting, in the context of patent cases, that "information related to new inventions and technology under development, especially those that are not already the subject of pending patent applications, is particularly sensitive proprietary information") (quoting *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1377-78 (Fed. Cir. 2010)). While protection of such sensitive information is unquestionably important, we nevertheless must balance such considerations with allowing the protester and its counsel the ability to fairly and effectively pursue its protest. *Connected Global Solutions, LLC*, B-418266.4, B-418266.7, Oct. 21, 2020, 2020 CPD ¶ 349 at 13 (noting that, absent special concerns over the sensitivity of the material or reason to believe admission would pose an unacceptable risk of inadvertent disclosure, "there is a strong policy in favor of permitting protesters to choose the assistance they deem necessary to pursue their protest"). In light of the highly technical issues presented in this protest, our Office concluded that our consideration of the protest would benefit from the views of a well-qualified professor with expertise in this scientific area. In this regard, we found unpersuasive the agency's and intervenor's arguments that, notwithstanding the adversarial nature of our protest proceedings, we should only rely on technical analyses or opinions proffered by NASA.

We further found no basis to require additional restrictions on the consultant's post-protest activities. In this regard, the consultant agreed to extensive post-protest restrictions, including (i) extending the restriction period from the default 2-year term to a 4-year term, (ii) agreeing not to engage or assist in the preparation of any proposal

involving HLSs to be submitted not just to NASA, but also to any agency of the U.S. government, international government agency, or commercial entity, and (iii) defining HLSs to include systems and related components for the transportation of humans to the surface of the Moon or other celestial bodies. See Dkt. (B-419783.2) No. 75, Revised Consultant Application, at 2. We determined that the requests of SpaceX and NASA for additional restrictions (e.g., extending the 2-year term to a 20-year term) were unduly draconian, and not reasonably tailored to the circumstances in light of the consultant's agreement to the above expansive restrictions.

## Part II – NASA's Requirements and Decision to Make a Single Award

### Decision to Make a Single Award

The protesters first contend that NASA erred by deviating from its announced intention to make two Option A awards. In addition to being inconsistent with NASA's stated preference for two awards, the protesters also argue that NASA's single award is inconsistent with statutory requirements for agencies to promote full and open competition to the maximum extent practicable. Additionally, the protesters argue that NASA's decision to make a single award creates unacceptable risk for NASA's long-term HLS needs, and grants SpaceX an effective monopoly for NASA's future HLS requirements. For the reasons that follow, we find no merit to these arguments.

We have long recognized that agencies acquiring research and development generally enjoy broad discretion with respect to the number of contract awards to make, consistent with their needs and available funding. See, e.g., *Wang Electro-Opto Corp.*, B-418523, June 4, 2020, 2020 CPD ¶ 187 at 5 (denying protester's challenge that the agency's failure to make more than one Small Business Innovation Research (SBIR) Phase I award "contravene[d] the SBIR program goals and violates other applicable laws" where the solicitation reserved the agency's right to make awards subject to the agency's research development test and evaluation budget)<sup>10</sup>; *Tamper Proof Container Systems Corp.*, B-402191, Jan. 27, 2010, 2010 CPD ¶ 46 at 4 & n.3 (noting that notwithstanding that 11 proposals submitted in response to a BAA were recommended for award, the agency only made nine awards due to funding availability); *Kolaka No'eau, Inc.*, B-291818, Apr. 2, 2003, 2003 CPD ¶ 67 at 9 (denying challenge to non-selection for SBIR award where the record reflected that the protester's proposal was not selected for award, notwithstanding its recommendation for award, because "NASA did not have sufficient funding to select all the recommended proposals"); see also *Herndon Science & Software, Inc.*, B-245505, Jan. 9, 1992, 92-1 CPD ¶ 46 at 1 n.1 (explaining that in a procurement conducted pursuant to FAR part 35, "[t]he issuing agency is under no obligation to award any contract").

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<sup>10</sup> We have previously recognized that procurements for research and development pursuant to the SBIR program, 15 U.S.C. § 638, and FAR part 35 BAA procurement procedures are analogous. See, e.g., *Global Aerospace Corp.*, B-414514, July 3, 2017, 2017 CPD ¶ 198 at 6 n.5.

We have further recognized that even where a solicitation specifically states an intention to award multiple contracts, it does not impose on the agency a legal obligation to make more than one award. *Hawkeye Glove Mfg., Inc.*, B-299741, Aug. 2, 2007, 2007 CPD ¶ 143 at 3; *E. Huttenbauer & Son, Inc.*, B-257778, B-257779, Nov. 8, 1994, 94-2 CPD ¶ 206 at 5-6. Rather, an agency's expression of intent merely demonstrates its expectation that it will make multiple awards. *Hawkeye Glove Mfg., Inc., supra*. Additionally, even where a solicitation contains an intention to make multiple awards, we have recognized that an agency is not required to do so if the outcome of proposal evaluation dictates that only one contract should be awarded. For example, regardless of an agency's intention, it cannot, in making contract awards, exceed the funds available. *Allied-Signal Aerospace Co.*, B-240938, B-240938.2, Jan. 18, 1991, 91-1 CPD ¶ 58 at 2.

Here, notwithstanding NASA's stated intention to make two awards, the Option A BAA's plain terms did not commit the agency to make multiple awards. Rather, the Option A BAA, in multiple places, expressly reserved NASA's right to make no, one, or multiple awards, and clearly advised potential offerors that the number of awards was contingent on available funding. See, e.g., AR, Tab 3, Option A BAA, ¶ 5.1 ("The Government intends to award *one or more* contracts . . .") (emphasis added); ¶ 5.2.2 ("Consistent with FAR 35.016(e), the primary basis for selecting *one or more* proposals for award . . .") (emphasis added); ¶ 6.1 ("NASA reserves the right to select for award *multiple, one, or none* of the proposals received in response to this Appendix. The overall number of awards *will be dependent upon funding availability* and evaluation results.") (emphasis added). Regardless of NASA's stated preference for two awards, the plain terms of the Option A BAA unambiguously provided NASA with the discretion to make a single award. Simply put, there was no requirement for multiple awards in the solicitation, or under applicable procurement law or regulation. Thus, the protesters have provided our Office with no basis to object to NASA's decision to make a single award.

Beyond the above arguments based on the Option A BAA, the protesters also raise a number of other arguments challenging NASA's decision to make a single award to SpaceX. Specifically, the protesters contend that the agency's approach (i) fails to promote competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304, (ii) will create a noncompetitive environment for NASA's future HLS requirements, and (iii) introduces material long term program risks by relying exclusively on SpaceX.<sup>11</sup> While we recognize that these arguments present significant acquisition

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<sup>11</sup> To the extent the protesters allege that a single award to SpaceX will result in a *de facto* sole-source award for NASA's Option B requirements and, perhaps, NASA's subsequent HLS requirements, without satisfying the requirements of 10 U.S.C. § 2304, such arguments are a legally deficient mix of (i) patently untimely challenges to the terms of the HLS BAA and Option A BAA, and (ii) premature challenges to future procurement actions. First, with respect to the Option B requirements, both the HLS BAA and Option A BAA unequivocally reserved NASA's right to make a single award for

policy and public policy questions, they do not demonstrate a violation of procurement statute or regulation.

The protesters' arguments are similar to those rejected by our Office in *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388. In that case, the Department of the Air Force sought proposals for the award of up to two contracts for National Security Space Launch Phase 2 launch service contracts. Among other challenges, the protester alleged that the Air Force's decision to only make two contract awards and to acquire five years of its requirements, as opposed to implementing shorter, incremental acquisitions, would unduly restrict future competition. The protester argued that the Air Force's abandonment of an incremental acquisition strategy would stifle further development and new entrants to the commercial space launch market, thereby limiting the number of potential competitors for future requirements. *Blue Origin Florida, LLC, supra*, at 13.

In denying the protester's allegations, we explained that the protester's complaint with respect to the Air Force's decision to make two requirements contract awards for 5 years-worth of the agency's launch requirements did not set forth a legally sufficient allegation that the agency was violating CICA's competition requirements. Rather, we explained that:

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

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the base period and Option A awards, and explained that such awards in the earlier phases of the procurement could ultimately result in a single source receiving NASA's Option B requirements. See, e.g., AR, Tab 3, Option A BAA, ¶ 1.3.1 (providing that NASA could later "award Option B CLINs for either one or two Option A contractors"). No party challenged the terms of either the HLS BAA or Option A BAA in this regard, and, therefore, any challenge to the terms of those solicitations at this juncture are patently untimely. See 4 C.F.R. § 21.2(a)(1) (requiring protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals to be filed prior to that time).

With respect to NASA's future HLS requirements, we note that NASA expressly represents its intent to competitively procure such requirements. See, e.g., NASA Req. for Dismissal (B-417596.1) at 5 (noting a recent NASA request for information identifying two forecasted upcoming HLS-related procurements that will be conducted using full and open competition). In any event, such requirements are not included within the scope of this procurement, and will be the subject of future procurements. To the extent the protesters anticipate that NASA will conduct future procurements in a manner inconsistent with applicable procurement law and regulation, such arguments are purely speculative and are premature at this time. *TRAX Int'l Corp.*, B-410441.14, Apr. 12, 2018, 2018 CPD ¶ 158 at 7-8; *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4.

future private investment necessary to satisfy the government's fulfillment of its future requirements.

*Id.* at 12.

As in *Blue Origin Florida, LLC*, the protesters contend that failing to make additional Option A awards (1) is inconsistent with the statutory requirements for obtaining competition, and (2) will hamper NASA's ability to competitively fulfill its future HLS requirements. As in *Blue Origin Florida, LLC*, the first argument is without merit because it conflates CICA's full and open competition requirement--which applies to an agency obtaining competitive proposals for its current requirements--with broader public policy and industrial mobilization and capacity considerations--which are not governed by CICA.

With respect to the second argument, we note that NASA does not specifically disagree with the protesters that making two Option A awards would be preferable. Indeed, as discussed above, NASA had a preference for multiple awards. As set forth above, however, the offerors did not submit proposals priced in a manner that NASA could make multiple awards with the available funding for the HLS program. While these important questions of policy may merit further public debate, they do not establish that NASA has violated any applicable procurement law or regulation.

#### Change in Requirements

The protesters next argue that when the agency learned, after the receipt of proposals, that its available funds for the HLS program would not support multiple awards, the agency was required to disclose this information to the offerors and obtain revised proposals. According to the protesters the difference between the agency's anticipated funding level and the amount it ultimately determined was available constituted a material change to the agency's requirements. Without this information, the protesters argue they could not intelligently submit a proposal for the agency's actual requirements. For the reasons that follow, the protester's arguments are without merit.

As an initial matter, we question whether the protesters' allegations that NASA's requirements have materially changed as a result of the agency's available funding for the HLS program are timely. We have explained that, as a general matter, when a protester challenges an agency's failure to amend a solicitation based on an agency's changed requirements, such a protest is analogous to a challenge to the terms of the solicitation. *Peraton, Inc.*, B-416916.11, Feb. 8, 2021, 2021 CPD ¶ 88 at 4. Our Bid Protest Regulations require that protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time; alternatively, if no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known. 4 C.F.R. § 21.2(a)(1). We have found that the alternative 10 day standard applies in situations when a solicitation impropriety becomes apparent after proposals have been



submitted, but where there is no established closing time or no opportunity to submit revised proposals. *Peraton, Inc., supra*, at 5; *Computer World Servs. Corp.*, B-418287.3, June 29, 2020, 2020 CPD ¶ 204 at 3-4.

As addressed above, the closing date for proposals in response to the Option A BAA was December 8. On December 21, Congress passed the Consolidated Appropriations Act for FY2021 appropriating \$850 million. The President then signed the Consolidated Appropriations Act into law on December 27. Thus, the protesters knew or reasonably should have known of NASA's available FY2021 funding for the HLS program upon enactment into law of the Consolidated Appropriations Act for FY2021 on December 27. As addressed above, Blue Origin and Dynetics each respectively proposed FY2021 milestone payments in excess of the entire FY2021 HLS program appropriation. To the extent that the protesters now contend, months later and after award, that they should have been afforded the opportunity to modify their proposals in light of NASA's available FY2021 funding for the HLS program, such arguments present untimely challenges to the terms of the Option A BAA. 4 C.F.R. § 21.2(a)(1); *Peraton, Inc., supra*; *Computer World Servs. Corp., supra*.

In any event, the merits of the allegations provide no basis on which to sustain the protests. NASA's ultimate available funding for the HLS program did not constitute a change in NASA's requirements because the solicitation and the applicable provisions in FAR part 35 unequivocally put offerors on notice that any award decision was subject to available funds. See, e.g., FAR 35.016(e) ("The primary basis for selecting proposals for acceptance shall be technical, importance to agency programs, *and fund availability.*") (emphasis added); AR, Tab 3, Option A BAA, ¶ 5.2.2 (stating that proposals would be evaluated in accordance with FAR 35.016(e)); ¶ 5.3.1.3 ("[T]he SSA may consider whether the proposal allows the Agency to effectuate its acquisition strategy of making two awards, *within the limits of NASA's available funds. . . .*") (emphasis added); ¶ 6.1 ("The overall number of awards will be dependent upon *funding availability* and evaluation results.") (emphasis added). Furthermore, the Option A BAA unequivocally notified offerors that no funding was currently available for the HLS program:

*Funds are not currently available for this solicitation, but are expected to become available on or before contract award. The Government's obligation to make awards is contingent upon the availability of appropriated funds from which payments can be made and the receipt of proposals that NASA determines are acceptable.*

AR, Tab 3, Option A BAA, ¶ 6.4 (emphasis added).

Our decision in *Rokach Eng'g P.C.--Recon.*, B-229680.2, Mar. 10, 1988, 88-1 CPD ¶ 250, is instructive. In that case, the Department of Education (DOE) issued a solicitation seeking proposals for SBIR Phase I proposals. The solicitation included nine topic areas, and represented that it was the agency's intent to make "one or more" awards. Subsequent to the submission of proposals, DOE concluded that as a result of

significant budget reductions, the agency would be unable to fund any awards under two of the solicitation's nine topics. The protester, which had submitted a proposal under one of the topics for which funding was no longer available, filed a protest alleging that DOE had solicited proposals in bad faith and sought to recover its bid and proposal costs. We denied the protest, finding that the solicitation clearly warned offerors that execution of the program depended on receipt of appropriated funds not yet available, and that the reestablishment of priorities in the face of fiscal restraints could not reasonably support an allegation of bad faith. *Rokach Eng'g P.C.*, B-229680, Feb. 3, 1988, 88-1 CPD ¶ 108, *recon. denied, Rokach Eng'g P.C.--Recon., supra*.

Here, the Option A BAA clearly notified offerors that funds had not been appropriated, it did not provide an estimated level of anticipated funding<sup>12</sup>, and numerous times warned offerors that the number of awards would be contingent on NASA securing adequate funding. Given the clear cautions in the solicitation, offerors should have been fully aware that future funding could be at a level such that only one, or perhaps no, award could be made. As we have advised, 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. *Blue Origin Florida, LLC, supra*, at 14.

Additionally, this is not an instance where the lack of available funding necessitated material changes to the scope, quality, or amount of the government's requirements. See, e.g., *Symetrics Indus., Inc.*, B-274246.3 *et al.*, Aug. 20, 1997, 97-2 CPD ¶ 59 at 6 (sustaining protest where agency did not amend solicitation and receive revised proposals where the estimate for supplies that "was largely driven by a single requirement" was subsequently materially changed from 3,755 units to only 531 units); *Management Sys. Designers, Inc. et al.*, B-244383.4 *et al.*, Dec. 6, 1991, 91-2 CPD ¶ 518 at 5 (same, where the solicitation anticipated the purchase of support services for seven discrete task areas, but the agency subsequently determined that funding would only be available for a single task area); *Joint Action in Community Service, Inc.*, B-214564, Aug. 27, 1984, 84-2 CPD ¶ 228 (same, where the agency engaged only one firm in subsequent negotiations where both proposals in the competitive range exceeded available funding, and the agency altered the solicitation's requirements to substitute government-furnished property for property that was to be provided by the contractor and that had an approximate value 40 times in excess of the funding deficit). No such material changes to NASA's requirements are apparent here.

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<sup>12</sup> There is no requirement for an agency to include funding information in a solicitation. See, e.g., *OMNIPLEX World Servs. Corp.--Reconsideration & Protest*, B-278105.2, B-278105.3, Nov. 13, 1997, 97-2 CPD ¶ 147 at 4.

The record shows that SpaceX proposed to fulfill the Option A BAA's existing requirements within the scope of its total proposed price, which remained unchanged following post-selection negotiations. The protesters fail to point to any material requirements that were descoped, reduced, or otherwise changed as a result of NASA identifying less available HLS program funding than it had originally anticipated.<sup>13</sup> In this regard, although NASA's preference was for two awards and a second demonstration mission, as discussed at length above, neither the Option A BAA nor applicable procurement law mandated that NASA's preference created a legally binding requirement. Thus, on this record, we find no basis to sustain this aspect of the protests.

### Unequal Discussions/Post-Selection Negotiations

The protesters also object to the SSA's decision not to hold discussions with the protesters to provide them with an opportunity to offer best and final pricing or revised milestone payment phasing in response to NASA's available funding for the HLS program. Additionally, the protesters contend that the agency acted unfairly when it elected to engage in post-selection negotiations with only SpaceX, and allow SpaceX to revise its proposal. For the reasons that follow, we find these arguments provide no basis on which to sustain the protests.

To the extent that the protesters argue that NASA was required to open discussions, we find no merit to such arguments for several independent reasons. First, to the extent the protesters suggest that discussions were required after NASA's requirements changed based on its available funding for the HLS program, as explained above, this difference did not constitute a change in the agency's requirements. Thus, the primary predicate for the protesters' assertions that discussions were required is unsupported.

Second, the Option A BAA expressly notified offerors no less than three times that NASA could evaluate proposals and award contracts without conducting discussions or post-selection negotiations. AR, Tab 3, Option A BAA, ¶¶ 4.1, 5.1, and 6.1. The Option A BAA further warned that "[a]ccordingly, each Offeror should submit its initial proposal

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<sup>13</sup> As addressed herein, the parties contend that NASA impermissibly waived mandatory flight readiness reviews (FRR) for each of SpaceX's proposed launches. In this regard, SpaceX's concept of operations contemplated sixteen total launches, consisting of: 1 launch of its [DELETED]; 14 launches of its Tanker Starships to supply fuel to [DELETED]; and 1 launch of its HLS Lander Starship, which would be [DELETED] and then travel to the Moon. See, e.g., AR, Tab 213, SSA Briefing Slides – Part I, at 35813. The protesters contend that the Option A BAA SOW requires a FRR for each launch, or a total of 16 launches for SpaceX's concept of operations. The protesters contend that NASA waived this material requirement when it only required SpaceX to propose 3 FRRs, or an FRR for each type of Starship. While we address the merits of those arguments herein, we do not find that any such waiver is evidence that NASA's requirements materially changed as a result of its available funding for the HLS program.

to the Government using the most favorable terms from a price and technical standpoint.” *Id.*, ¶ 6.1.

Third, we have recognized that contracting officers hold broad discretion not to initiate discussions because there are generally no statutory or regulatory criteria specifying when an agency should or should not initiate discussions. *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 5. As a result, an agency’s decision not to initiate discussions is a matter we generally will not review. See, e.g., *id.*; *SOC LLC*, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 8; *United Airlines, Inc.*, B-411987, B-411987.3, Nov. 30, 2015, 2015 CPD ¶ 376 at 11. This is especially true in the context of a procurement conducted pursuant to FAR part 35, which does not include any comparable provisions to FAR part 15’s discussion rules. Thus, we find no basis under the terms of the Option A BAA, or applicable procurement law, to disturb NASA’s exercise of its discretion not to conduct discussions.

The protesters also allege that it was unreasonable for NASA to engage in post-selection negotiations only with SpaceX. We, again, find no merit to these arguments. First, the protesters base their arguments on discussions principles applicable to procurements conducted in accordance with FAR part 15. See, e.g., FAR 15.306(d)(1) (requiring that discussions “must be conducted by the contracting officer with each offeror within the competitive range”); FAR 15.307(b) (“At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision.”). While an agency that conducts discussions with one offeror in a procurement conducted pursuant to FAR part 15 must generally conduct discussions with all offerors remaining in the competition, see, e.g., *International Waste Indus.*, B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5, we have explained that post-selection negotiations in the context of a BAA procurement are not generally intended as discussions as defined in FAR part 15. *Spaltudaq Corp.*, B-400650, B-400650.2, Jan. 6, 2009, 2009 CPD ¶ 1 at 5; see also AR, Tab 3, Option A BAA, ¶ 4.1.3 (establishing different meanings to the terms and procedures for discussions and post-selection negotiations).

Therefore, we have recognized that an agency conducting post-selection negotiations in a BAA procurement are generally under “no obligation to follow the specific requirements for discussions set forth in FAR part 15.” *Spaltudaq Corp.*, *supra*. Rather, we only review an agency’s conduct of such negotiations to ensure that an agency has not conducted itself in an arbitrary manner, or negotiated in bad faith or a manner inconsistent with the BAA.<sup>14</sup> *Id.*; cf. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto.*

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<sup>14</sup> Our Office did not interpret either protester to allege--and we otherwise find no credible basis in the record to conclude--that NASA, either in conducting post-selection negotiations or otherwise in its evaluation and award decision, acted in bad faith, with bias, or otherwise with any specific intent to injure the protesters. In this regard, government officials are presumed to act in good faith, and a contention that procurement officials are motivated by bias or bad faith must be supported by

*Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency’s actions are “arbitrary and capricious” under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”).

Under the circumstances, we find no basis to conclude that NASA’s decision to limit post-selection negotiations only to SpaceX was arbitrary or evidence of bad faith. As detailed above, the Option A BAA unequivocally reserved the agency’s right to engage in post-selection negotiations only with potential awardees. See, e.g., AR, Tab 3, Option A BAA, ¶ 5.3.1.3 (“Finally, the SSA may make initial, non-binding selections of an Offeror or Offerors for the purpose of having the Contracting Officer engage in post-selection negotiations with one or more Offerors as defined in this solicitation.”). The Option A BAA also expressly contemplated that such negotiations could result in proposal revisions. See *id.*, ¶ 4.1.3. The SSA here concluded that SpaceX submitted a strong technical proposal with a fair and reasonable price that was largely consistent with NASA’s available and anticipated funding for the HLS program. In this regard, the agency concluded that it was not “insurmountable” to negotiate with SpaceX to shift approximately \$[DELETED] in FY2021 proposed milestone payments (or approximately [DELETED] percent of the \$2.941 billion total proposed price) to later years to meet NASA’s FY2021 funding limitations. In contrast, the SSA concluded that it was implausible for Blue Origin (\$5.995 billion) and Dynetics (\$9.082 billion) to materially reduce their significantly higher total proposed prices without material revisions to their respective technical and management approaches, or to shift their respective proposed FY2021 milestone payments to meet NASA’s FY2021 budget (for Blue Origin, it would need to shift approximately [DELETED], or approximately [DELETED] percent of its total proposed price, and for Dynetics, it would need to shift approximately [DELETED], or approximately [DELETED] percent of its total proposed price). On this record, we cannot conclude that the agency’s decision was so unreasonable as to be arbitrary or made in bad faith.

Second, and more fatal to the protesters’ position, is that even if we were to conclude that FAR part 15 principles should apply in this procurement conducted pursuant to FAR

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convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Kolaka No’eau, Inc.*, *supra*, at 8. The burden of establishing bad faith is a heavy one; a protester must present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. *Undercover Training, LLC*, B-418170, Jan. 9, 2020, 2020 CPD ¶ 25 at 6 n.4; see also *Galen Medical Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (explaining that when a bidder alleges bad faith, in order to overcome the presumption of good faith on behalf of the government, the proof must be almost irrefragable; almost irrefragable proof amounts to clear and convincing evidence of some specific intent to injure the plaintiff) (citations omitted).

part 35, such an objection to the Option A BAA's contrary explicit ground rules would be patently untimely at this time. See, e.g., *Gulf Civilization Gen. Trading & Contracting Co.*, B-419754, B-419754.2, June 10, 2021, 2021 CPD ¶ 208 at 6-7 n.2 (“[E]ven assuming for the sake of argument that FAR part 15 principles did or should apply by analogy, as explained above, the protester’s post-award objections to the RFP’s unambiguous reservation of [the agency’s] right not to evaluate proposals in a manner consistent with a FAR part 15 procurement are patently untimely.”). Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1); *International Bus. Machines Corp.*, B-417596.10, Mar. 17, 2021, 2021 CPD ¶ 127 at 15.

Relevant to the issues presented here, we have routinely rejected as untimely post-award challenges alleging that an agency’s scope or conduct of discussions violated applicable procurement law when the agency’s discussions were consistent with the express, unambiguous ground rules set forth in the solicitation. See, e.g., *CSRA LLC*, B-417635 *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 7 (dismissing as an untimely protest allegation that the agency failed to engage in meaningful discussions when it declined to address evaluated concerns with the protester’s oral presentation where the solicitation unambiguously provided that oral presentations would not be covered during discussions); *OGSystems, LLC*, B-414672.6, B-414672.9, Oct. 10, 2018, 2018 CPD ¶ 352 at 13-14 (dismissing as untimely protest allegation that the agency engaged in unequal discussions where it conducted discussions only with prospective awardees regarding--and allowed revisions with respect to--those firms’ small business subcontracting plans where the solicitation provided that the acceptability of such plans were to be evaluated as matters of responsibility separate from the underlying evaluation of small business utilization).

For example, in *VariQ-CV JV, LLC*, B-418551, B-418551.3, June 15, 2020, 2020 CPD ¶ 196, we dismissed as untimely a post-award challenge alleging that the agency engaged in unequal discussions when it conducted exchanges only with the apparent successful offeror, resulting in changes to the firm’s staffing levels and price. Similar to the provision in the Option A BAA, the solicitation in *VariQ-CV JV* reserved the agency’s “right to communicate” only with the apparent successful offeror to “address any remaining issues,” which may include technical or price. *VariQ-CV JV, LLC, supra*, at 18-19. Based on this unambiguous reservation of rights and the fact that the procurement was conducted pursuant to FAR subpart 16.5, we found in *VariQ-CV JV* that the agency’s conduct was consistent with the terms of the solicitation and did not otherwise violate any applicable procurement law or regulation. We further concluded that, to the extent the protester objected to the agency’s reservation of its right to conduct limited negotiations only with the apparent successful offeror, the protester’s post-award objection raised an untimely challenge to the terms of the solicitation. *Id.* at 20-21; see also *Gunnison Consulting Grp., Inc.*, B-418876 *et al.*, Oct. 5, 2020, 2020 CPD ¶ 344 at 14 (reaching same result as *VariQ-CV JV, LLC, supra*).

Just as in *VariQ-CV JV*, the Option A BAA unequivocally provided that (i) NASA reserved the right to only engage in post-selection negotiations with potential awardees, and (ii) such negotiations could result in proposal revisions. See AR, Tab 3, Option A BAA, ¶¶ 4.1.3, 5.3.1.3. Thus, even assuming that FAR part 15 standards should have applied to this procurement conducted pursuant to FAR part 35, the Option A BAA clearly put offerors on notice that NASA reserved the right to conduct post-selection negotiations with--and receive proposal revisions from--only potential awardees. To the extent that the protesters now object to NASA conducting this procurement in accordance with the Option A BAA's unambiguous terms, such protest allegations are untimely.<sup>15</sup> 4 C.F.R. § 21.2(a)(1).

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<sup>15</sup> In *Innovative Mgmt. & Tech. Approaches, Inc.*, B-418823.3, B-418823.4, Jan. 8, 2021, 2021 CPD ¶ 18, we reached the opposite result than in *VariQ-CV JV*, and *Gunnison Consulting* because the solicitation in *Innovative Management* did not include an unambiguous reservation of the agency's right to engage in post-selection negotiations only with a potential awardee or expressly provide that such negotiations could result in proposal revisions. Rather, the solicitation there only provided that the government reserved the "right to communicate with any or all [c]ontractors submitting a quote, if it is determined advantageous to [the agency] to do so." *Id.* at 9 (citation omitted). We found that language insufficient to put offerors on notice that the agency could conduct negotiations only with a single firm or were so broad as to encompass material proposal revisions. *Id.* at 11-12. In contrast, as addressed above, the Option A BAA unequivocally reserved NASA's right to engage only potential awardees in post-selection negotiations *and* to receive proposal revisions as a result of such negotiations.

Additionally, we found that the awardee in *Innovative Management* was not the apparent successful offeror because its quotation included an assumption that took material exception to the solicitation's requirements, and, therefore, the agency improperly limited discussions only with the awardee. While it is true that the Option A BAA provided that a deficient proposal was ineligible for award, the Option A BAA's post-selection negotiations provision contemplated that NASA could open such negotiations and obtain proposal revisions from potential awardees. AR, Tab 3, Option A BAA, ¶ 4.1.3; *see also id.*, ¶ 5.3.1.3 (providing for post-selection negotiations with offerors that were selected for "initial, non-binding selections"). We find that the Option A BAA, therefore, sufficiently contemplated that NASA could engage in post-selection negotiations and solicit proposal revisions as it did here.

Moreover, as discussed in more detail below, even accepting that SpaceX's proposal took a material exception to the Option A BAA's FRR requirements, unlike in *Innovative Management*, where the agency required the awardee to remove the assumption that otherwise would have rendered the quotation technically unacceptable, here NASA expressly waived the FRR requirement. Thus, SpaceX was otherwise the apparent awardee based on the waived requirement.

## Part III – Evaluation Challenges

### Appropriate Standard of Review

The Option A BAA was issued pursuant to the rules established by FAR section 35.016, which are materially different from a FAR part 15 procurement. *Millennium Space Sys., Inc.*, B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 6 n.4. When an agency uses the BAA process, proposals need not be evaluated against each other since they are generally not submitted in accordance with a common statement of work.<sup>16</sup> See FAR 35.016(d). Rather, offerors are attempting to demonstrate that their proposed research meets the agency's requirements. *Tetracore, Inc.*, B-412535, Jan. 29, 2016, 2016 CPD ¶ 27 at 1-2; *Avogadro Energy Sys.*, B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 at 2.

Thus, under a BAA agencies have substantial discretion to decide which proposals to fund under experimental and creative procurement programs when an agency's requirements are based, not on design or performance specifications for existing equipment, but on new and creative research or development solutions to scientific and engineering problems. *Wang Electro-Opto Corp.*, *supra*; *Kolaka No'eau, Inc.*, *supra*, at 5-6; *INRAD, Inc.*, B-284021, Feb. 4, 2000, 2021 CPD ¶ 239 at 3. When an agency has such discretion, we limit our review to whether the agency violated any applicable statute, regulation, or solicitation provision, or acted in bad faith. *Wang Electro-Opto Corp.*, *supra*; *INRAD, Inc.*, *supra*.

### Evaluation of Protesters' Proposals and Alleged Disparate Treatment

Both protesters raise a multitude of objections to the agency's evaluation of proposals. Both protesters challenge the evaluation of their own respective proposals, alleging that NASA's evaluation was inconsistent with the terms of the Option A BAA or otherwise unreasonable. The protesters also allege that NASA's evaluation was unreasonable because the record reflects that NASA's evaluation was unequal with respect to the protesters' and SpaceX's proposals. In this regard, the protesters allege that NASA failed to equally and reasonably evaluate similar features between the proposals, resulting in SpaceX not receiving weaknesses for similar attributes of the protesters' proposals that were negatively assessed.

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<sup>16</sup> Contrary to the protesters' arguments, however, the fact that the Option A BAA included a statement of work setting forth various programmatic, mission, safety, and minimum technical requirements does not provide us with a basis for concluding that NASA's procurement was not conducted in accordance with the requirements of FAR part 35. In this regard, FAR part 35 specifically requires "[a] clear and complete work statement concerning . . . the end objectives," including, as appropriate, "[i]nformation on factors such as personnel, environment, and interfaces that may constrain the results of the effort," and "[a]ny other considerations peculiar to the work to be performed." FAR 35.005(a), (d).



As the following representative examples demonstrate, we find that, on balance, NASA's evaluation was reasonable, adequately documented, and in accordance with the requirements of the Option A BAA and applicable procurement law. Therefore, we find no basis to sustain this aspect of the protests.

### Blue Origin's Allegations

Blue Origin's initial protest raised many challenges to the agency's evaluation of Blue Origin's proposal, arguing that NASA simultaneously erred in assessing weaknesses in Blue Origin's proposed approach and in failing to assess other aspects as warranting strengths. Blue Origin subsequently withdrew many of these objections. See Blue Origin Comments, exh. 1, Table of Withdrawn Protest Allegations. Blue Origin's remaining initial and supplemental protest allegations challenge three assessed weaknesses under the most important technical approach factor, and two assessed weaknesses under the least important management approach factor.<sup>17</sup>

As an initial matter, we note that it is not apparent that Blue Origin's limited objections to the agency's evaluation of its proposal demonstrate a sufficient likelihood of competitive prejudice. In this regard, competitive prejudice is an essential element of any viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 10; *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 12-13; *HP Enter. Servs., LLC*, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6.

Here, Blue Origin's proposal was assessed the following findings under the technical approach factor: 13 strengths; 14 weaknesses; and 2 significant weaknesses. AR, Tab 213, SSA Briefing Slides – Part I, at 35796. Similarly, under the management approach factor, Blue Origin's proposal was assessed the following findings: 1 significant strength; 2 strengths; and 6 weaknesses. *Id.* at 35799. Even if Blue Origin could demonstrate that the limited number of weaknesses it challenges were in error, it is not apparent that Blue Origin's overall evaluation results would materially change.<sup>18</sup>

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<sup>17</sup> Blue Origin also raises general objections to the adjectival ratings assigned to its proposal. The protester's arguments that its quotation merited higher adjectival ratings reflect little more than the protester's disagreement with NASA's judgment, and without more, do not provide a basis to sustain the protest. *Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2019 CPD ¶ 33 at 8; *Construction Servs. Grp., Inc.*, B-412343.3, Feb. 27, 2017, 2017 CPD ¶ 76 at 5.

<sup>18</sup> Blue Origin also challenges NASA's determination that the firm's proposed milestone payment phasing included two instances of prohibited advance payments. See, e.g., Blue Origin Protest at 15-19; Blue Origin Comments at 14-17, and exh. 2, Decl. of

See *Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2019 CPD ¶ 33 at 8 n.3 (explaining that even if the protester were to have prevailed on some of its protest allegations, it could not establish competitive prejudice where the presence of several remaining weaknesses would still support the agency's ultimate evaluation determinations (citing *Electrosoft Servs., Inc.*, B-413661, B-413661.2, Dec. 8, 2016, 2017 CPD ¶ 7 at 5)).

Turning to the merits, we address as a representative example Blue Origin's challenge to the agency's assessment of a weakness under the technical approach factor relating to Blue Origin's proposed guidance, navigation, and control system. The evaluators assessed a two-part weakness based on two of Blue Origin's components the evaluators determined would require substantial additional development efforts that the protester failed to sufficiently account for and could constrain Blue Origin's ability to land in certain areas of the Moon or under many possible circumstances. AR, Tab 92, Blue Origin Eval. Report, at 27716.

First, the evaluators identified a concern with Blue Origin's lack of supporting detail regarding the development of its proposed approach to use [DELETED] inertial measurement unit (IMU) sensors for its Ascent Element (AE), as opposed to a 3-IMU architecture, which is currently used on other spacecraft. An IMU sensor is a critical part of a flight control system, and a failure is a critical issue for safety and reliability. Specifically, an IMU:

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Outside Consultant, at 1-11. Specifically, the agency found that Blue Origin's proposed milestone payments for kickoff meeting-related expenses were not commensurate with proposed performance, and, therefore, violated the prohibition on advance payments in paragraph 5.2.5 of the Option A BAA. AR, Tab 93, Source Selection Statement, at 27787. Although the SSA concurred with the assessed concerns, and, therefore, concluded that Blue Origin's proposal would be ineligible for award without discussions or negotiations, the SSA clearly did not exclude Blue Origin's proposal from consideration for award on this basis. Indeed, the SSA unequivocally stated that NASA "would endeavor to allow Blue [Origin] to correct [the advance payments issue] through negotiations or discussions if [the agency] otherwise concluded that [the protester's] proposal present[ed] a good value to the Government." *Id.* at 27789-27790 n.1.

As detailed above, the SSA explained that she did not believe that discussions or negotiations with Blue Origin were otherwise warranted because of the agency's available funding for the HLS program, Blue Origin's high total proposed price, and decision to make an award to SpaceX. *Id.* at 27789. Thus, even assuming for the sake of argument that NASA's underlying evaluation that Blue Origin proposed prohibited advance payments was erroneous, it is readily apparent that such finding had no impact on the ultimate award decision. Therefore, even if the agency's underlying evaluation was in error, the protester cannot establish a reasonable possibility of prejudice because it cannot show that it would have had a substantial chance for award but for this error.

[I]s the main component of the inertial navigation system (INS) and is used by the flight computer to calculate attitude, angular rates, linear velocity, and position with respect to a global reference frame. IMUs are used on both manned and unmanned aircraft for navigational purposes in particular during poor weather conditions as well as in the event of lack of ground communication. The navigation errors of an INS are mainly caused by issues such as the gyroscope drifts and accelerometer bias. Because the guidance system is continuously integrating acceleration with respect to time to calculate airspeed and position (dead reckoning), measurement errors, even if small, accumulate substantially over time. . . . Thus, ensuring fault-free and stable operations of this sensor system is crucial for safe and reliable tracking to a designated flight trajectory.

Crispoltoni M., Fravolini M.L., Balzano F., D’Urso S., Napolitano M.R., “Interval Fuzzy Model for Robust Aircraft IMU Sensors Fault Detection,” U.S. Nat’l Library of Medicine, Nat’l Institutes of Health, *Sensors*, 2018;18(8):2488, at 1-2, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6111987/> (last visited July 25, 2021); *see also* AR, Tab 59, Blue Origin Proposal Vol. IV, attach. 37, Design Data Book, at 24165 (“Fault management is a critical function of all space vehicles and becomes increasingly important when the vehicle is crewed.”).

Relevant here, the Option A BAA’s technical requirements set forth in attachment F of the solicitation established failure tolerance requirements to catastrophic events, which are events that could result in the loss of the crew. Specifically, the offeror’s HLS is required to provide at least single failure tolerance for the control of catastrophic hazards, with the specific level of failure tolerance (one or more) and implementation (the use of similar or dissimilar redundancy) based on an analysis of hazards, failure modes, and risk associated with the system. AR, Tab 7, Option A BAA, attach. F, Requirements, HLS-RQMT-002, Human Landing System Partner System Requirements Document (HLS PaSRD), at 10110. In a multi-IMU architecture with an IMU providing erroneous outputs, determining which sensor is correct is called a “dilemma” fault. The “dilemma” can be solved by using a three-IMU architecture. In this regard, if the measurements of two of the three IMU sensors match, the outlier IMU is considered at fault and can be isolated. COS (B-419783) at 39 n.8; *see also* AR, Tab 59, Blue Origin Proposal Vol. IV, attach. 37, Design Data Book, at 24167 (“In the 3 IMU case, when a faulty IMU drifts away from the other 2 IMUs it is identified as the failed IMU and de-prioritized.”). The Orion spacecraft utilizes a 3-IMU architecture.<sup>19</sup> AR, Tab 59, Blue Origin Proposal Vol. IV, attach. 37, Design Data Book, at 24165.

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<sup>19</sup> Orion is a human spacecraft that will serve as the exploration vehicle that will carry astronauts to space, provide emergency abort capability, sustain astronauts during their missions, and provide safe re-entry from deep space return velocities. *See* “Orion Overview,” available at <https://www.nasa.gov/exploration/systems/orion/about/index.html> (last visited July 25, 2021).

In order to satisfy the single fault requirement, Blue Origin proposed to “rel[y] heavily” on the Orion vehicle’s heritage technology. AR, Tab 59, Blue Origin Proposal Vol. IV, attach. 37, Design Data Book, at 24165; see also *id.* at 24154 (“By leveraging both the hardware and software from the Orion vehicle, the [AE] is able to increase safety and reliability, accelerate the development timeline, and provide for a common crew and ground experience between the AE and Orion.”). The protester, however, pointed out a “notable difference” between the Orion’s and its proposed HLS’s architecture, namely that Orion uses a 3-IMU architecture while the HLS will use a [DELETED] architecture. *Id.* To address potential dilemma situations arising with [DELETED], Blue Origin proposed to utilize [DELETED] to [DELETED]. *Id.* at 24167. Blue Origin’s proposal represented that “[t]hese [DELETED] . . . will be developed and fly on Orion before being leveraged for HLS.” *Id.* at 24156 (emphasis added).

The agency’s evaluators assessed this aspect of Blue Origin’s proposal as warranting a weakness. Specifically, the evaluators expressed concern that [DELETED] architecture, as opposed to the “standard three-IMU design”:

[H]as never been implemented in human spaceflight applications and will require significant development to increase necessary technology readiness levels necessary to achieve the requisite reliability of this capability. However, the offeror’s proposal does not sufficiently substantiate its plan for this necessary development effort. This capability is crucial to ensure that the offeror’s HLS will meet NASA’s fault tolerance requirements prior to the vehicle’s certification for crewed missions.

AR, Tab 92, Blue Origin Eval. Report, at 27716.

Blue Origin objects to the assessed weakness on the grounds that its proposal adequately addressed its proposed use of Orion’s heritage technology to provide single-fault tolerance in the event of a sensor failure. The protester, however, points to nothing in its proposal addressing the developmental process or timeline for the [DELETED], whether in connection with the HLS program or with respect to the Orion program. In this regard, the agency reasonably determined that the proposal asserts, without further elaboration, that the [DELETED] “will be developed.” Blue Origin’s protest submissions fail to identify any aspect of its proposal elaborating on the required development for its [DELETED] system that the protester itself asserts is a “critical function” that becomes “increasingly important” for crewed missions.<sup>20</sup>

It is an offeror’s responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a

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<sup>20</sup> Blue Origin’s initial protest asserts that the [DELETED] capability is “inherent in the Orion software” and “has already been tested and will be inherited directly from Orion for use on the AE.” Blue Origin Protest at 27; see also *id.* (representing that an earlier

meaningful review by the procuring agency. *ARBEiT, LLC*, B-411049, Apr. 27, 2015, 2015 CPD ¶ 146 at 4; see also AR, Tab 3, Option A BAA, ¶ 4.4 (“The Offeror’s proposed approach should be specific, detailed, and contain sufficient information to clearly and completely convey the Offeror’s understanding of the requirements and address the inherent risks associated with the objective of this effort.”). On this record, we cannot conclude that NASA’s evaluated concern regarding the absence of any supporting detail regarding Blue Origin’s planned development efforts was unreasonable. See *InfoPro, Inc.*, B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 13 (denying protest challenging assessed weakness where agency reasonably found that the protester’s proposed solution was essentially untried and the proposal failed to include sufficient detail to mitigate the risk surrounding its development).

In addition to the IMU-related concern, the evaluators also identified a concern with Blue Origin’s Crewed Landing Vehicle (CLV) Light Detection and Ranging system integrated with a Passive Terrain Relative Navigation (TRN) system. Relevant here, the Option A BAA established landing accuracy requirements, specifically the HLS must be capable of landing within 100 meters of the target landing site. The agency explained the HLS is expected to be able to land within an accessible distance of preselected surface destinations in order to optimize extravehicular activity resources, scientific objectives, fuel consumption, vehicle navigation capabilities, and crew schedule. AR, Tab 7,

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version of the [DELETED] was flown on an Orion test flight in 2014). Blue Origin, however, fails to point to anywhere in its proposal where it included such information that is directly contradicted by its proposal assertion that the [DELETED] “will be developed and fly on Orion.” See AR, Tab 59, Blue Origin Proposal Vol. IV, attach. 37, Design Data Book, at 24156 (emphasis added). To the extent that Blue Origin’s protest submissions attempt to more clearly articulate (or otherwise correct its proposal representations regarding) its technical approach, our review is limited to Blue Origin’s proposal, as submitted. *Applied Visual Tech., Inc.*, B-401804.3, Aug. 21, 2015, 2015 CPD ¶ 261 at 3.

In this regard, contracting agencies are not responsible for evaluating information that is not included in a proposal. *Patriot Def. Grp., LLC*, B-418720.3, Aug. 5, 2020, 2020 CPD ¶ 265 at 7. This is especially true here, where the Option A BAA directed that proposals were to “fully demonstrate that the Offeror understands and can successfully perform the requirements of this solicitation . . . and has a thoughtful, comprehensive, and feasible approach for doing so,” and proposed approaches “should be specific, detailed, and contain sufficient information to clearly and completely convey the Offeror’s understanding of the requirements and address the inherent risks associated with the objective of this effort.” AR, Tab 3, Option A BAA, ¶ 4.4. The Option A BAA also specifically warned that “[i]nformation previously submitted through other efforts and contracts . . . will be considered by the Government only if it is resubmitted and explained in the Offeror’s Option A proposal.” *Id.*

Option A BAA, attach. F, Requirements, HLS-RQMT-002, HLS PaSRD, at 10111-10112.

Based on this requirement and the Option A BAA's overall design requirements, the evaluators assessed a weakness with Blue Origin's proposed CLV Passive TRN system because it requires illumination of the surface of the Moon to process navigation data. The evaluators explained that:

[P]ursuant to NASA's requirements, the offeror's planned mission will require landing in either darkness or low light conditions. As such, the offeror's proposed TRN will not likely be able to provide the precision necessary to achieve an accurate landing in such conditions in accordance with NASA's requirements. And, as a result, the offeror's potential mission trajectories will be limited to those that can achieve a landing in areas with lighting conditions that are sufficient for the offeror to be able to utilize its TRN. This will in turn constrain the offeror's landing sites and dates.

AR, Tab 92, Blue Origin Eval. Report, at 27716.

Blue Origin does not contest that its TRN system generally is constrained by the limits identified by the technical evaluators. Indeed, the protester's proposal unequivocally identifies the potential limitations, and these parts of the proposal were cited to and relied upon by the evaluators. Specifically, Blue Origin explained that it did a preliminary assessment of two reference locations provided by NASA for potential deorbit, descent, and landing (DDL) exercises.

For the first location for a landing in mid-November 2024, Blue Origin represented that the "Lighting Condition during DDL" would be "Challenging" because the location of the sun would be [DELETED] which in turn would "yield[ ] poor lighting conditions for TRN imagery." AR, Tab 44, Blue Origin Proposal Vol. IV, attach. 23A, HLS Concept of Operations, at 17736. For the second location, Blue Origin similarly represented that a mid-November 2024 landing would be "Challenging," and an alternative early February 2025 landing would be "[i]nfeasible due to [DELETED]." *Id.* at 17736-17737. Blue Origin further explained that both of the referenced landing sites "pose a challenge: difficult lighting conditions for an optical TRN system during DDL." *Id.* at 17737.

Notwithstanding that the evaluators reasonably understood the limitations of Blue Origin's approach, the protester nonetheless complains that the agency unreasonably relied on an unstated evaluation criterion. Specifically, the protester contends that the Option A BAA did not specifically require offerors' HLS vehicles to be able to land in darkness or low light conditions. Agencies, however, are generally not required to identify all areas of each factor that might be taken into account in an evaluation, provided the unidentified areas are reasonably related to, or encompassed by, the established factors. *OnPoint Consulting, Inc.*, B-417397.3 *et al.*, Oct. 3, 2019, 2019 CPD ¶ 332 at 12; *Telephonics Corp.*, B-401647, B-401647.2, Oct. 16, 2009,

2009 CPD ¶ 215 at 4. Here, we think operational limitations on Blue Origin’s ability to land at various lunar locations or under certain conditions was reasonably encompassed by the Option A BAA’s requirements.

For example, the Option A BAA’s overall technical design concept focus area contemplated that offerors were to address, among other requirements: (1) “[s]cope of supported or required crewed operations, including approach for providing the crew with direct viewing of the landing site during landing and capability to adjust the landing site location”; and (2) “[o]perational features and limitations, including those related to HLS survival and operations in sunlight/eclipse, for all mission phases.” AR, Tab 3, Option A BAA, ¶ 4.4.3.1. Limited visibility--or the total inability to land--in dark locations would impede the crew’s ability to directly view the landing site, limit the ability to adjust landing site locations, and present limitations in landing operations in eclipse conditions. The same limitations would similarly frustrate the stated purpose of the 100 meter landing requirement, as the failure to land within an accessible distance of preselected surface destinations could result in less than optimal extravehicular activity resources, scientific objectives, fuel consumption, vehicle navigation capabilities, and crew schedule. AR, Tab 7, Option A BAA, attach. F, Requirements, HLS-RQMT-002, HLS PaSRD, at 10111-10112. On this record, we find no basis to object to NASA’s evaluated concerns.

As another example, Blue Origin complains that NASA unreasonably evaluated a weakness in Blue Origin’s management approach proposal with respect to the protester’s data rights assertions. Per the Option A BAA, offerors were required to populate the data rights assertion notice, which was a template provided by the agency. AR, Tab 3, Option A BAA, ¶¶ 4.2.1, 4.4.5.7, 4.4.6.16. The data rights assertion notice required offerors to include the following four items: (1) technical data or computer software to be furnished with restrictions; (2) basis for assertion; (3) asserted rights category; and (4) name of person asserting restrictions. See, e.g., AR, Tab 37, Blue Origin Proposal Vol. IV, attach. 16, Data Rights Assertion Notice.

In addition to the data rights assertion, the Option A BAA established specific requirements for offerors to support any restriction assertions. Specifically, offerors were directed to include detailed accompanying narratives to support any assertions made in the data rights assertion notice as follows:

If the Offeror provides assertions pertaining to delivery of any [technical data (TD)/computer software (CS)/computer software documentation (CSD)] with less than [government purpose rights (GPR)] in its *Assertion Notice*, the Offeror shall furnish a written explanation with its proposal separate from and in addition to the Assertion Notice for any restriction asserted by the Contractor or its subcontractors on the right of the United States or others to use that TD/CS/CSD and the detailed basis for that right. Offeror shall also provide a reasonable amount of initial evidence to support any such assertion with submission of its proposal.

AR, Tab 3, Option A BAA, ¶ 4.4.5.7 (underlining added for emphasis; italics in original).

In response to the foregoing requirements, Blue Origin provided the required data rights assertion notice. AR, Tab 37, Blue Origin Proposal, Vol. IV, attach. 16, Data Rights Assertion Notice. Blue Origin did not also furnish a detailed written explanation “separate from and in addition” to its rights assertion notice, as required by Option A BAA paragraph 4.4.5.7. Rather, Blue Origin’s volume III management proposal only asserts that any TD/CS/CSD to be delivered with less than GPR was identified in the data rights assertion notice, and “[t]he rationale, in all cases, is that these items have been, or will be, developed entirely at private (not government) expense.” AR, Tab 22, Blue Origin Proposal Vol. III – Management, at 15418.

The source evaluation panel assessed a weakness in Blue Origin’s data rights assertions because they lacked required specificity and explanation. Specifically, the evaluators found that Blue Origin’s proposal failed to provide a reasonable amount of initial evidence to support its assertions, in contravention of the above-described requirements of Option A BAA paragraph 4.4.5.7. The evaluators noted several ways that Blue Origin’s proposal failed to provide sufficient information, and how the failure inhibited the agency’s ability to adequately evaluate the asserted restrictions, including the following examples:

[T]his issue is most problematic for a subset of assertions for which the Government cannot verify their validity without the offeror providing additional explanations or evidence. For example, the offeror makes assertions for TD/CS/CSD involving, “[Teammate [DELETED]] funded subset of software” and “[DELETED] funded subset of hardware” without providing any additional explanation. Even a summary level about what is included in that subset would be helpful to the Government in assessing the validity of these assertions, but the offeror’s proposal contains no such additional information. This makes it impossible to know what subsets of software or hardware are expected to be at GPR and what are expected to be delivered at less than GPR. As an additional example, the offeror proposes to deliver “POST source code and algorithms” with restricted rights. However, POST is Government-developed software, and the offeror fails to describe the features/algorithms that have been added or otherwise changed, making it impossible to know what specific source code or algorithms are appropriately asserted as having less than GPR.

AR, Tab 92, Eval. Report for Blue Origin, at 27761.

Blue Origin does not argue that the evaluators’ findings are *per se* unreasonable or contrary to the terms of the Option A BAA. Based on our review of the record, we generally agree with the observations of the evaluators that Blue Origin’s proposal failed to comply with the Option A BAA’s unambiguous requirements to include meaningful information upon which the government could reasonably assess the validity of the protester’s data rights assertions. Rather, the protester primarily complains that NASA



previously accepted materially similar data rights assertions during the HLS BAA base period procurement. See Blue Origin Comments at 27 (“Blue Origin argued the Agency’s evaluation is arbitrary and unreasonable where the Agency provides two different assessments of the same proposed data rights assertions, where the solicitation requirements and the Agency conducting the evaluation remained the same, unless the Agency provides a reasonable justification or rationale.”). Blue Origin’s preferred standard, however, is inconsistent with our established line of decisions recognizing that each procurement generally stands on its own. Cf. AR, Tab 3, Option A BAA, ¶ 4.4 (“Information previously . . . submitted during the base period source selection process, will be considered by the Government only if it is resubmitted and explained in the Offeror’s Option A proposal.”).

In this regard, we have repeatedly explained that individual evaluators may reasonably reach differing conclusions and assign different technical ratings, since both objective and subjective judgments are involved in technical evaluations; accordingly, ratings assigned by evaluators under one solicitation are not generally probative regarding the reasonableness of ratings assigned by different evaluators under a different solicitation. See, e.g., *Fisher Sand & Gravel Co.*, B-419238, Jan. 7, 2021, 2021 CPD ¶ 49 at 5; *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 4-7; *Nat’l Gov’t Servs., Inc.*, B-401063.2 *et al.*, Jan. 30, 2012, 2012 CPD ¶ 59 at 4-7.

Here, the members of the Option A BAA management evaluation subpanel, which was charged with evaluating offerors’ management proposals, were comprised of “an entirely new slate of members” as compared to the base period team, and a different SSA was appointed for the Option A BAA procurement. See, e.g., COS (B-419783) at 19; AR, Tab 93, Source Selection Statement, at 27793; Tab 106, Base Period Source Selection Statement, at 27995. Where, as here, the protester fails to establish that the actions of a new slate of evaluators and source selection official are inconsistent with applicable procurement law, regulation, or solicitation provision, but, rather, merely complains that a different slate of evaluators and selection official previously reached a contrary result, the protester’s complaints provide no basis to object to the agency’s actions.

Blue Origin also asserts three alleged instances of a disparate evaluation arguing Blue Origin’s proposal received weaknesses or significant weaknesses for certain assessed risks, while SpaceX was not similarly assessed weaknesses or significant weaknesses for similar features of its proposal. When a protester alleges disparate treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the offerors’ quotations. *Environmental Chem. Corp.*, B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 10-11; *INDUS Tech., Inc.*, B-411702 *et al.*, Sept. 29, 2015, 2015 CPD ¶ 304 at 6. Accordingly, to prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably assessed weaknesses or failed to assess strengths for aspects of its proposal that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Cognosante MVH, LLC*, B-418986 *et al.*, Nov. 13, 2020, 2021 CPD ¶ 3 at 5. Based on our review of the record, we find that, NASA’s different evaluation results

were the result of material differences between the proposals, and, therefore, fail to establish that NASA's evaluation was unequal.<sup>21</sup>

As an initial matter, similar to our concerns noted above regarding whether Blue Origin's challenges to the evaluation of its own proposal reasonably could demonstrate a meaningful possibility of competitive prejudice, Blue Origin's disparate treatment allegations also appear to fall short of demonstrating a reasonable possibility of competitive prejudice. As discussed above, Blue Origin's proposal was assessed the following findings under the technical approach factor: 13 strengths; 14 weaknesses; and 2 significant weaknesses. AR, Tab 213, SSA Briefing Slides – Part I, at 35796. Similarly, under the management approach factor, Blue Origin's proposal was assessed 1 significant strength; 2 strengths; and 6 weaknesses. *Id.* at 35799.

In contrast, SpaceX's proposal was evaluated as warranting the following findings under the technical approach factor: 3 significant strengths; 10 strengths; 6 weaknesses; and 1 significant weakness. *Id.* at 35816. Under the management approach factor, SpaceX's proposal was assessed 2 significant strengths; 3 strengths; and 2 weaknesses. *Id.* at 35819. Even assuming that certain weaknesses should have been removed from Blue Origin's evaluation, or otherwise also assigned to SpaceX's proposal, the record reflects that SpaceX would still have received more significant strengths and fewer significant weaknesses and weaknesses than Blue Origin's proposal. Additionally, as we discuss in greater detail below, because this was a FAR part 35 procurement, where the agency was not required to--and in fact did not--conduct a comparative assessment of proposals, it is not apparent that any limited revisions to the evaluation findings would result in Blue Origin materially improving its chance for award where its proposed price was double SpaceX's price.

Turning to the merits, Blue Origin first complains that the agency assessed its proposal a weakness for the firm's approach to cryogenic fluid management (CFM) development and verification. Blue Origin distills the assessed weakness into three core components that it alleges apply equally to SpaceX's proposal: (i) proposed implementation of

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<sup>21</sup> Blue Origin also alleges that the agency unreasonably assigned Blue Origin's proposal a weakness for having inconsistencies between its proposed milestones and its integrated master schedule (IMS), while not similarly assigning SpaceX a similar weakness after it revised its milestones during post-selection negotiations, but the agency did not require SpaceX to also amend its IMS. We find no basis to sustain the protest on this basis because both offerors were assessed weaknesses associated with concerns regarding the alignment of their proposed milestones and their respective IMSs. *Compare* AR, Tab 92, Blue Origin Eval. Rep., at 27755 (assigning weakness for "payment milestones missing from IMS") *with* Tab 212, SpaceX Eval. Report, at 35769-35771 (weakness assigned for "milestone inconsistency within IMS"). To the extent the protester contends that NASA should have required SpaceX to update its IMS as part of its post-selection negotiations, we find no merit to the argument where the record reflects that SpaceX's proposal was otherwise negatively assessed for the perceived milestone discrepancies in SpaceX's IMS.

cryogenic propellants relies on several critical advanced CFM technologies which are both low in maturity and have not been demonstrated in space; (ii) proposed use of [DELETED]; and (iii) reliance on flight demonstrations on a separate NASA contract that are at risk of delayed award. See Blue Origin Comments at 36-38. While the protester attempts to draw a direct comparison between the proposals, a review of the record reflects that the attempted comparison ignores that material differences reasonably support the different evaluation results in some respects, and offerors were otherwise treated similarly in others.

Blue Origin's objections first ignore that the evaluators identified specific concerns with Blue Origin's unique approach that the evaluators reasonably concluded introduced material risks. For example, a significant component of the assessed weakness with Blue Origin's proposed approach involved the risks associated with the need to further develop CFM technologies based on the particular fuel selected by Blue Origin, specifically cryogenic liquid hydrogen (LH2)/liquid oxygen (LO2) propellant. AR, Tab 92, Blue Origin Eval. Report, at 27727-27728. Specifically, the evaluators found that:

[T]he selection of LH2 fuel, the coldest and most challenging cryogenic propellant, elevates the difficulty of maturing the necessary CFM technologies. The proposed approach relies on an active cryogenic fluid management (ACFM) system integrating cryocoolers with the propellant tanks to significantly reduce LH2 boil-off losses and eliminate LO2 boil-off during in-space operations.

AR, Tab 92, Blue Origin Eval. Report, at 27727-27728.

In contrast, SpaceX proposed to use a different propellant, specifically methane. See AR, Tab 112, SpaceX Proposal – Vol. I, at 28111. Blue Origin makes no effort to explain why the specific concerns arising from its need to mature technologies associated with its proposed use of LH2/LO2 are equally applicable to or otherwise reasonably comparable to the necessary development associated with SpaceX's proposed use of methane propellant. *Cf. id.* (explaining that “[t]hermal risks for propellant transfer and storage are reduced through the use of liquid oxygen and methane, which can be stored at a significantly higher temperature and greater bulk density than liquid hydrogen”).

Additionally, as with the different propellants proposed, Blue Origin similarly makes no efforts to explain why other differences in the offerors' unique proposed approaches were equivalent or required similar evaluation results. *Compare, e.g.,* AR, Tab 92, Blue Origin Eval. Rep., at 27728 (noting concerns with the need to develop technologies suitable for CFM operations [DELETED], including [DELETED]) *with* AR, Tab 112, SpaceX Proposal – Vol. I, at 28112 (proposing to replenish propellant [DELETED] and utilize [DELETED] and [DELETED] rather [DELETED]).

We also note that Blue Origin ignores that comparable concerns in the proposals appear to have been similarly evaluated by NASA. For example, the protester was assigned its weakness, in part, because Blue Origin's CFM technologies are "both low in maturity and have not been demonstrated in space." AR, Tab 92, Blue Origin Eval. Report, at 27728. Blue Origin, however, makes no effort to explain how NASA's evaluation was disparate in this regard when SpaceX was similarly assessed a weakness because portions of the awardee's propulsion system have a "low Technology Readiness Level." AR, Tab 185, SpaceX Eval. Report, at 35168. Thus, Blue Origin's selective and broad comparison of NASA's evaluation of the offerors' respective proposals fails to demonstrate that NASA's evaluation was unequal or otherwise unreasonable.

In another example, Blue Origin complains that it received a significant weakness because its radio frequency communication links do not close, but SpaceX was only assessed a weakness for a similar flaw. In this regard, the Option A BAA required offerors to provide their proposed approaches to communications capabilities (voice, command, data) in accordance with the communication-related requirements established in the attachment F HLS requirements. AR, Tab 3, Option A BAA, ¶ 4.4.3.1. A communications link does "not close" if "communication cannot be sustained at the required data rates over the link." See COS (B-419783) at 44 (*quoting* Blue Origin Protest at 24 n.40). As with the CFM example discussed above, even a cursory review of the evaluation record demonstrates material differences between the proposals that support NASA's different evaluation findings.

In this regard, the evaluators found that four of Blue Origin's six required communications links did not close as currently designed, and a fifth link "may potentially close, but with very low positive margin." AR, Tab 92, Blue Origin Eval. Report, at 27724. In contrast, only two of the six communications links did not close for SpaceX. AR, Tab 185, SpaceX Eval. Report, at 35167; Supp. COS (B-419783) at 28.

In addition to the different number of non-closing links, the contracting officer explained that there were important qualitative differences between the offerors' broken links and the extent of mitigation or corrective actions necessary to resolve the issues. Specifically, the contracting officer noted material differences in how the parties addressed the risks associated with multipath degradation. As explained in the Option A BAA:

Multipath is the propagation phenomenon that results in radio signals reaching the receiving antenna by two or more paths. The direct path between antennas is usually the "desired" signal, whereas reflections (like off of the lunar surface) that cause weaker, delayed signals to also reach the receiving antenna are undesirable signals. Receiving more than one signal results in constructive and destructive interference, and can cause a communication channel to become too weak in certain areas to be received.

AR, Tab 4, Option A BAA, attach. A08, HLS Radio Frequency Communications Concept of Operation, at 8808.

The Option A BAA further explained that multipath degradation “can have a detrimental effect on line-of-sight communications between the lunar surface (and lunar orbit) and external communication assets such as the Earth and Orion,” and specifically required offerors to “take steps to mitigate” the phenomenon. *Id.* The solicitation required an allocation of at least 16 decibels (dB) for multipath degradation. *Id.*

In response to the protest, the contracting officer provided a detailed discussion regarding the offerors’ proposed approaches to accounting for and mitigating multipath degradation. With respect to SpaceX, the contracting officer noted that SpaceX’s proposal specifically addressed multipath degradation, both in terms of accounting (or “budgeting”) for potential degradation in its calculations and design, and proposing specific mitigation approaches. See Supp. COS (B-419783) at 30-31 (reviewing link budgets and mitigation approaches discussed in Chapters 21 – “Lunar South Pole Multipath Fading Analysis and Mitigations” and 22 – “Link Budget Analysis” of AR, Tab 150, SpaceX Data Design Book, at 33249-33304). The agency’s independent analysis concluded that there were parameter discrepancies that necessitated correction and adjustment, and which ultimately led to two of the proposed links not closing. NASA determined that SpaceX would need to [DELETED] to enable each of the broken links to close, but concluded that this change would typically involve only relatively minor modifications to a single system. Therefore, while SpaceX’s approach created a risk to successful performance, the risk did not rise to a level warranting the assessment of a significant weakness. Supp. COS (B-419783) at 31.

In contrast, the contracting officer noted that Blue Origin essentially deferred addressing multipath degradation in its proposal.<sup>22</sup> Specifically, the contracting officer pointed to Blue Origin’s link budget which accounted for 0 dB of multipath loss. COS (B-419783) at 47-48 (*quoting* AR, Tab 66, Blue Origin Proposal Vol. IV, attach. 38, Integrated Systems Performance Analysis (ISPA) – Initial, at 26207). In this regard, Blue Origin’s proposal represented that:

Multipath losses *are not included* in the Return budget due to [DELETED], but [DELETED] dB of multipath loss is included in the Forward budget. Multipath effects, and the integrated pattern analysis for the Ka-band antennas are *planned forward work*.

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<sup>22</sup> In this regard, we note that Blue Origin initially challenged the agency’s assessment of a significant weakness for this issue in its proposal, but subsequently withdrew its challenge after receipt of the agency’s initial report. See Blue Origin Comments, exh. 1, Table of Withdrawn Protest Grounds. While Blue Origin’s supplemental protest alleges disparate treatment with respect to the agency’s evaluation of SpaceX’s communication frequency closure issues, it does not otherwise challenge the agency’s assessment of Blue Origin’s proposal in this regard.

AR, Tab 66, Blue Origin Proposal Vol. IV, attach. 38, Integrated Systems Performance Analysis – Initial, at 26206-26207 (emphasis added).

The contracting officer asserted that failing to properly mitigate communication system losses of this magnitude, and instead relegating such work to “forward work,” was a significant proposal omission that could have drastic effects on the protester’s overall HLS design. Specifically, the contracting officer explained that to properly mitigate for such significant losses, Blue Origin would likely either need to effectuate a significant increase in radio frequency output power (*i.e.*, a much larger power amplifier) or implement a more capable and complex antenna system. The contracting officer explained that changes of this magnitude could adversely and significantly impact Blue Origin’s overall HLS design, including potential mass and volume increases, or significant changes to power- and thermal-system designs. Based on the failure to properly mitigate for multipath degradation, as well as another evaluated concern based on Blue Origin’s failure to properly account for additional thermal background noise, the contracting officer explained that a significant weakness was appropriate because the protester’s inadequate approach appreciably increased the risk of unsuccessful performance. COS (B-419783) at 57.

Blue Origin does not materially contest the contracting officer’s explanation or conclusion for why the agency believes that the necessary work to resolve SpaceX’s communications issues would not be as difficult to resolve as Blue Origin’s communications issues, other than to assert, without further elaboration, that the agency’s assessment is “untrue.” Blue Origin Supp. Comments at 42. Rather, Blue Origin raises two objections to our consideration of the agency’s explanation. First, the protester contends that the amount of mitigation work necessary to resolve the communications issues constitutes an unstated evaluation factor. This argument, however, is without merit. As addressed above, the Option A BAA specifically required offerors to mitigate against multipath degradation. AR, Tab 4, Option A BAA, attach. A08, HLS Radio Frequency Communications Concept of Operation, at 8808. Thus, it was entirely reasonable for NASA to consider the extent and effectiveness of offerors’ necessary mitigation.<sup>23</sup>

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<sup>23</sup> Additionally, even if the extent and effectiveness of potential mitigation was not an express evaluation factor, such considerations are reasonably related to meeting the Option A BAA’s communications requirements. We have routinely explained that even if performance risk is not specifically listed in the solicitation as an evaluation criterion, an agency may always consider risk intrinsic to the stated evaluation factors, that is, risk that arises from the offeror’s approach or demonstrated lack of understanding. *Equinoxys, Inc.*, B-419237, B-419237.2, Jan. 6, 2021, 2021 CPD ¶ 16 at 7-8; *Ridoc Enter., Inc.*, B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 7. We find nothing unreasonable in the agency considering the feasibility of mitigation or corrective actions in its analysis of the performance risk associated with the proposals’ respective shortcomings. Stated simply, we find nothing unreasonable in the agency concluding that SpaceX’s recognition of the risk and proposal of specific mitigation to remedy the

Second, Blue Origin argues that the contracting officer's detailed analysis of the proposals is an improper *post hoc* analysis that is inconsistent with the evaluation findings in the contemporaneous record.<sup>24</sup> For the reasons that follow, we disagree.

In determining the rationality of an agency's evaluation and award decision, we do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties' arguments and explanations. *MiMoCloud*, B-419482, Mar. 25, 2021, 2021 CPD ¶ 157 at 9. While we generally give little weight to reevaluations prepared in the heat of the adversarial process, we will consider post-protest explanations that provide a detailed rationale for contemporaneous conclusions which, as is the case here, simply fill in previously unrecorded details. These explanations will generally be considered in our review of the rationality of selection decisions, so long as the explanations are credible and consistent with the contemporaneous record. *Id.*

Here, we find the contracting officer's detailed analysis to be credible and consistent with the contemporaneous evaluation record. The contemporaneous evaluation record similarly reflects that NASA identified concerns with five of the six links in Blue Origin's proposal, and only two of the links in SpaceX's proposal. *Compare* AR, Tab 92, Blue Origin Eval. Report, at 27724 *with* Tab 185, SpaceX Eval. Report, at 35167.

Additionally, in light of this being a FAR part 35 procurement where there was no contemporaneous comparative assessment of proposals that was required or otherwise made, it is not surprising that the contemporaneous record would not include a detailed rationale explaining why the agency reached different evaluation results as between the two proposals. Finally, we note that Blue Origin fails to rebut any of the analysis presented by the contracting officer with respect to Blue Origin's or SpaceX's proposals. In fact, Blue Origin initially challenged the agency's evaluation of its own proposal, but then affirmatively withdrew that protest ground after receipt of the agency report. Thus, absent a compelling reason to question the credibility of the contracting officer's post-protest explanation, which appears to be facially consistent with the contemporaneous

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risk warranted a lesser risk rating than Blue Origin's proposal, which failed to address the issue other than to note that Blue Origin would attempt to address the issue at a later date.

<sup>24</sup> Blue Origin also accuses the contracting officer of "offering only citations to areas of SpaceX's proposal that purportedly support his contentions." Blue Origin Supp. Comments at 42. The protester's assertion, however, is not factually accurate. See Supp. COS (B-419783) at 32 (citing specifically to passage from SpaceX's proposal that presented an alleged ambiguity that resulted in the assignment of a weakness). More critically, however, the protester failed to allege with any specificity what additional provisions of SpaceX's proposal beyond the one identified by the contracting officer that it suggests are inconsistent with or that otherwise rebut the contracting officer's analysis.

evaluation, we find no basis to disturb the agency's exercise of its independent evaluation judgments.<sup>25</sup>

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<sup>25</sup> We also find no merit to Blue Origin's complaints that NASA erred in only assigning a weakness, as opposed to a significant weakness or deficiency, to SpaceX's proposal for allegedly failing to propose communications independent of the Gateway system. Gateway is a multi-purpose outpost orbiting the Moon that provides essential support for sustainable, long-term human return to the lunar surface and will serve as a staging point for deep space exploration. See "Gateway," available at <https://www.nasa.gov/gateway> (last visited July 25, 2021). Relevant here, the Option A BAA included a note that:

In designing HLS for the initial crewed demonstration mission, Offerors that elect to dock directly with Orion may plan to use any communication relay available in lunar orbit at the time of the Artemis III mission, and this could potentially include Gateway. However, the Offeror shall not rely on any NASA communication relay assets to meet the requirements for the initial crewed demonstration mission.

AR, Tab 3, Option A BAA, ¶ 4.4.3.1.

NASA assessed a weakness in SpaceX's proposal because it appeared that its proposed communications architecture would rely upon Gateway. AR, Tab 185, SpaceX Eval. Report, at 35167.

In response to the protest, the contracting officer explained that a single graphic in SpaceX's proposal indicated that Gateway could be used for a relay. See Supp. COS (B-419783) at 32 (citation omitted). However, the contracting officer cited four other proposal references indicating that SpaceX's approach complied with the Option A BAA's limitation not to rely on a NASA communication relay, and otherwise reflected flexibility to allow for communication with either Orion or Gateway (if present). See, e.g., AR, Tab 112, SpaceX Proposal, Vol. I – Technical, at 28120 (discussing communications architecture as supporting space-to-space and space-to-ground direct-with-Earth (DWE) links); Tab 128, SpaceX Proposal, Vol. IV, attach. 23a, SpaceX Concept of Operations – Initial, at 28993 ("Once [DELETED], it will maintain simultaneous communication links with [DELETED] and with Earth."); Tab 150, SpaceX Data Design Book, at 33210 (discussing contingency communication with [DELETED] in the event the DWE link is down).

Thus, the contracting officer explained that the weakness was assessed because of the potential ambiguity in SpaceX's proposal. Blue Origin did not substantively address the merits of the contracting officer's analysis. Absent any compelling rebuttal to the contracting officer's clarification of the assessed weakness, we find no basis to disturb the agency's exercise of its evaluation judgment that this ambiguity warranted only the assessment of a weakness. See *Enterprise Servs., LLC, B-417329 et al.*, May 30,



On this record, Blue Origin's subjective disagreement with respect to the weight assigned to the evaluated concern with its proposal as opposed to the weight assigned to a similar, but less severe, evaluated concern with SpaceX's proposal fails to demonstrate unequal treatment or otherwise present a credible basis to object to the agency's evaluation. *Cf. Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2019 CPD ¶ 33 at 7 (providing that a protester's subjective disagreement with respect to the weight assigned to an evaluated concern generally does not provide any basis to conclude that an agency's evaluation was unreasonable); *SOS Interpreting, Ltd.*, B-287505, June 12, 2001, 2001 CPD ¶ 104 at 8 (same).

### Dynetics's Allegations

In contrast to Blue Origin's more narrowly tailored objections, Dynetics raises more than a dozen challenges to the agency's evaluation of the Dynetics's proposal, and ten alleged instances of disparate treatment with respect to the evaluation of the protester's and SpaceX's proposals.<sup>26</sup> As the following representative examples demonstrate, we

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2019, 2019 CPD ¶ 205 at 10 ("As with other aspects of an evaluation, agencies have discretion to assess whether a failure meets the standard of materiality set forth in a solicitation, and our Office will not substitute our judgment for the agency's unless the record shows that the agency has acted unreasonably.").

<sup>26</sup> As with Blue Origin, Dynetics also raises certain general complaints regarding the subjective evaluation judgments of NASA that do not provide a basis on which to sustain the protest. For example, Dynetics alleges that NASA treated proposals disparately when it awarded SpaceX multiple strengths for aspects of its proposal while Dynetics received fewer, aggregated strengths.

An agency's judgment about whether to assess unique strengths is a matter within the agency's discretion and one we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable or inconsistent with the applicable evaluation criteria. *Raytheon Co.*, B-417935 *et al.*, Dec. 13, 2019, 2020 CPD ¶ 6 at 7; *Fluor Intercontinental, Inc.--Advisory Opinion*, B-417506.14, Nov. 5, 2019, 2020 CPD ¶ 46 at 23. We also have explained that we will not sustain a protest that essentially elevates form over substance by challenging the number of discrete assessed weaknesses or strengths where a protester fails to demonstrate that the underlying evaluation was unreasonable or inconsistent with solicitation's requirements. *Mission1st Grp., Inc.*, B-419369.2, Jan. 25, 2021, 2021 CPD ¶ 65 at 12; *SMS Data Products Grp., Inc.*, B-418925.2 *et al.*, Nov. 25, 2020, 2020 CPD ¶ 387 at 6-7.

Here, the record reflects that the agency's award decision did not rely on a simple count of assessed strengths or weaknesses or rote reliance on assessed adjectival ratings. Rather, the SSA made a detailed and careful analysis of the associated proposal evaluation findings. See, e.g., Tab 93, Source Selection Statement, at 27777-27793.

find NASA's evaluation reasonable in accordance with applicable procurement law, regulation, and the requirements of the Option A BAA.

As an initial matter, Dynetics challenges a number of NASA's evaluation findings that the protester's proposal failed to include adequate supporting information, arguing that the agency should have considered information Dynetics submitted to NASA during the performance of the initial base award requirements. See, e.g., Dynetics Protest at 46 ("Contrary to these assigned ratings, NASA had at its disposal substantial information from [continuation reviews (CR)] conducted during the Base period that would have alleviated many of these alleged concerns with Dynetics's technical approach."). These arguments, however, which rely on information not included within the proposal submitted in response to the Option A BAA, cannot provide a basis to object to NASA's evaluation because they are foreclosed by the solicitation's plain terms.

The Option A BAA repeatedly warned offerors that they could not rely on extra-proposal information, including information from the base period of performance, *unless it was specifically incorporated into and explained* in the Option A BAA proposal. AR, Tab 3, Option A BAA, ¶ 4.4 ("Information previously . . . submitted during the base period source selection process, will be considered by the Government only if it is resubmitted and explained in the Offeror's Option A proposal."); ¶ 5.2.1 ("The Government will base its evaluation on the information presented in the Offeror's proposal. Data previously submitted, or presumed to be known (e.g., data or services previously submitted or performed for the Government), will not be considered as part of the proposal unless entirely incorporated into and contained within the proposal."). Accordingly, to the extent the protester's various arguments concerning its technical evaluation rely on the agency's familiarity with its incumbent solution or reviews with the agency during the base period of performance, they are without merit.<sup>27</sup> *Chenega Healthcare Servs., LLC*,

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Additionally, as repeatedly addressed herein, no comparative assessment of proposals was made in the context of this FAR part 35 procurement. Thus, absent any compelling evidence suggesting that NASA mechanically relied on the number, as opposed to the quality, of evaluated strengths, the protester's complaints provide no basis for us to disturb the agency's exercise of its evaluation judgment.

<sup>27</sup> Dynetics also complains that NASA's evaluation findings are unreasonable and contrary to information (HLS correspondence) provided to offerors during the Option A BAA procurement that allowed members of the source evaluation panel and contracting officer to attend base period CR presentations "in order to aid in the [evaluators'] understanding of those Option A proposals." See Dynetics Comments & Supp. Protest at 33 (*quoting* AR (B-417589.2), Tab 159, HLS Correspondence, at 26136). NASA's issuance of this correspondence does not require a different result. The correspondence did not formally amend the Option A BAA or otherwise remove the solicitation's direct admonishments that offerors were required to incorporate and explain any information previously submitted by the government.

*supra*, at 4-5 (denying protest that agency was required to consider information about the protester's incumbent performance to cure a defective proposal).

Dynetics challenges two significant weaknesses assigned to its technical proposal relying in large part on extra-proposal information. As noted above, however, the protester's contentions relying on extra-proposal information are meritless. These contentions manifest in many of Dynetics's challenges to the agency's evaluation. First, Dynetics protests the agency's assignment of a significant weakness for the proposal's failure to reasonably substantiate the claimed mass reduction opportunities necessary to close the deficit between the mass estimate for Dynetics's proposed integrated descent/ascent element (DAE) and the current flight dynamic mass allocation. In order to enable a rocket to lift off from a launch pad, the action or thrust of the rocket must be greater than the mass of the rocket it is lifting. See "Rocket Principles," NASA, available at [https://www.grc.nasa.gov/www/k-12/rocket/TRCRocket/rocket\\_principles.html](https://www.grc.nasa.gov/www/k-12/rocket/TRCRocket/rocket_principles.html) (last visited July 25, 2021). In this regard, overweight vehicles may not be able to execute the mission and could incur significant cost and schedule impacts associated with necessary redesigns. See AR, Tab 56, Dynetics Proposal, Vol. IV, attach. 33, Risk Reports, at 14044.

Relevant here, the Option A BAA attachment J, Design and Performance Metrics, set forth the basis for calculating dry mass, inert mass, and total module mass of an offeror's proposed spacecraft. Dry mass was to be calculated based on summing the masses for the following nine subsystems, plus any anticipated growth allowances:

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Indeed, the protester's excerpt of the correspondence omits the extremely important preceding text to the quoted language: "NASA's Option A source selection *will be based entirely on the information contained within the Option A proposals*; nonetheless, NASA is providing notice that some [evaluators] may attend the CR presentations in order to aid in the [evaluators'] understanding of proposals." AR (B-417589.2), Tab 159, HLS Correspondence, at 26136 (emphasis added). Notwithstanding the protester's selective citation to the record, we find nothing incompatible with the evaluators attending the base period reviews in order to better understand base period information incorporated into and explained in the offerors' Option A proposals. Nothing in the cited language indicates that the evaluators would use information personally known to them to cure any informational deficiencies in Dynetics's Option A proposal.

1.0 Structures	Includes both primary and second structural elements, connection and separation mechanisms, landing gear, and payload adapters.
2.0 Protection	Includes micrometeoroid and orbital debris, radiation, and acoustic protections, and dust mitigation.
3.0 Propulsion	Includes main propulsion systems (MPS) and propellant tanks but not propellant tank thermal control; and thrust vector control systems if required.
4.0 Orbital Attitude & Maneuvering (OAM) Systems	Includes reaction control system and dedicated propellant tanks, if propellant not contained in MPS tanks.
5.0 Power	Includes all power production, storage, and distribution systems. Includes cabling for power distribution.
6.0 Avionics	Includes communications, guidance, and navigation systems, command and data handling systems, and cabling for data transfer.
7.0 Thermal	Includes vehicle thermal control and propellant conditioning thermal control systems, tank insulation, and working fluids.
8.0 Environmental Control & Life Support Systems (ECLSS)	Includes all ECLSS.
9.0 Crew Accommodation	Includes systems for food, water usage, and waste management, furnishings, and emergency equipment
<i>Growth</i>	Mass growth allowance ( <i>i.e.</i> , the percent delta from basic to predicted masses) for the above components.

AR (B-419783.2), Tab 13, Option A BAA, attach. J, Design & Performance Metrics, "Mass Category Definitions" Tab.

Inert mass was to be calculated by summing dry mass plus the following items:

10.0 Crew & Support Items	Includes Crew and Crew Support items and accessories.
11.0 [Extravehicular Activity (EVA)] Equipment	Includes all [government furnished equipment (GFE)] for EVA.
12.0 Crew Consumables	Includes all non-GFE (air, water, etc.) and storage & delivery systems.
13.0 System Consumables/ Residuals	
13.1 Pressurant	
13.2 MPS Fuel Unusable	Reserves, residual, bias.
13.3 MPS Fuel Engine Operation	Engine start and stop, propulsion system chill in (if not tracked separately, to be included in 13.2).
13.4 MPS Fuel Boil Off	
13.5 MPS Ox Unusable	Reserves, residual, bias.
13.6 MPS Ox Engine Operations	Engine start and stop, propulsion system chill in (if not tracked separately, to be included in 13.5).
13.7 MPS Ox Boil Off	
13.8 [Reaction Control System (RCS)/Attitude Control System (ACS)] Fuel Unusable	Reserves, residual, bias.
13.9 RCS/ACS Fuel Unusable	Reserves, residual, bias.
13.10 Other System Fluids	Consumables and residuals of systems other than propulsion, such as Power and Thermal

*Id.*

Finally, total mass was calculated by summing dry mass, inert mass, and the following items:

14.0 Useable MPS Propellant	Total propellant used for main engine burns.
14.1 Useable MPS Fuel	
14.2 Useable MPS Oxidizer	
15.0 Useable RCS/ACS Propellant	Total propellant used for reaction control and attitude control burns.
15.1 Useable RCS/ACS Fuel	
15.2 Useable RCS/ACS Oxidizer	
16.0 Payload	Items such as scientific payloads, including associated containers.

*Id.*

The source evaluation panel assessed a significant weakness against Dynetics's technical approach because the proposal's current mass estimate for its design "far exceeds" the current mass allocation. Specifically, the agency noted that in order to meet Dynetics's own target mass for the DAE, the protester would need to achieve an approximate [DELETED] reduction in mass. Although the evaluators recognized that Dynetics claimed it had identified "mass opportunities" to significantly reduce mass, the protester failed to elaborate on the specifics of the claimed opportunities or address the basis for the credibility of the calculations or how they would be implemented. The evaluators also noted that Dynetics relied on overly-optimistic forecasts, whereby it would successfully achieve all of the non-specified mass opportunities, while simultaneously not experiencing any of the significant mass risks identified in the proposal that could potentially further exacerbate the deficit. See AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18739-18743. In sum, the evaluators found that a significant risk was warranted based (1) on the design's current significant mass margin deficit and (2) the absence of reasonable supporting detail regarding proposed mitigations and implementation approaches:

The offeror acknowledges this substantial mass margin deficit and claims to have identified mass opportunities to close this deficit; however, *the description of mass opportunities and threats lacks details to substantiate the offeror's claims*, making it impossible for the Government to evaluate the realism and adequacy of the proposed approach. This issue represents a significant risk to successful contract performance.

*Id.* at 18739 (emphasis added); see also *id.* at 18743 ("Thus, the offeror's current mass margin deficit at this juncture, *coupled with insufficient substantiation as to how the offeror will address the predicament*, represents a flaw in its proposal that appreciably increases the risk of unsuccessful contract performance.") (emphasis added); AR (B-419783), Tab 93, Source Selection Statement, at 27790-27791 ("I concur with the [evaluators] that *collectively*, Dynetics's mass margin deficit at this juncture, *coupled with insufficient substantiation as to precisely how Dynetics will address this issue*, creates a potential risk to successful contract performance.") (emphasis added).

Dynetics's protest raises two primary objections to the agency's evaluation.<sup>28</sup> First, Dynetics argues that the agency unreasonably ignored detailed design reviews

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<sup>28</sup> In its comments and supplemental protest, Dynetics for the first time asserts detailed allegations that the evaluators miscalculated the protester's mass deficit and overstated the impact of additional potential mass threats identified in the protester's proposal. See Dynetics Comments & Supp. Protest at 53-58. These arguments, however, constitute improper piecemeal presentation of protest issues. Our Bid Protest Regulations obligate a protester to set forth all of the known legal and factual grounds supporting its allegations because piecemeal presentation of evidence unnecessarily delays the procurement process and our ability to resolve protests within the requisite 100-day period. *XTec, Inc.*, *supra*, at 25; see also *Leading Edge Aviation Servs., Inc.*,

conducted with NASA during the base period of performance addressing mass closure issues. Dynetics Protest at 47-48. As addressed above, such arguments are patently inconsistent with the terms of the Option A BAA and our established line of decisions placing the onus on offerors to submit adequate proposals detailing their proposed technical approaches. *ARBEIT, LLC, supra*. Thus, they provide no basis to object to NASA's evaluation.

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B-419427, Feb. 25, 2021, 2021 CPD ¶ 146 at 4 (dismissing as untimely arguments first advanced in the protester's comments because our rules do not allow for piecemeal development of a protest issue "through later submissions citing examples providing alternate or more specific legal arguments missing from earlier general allegations of impropriety").

Here, Dynetics was provided with an unredacted copy of its evaluation report, which clearly set forth the evaluators' understanding of Dynetics's mass calculations and its consideration of the mass threats identified in the protester's proposal. Dynetics Protest, exh. E, Dynetics Eval. Report, at 30-32. Dynetics's initial protest did not allege that the agency had miscalculated, or otherwise misunderstood, the protester's mass calculations or potential mass risks. Rather, as addressed above, Dynetics only complained that (1) NASA unreasonably failed to consider information exchanged with the agency during the base period of performance, and (2) the protester's proposal "clearly and thoroughly described its strategy for achieving mass reduction, including the ability to reach mass growth allowance." Dynetics Protest at 46-47.

If Dynetics surmised that the agency misunderstood or miscalculated Dynetics's proposed mass calculations, it had all of the relevant information needed--and therefore was required--to have raised those arguments in its initial protest. In this regard, the protester's arguments that it was timely rebutting the contracting officer's response to the protest is unavailing where the contracting officer's analysis explained and otherwise provided additional detail regarding the evaluators' analysis of these issues that was manifest from the contemporaneous evaluation report, which, again, was provided in unredacted form to the protester prior to the filing of its initial protest. Thus, we will not consider these patently untimely challenges to NASA's evaluation.

In any event, even if we accepted the protester's critiques of the agency's analysis, we fail to see how such calculation errors undermine the agency's conclusion that Dynetics failed to provide meaningful detail regarding the specific nature of the claimed "mass opportunities" or how it would achieve such significant mass reductions. For example, whether the evaluators were correct that Dynetics would need to achieve nearly all of its identified potential mass reduction opportunities or the protester is correct that it would only need to achieve approximately [DELETED] percent, the significant weakness based on the absence of any meaningful detail regarding the specific nature of--and how the protester will be able to realize--such significant mass reductions would remain.

Second, Dynetics argues that a graphic in its proposal provided sufficient information regarding the mass opportunities identified by the protester to close the mass deficit.<sup>29</sup> As shown in the excerpt below, the chart, while suggesting that there are significant “known mass opportunities,” provides no supporting details or rationale to substantiate the protester’s assertions:

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<sup>29</sup> In its comments and first supplemental protest, Dynetics for the first time identified other sections of its proposal that it asserts provided the allegedly missing detail. See Dynetics Comments & Supp. Protest at 57-58. Setting aside that this information should have been presented in the initial protest, we nonetheless do not find that it in fact provides the detail that the evaluators found wanting. Specifically, the protester points to two charts in its technical volume indicating that Dynetics has or will perform trade studies that are relevant to mass closure. See *id.* (citing AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I, Technical, at 10958-10959). These entries, however, merely contain high level descriptions and do not provide any detail with respect to the specific anticipated “known mass opportunities” relied upon by Dynetics to close its mass deficit. See, e.g., AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I, Technical, at 10958 (identifying a completed trade study titled [DELETED] with the scope of [DELETED] and listing benefits as “[DELETED], reduced mass”); *id.* at 10959 (identifying a future study titled [DELETED] with the scope of “Trade capacity vs. mass vs. availability”), and listing potential benefits as including “Reduced mass”).

Dynetics also points to its proposal’s risk report attachment, which generally identifies the risk associated with managing mass budget and the protester’s overall risk mitigation plan, including, for example, conducting studies and [DELETED]. AR (B-419783.2), Tab 56, Dynetics Proposal, Vol. IV, attach. 36, Risk Reports, at 14044-14045. Here again, nothing in this general framework addresses the basis for the “known mass opportunities” or how Dynetics will be able to achieve them. See *id.* at 14045 (“If mass cannot be mitigated, other work-around options could include [DELETED], etc.”).



Subsystem	Current DAE Mass Estimate	DAE Mass Allocations	Mass Growth Allowance	Known Mass Opportunities
1.0 Structures	[DELETED]	[DELETED]	[DELETED]	[DELETED]
2.0 Protection	[DELETED]	[DELETED]	[DELETED]	[DELETED]
3.0 Propulsion	[DELETED]	[DELETED]	[DELETED]	[DELETED]
4.0 OAM	[DELETED]	[DELETED]	[DELETED]	[DELETED]
5.0 Power	[DELETED]	[DELETED]	[DELETED]	[DELETED]
6.0 Avionics	[DELETED]	[DELETED]	[DELETED]	[DELETED]
7.0 Thermal	[DELETED]	[DELETED]	[DELETED]	[DELETED]
8.0 ECLSS	[DELETED]	[DELETED]	[DELETED]	[DELETED]
9.0 Crew Accommodation	[DELETED]	[DELETED]	[DELETED]	[DELETED]
<b>Dry Mass</b>	[DELETED]	[DELETED]	[DELETED]	[DELETED]
[Omitting subsystem figures]				
<b>Insert Mass</b>	[DELETED]	[DELETED]	[DELETED]	[DELETED]
[Omitting subsystem figures]				
<b>Total Mass</b>	[DELETED]	[DELETED]	[DELETED]	[DELETED]

AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I – Technical, at 10946-10947 (all figures in kilograms (kg)).

The lack of supporting detail addressing the nature of these “known” mass reduction opportunities and how such reductions will be achieved, which is precisely the problem identified by the evaluators, is evident from the record. For example, at the subsystem level, Dynetics suggests that it may be able to reduce its current mass estimate for structures by approximately [DELETED] percent; absent, however, is any explanation for what structures will be jettisoned or redesigned, and how Dynetics proposes to do so without compromising the mission or materially revising its current design. Notwithstanding that Dynetics identified the “criticality” of mass control in its proposal, it failed to provide an adequate basis for the realism and feasibility of its proposed reductions. *Id.* at 10947. On this record, we cannot find fault with the agency’s concern with the lack of substantiating analysis in the proposal.

Dynetics makes similarly flawed arguments when challenging the agency’s assessment of a significant weakness relating to inconsistencies and insufficient design and analysis detail regarding the protester’s CFM system and the long-term storage characteristics and capabilities of both the protester’s DAE and Centaur Tanker (a supporting spacecraft that the protester proposed to use to deliver propellant), as well as insufficient detail regarding the development of those capabilities. AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18746-18747; *see also* AR (B-419783), Tab 93, Source Selection Statement, at 27791 (identifying as one of three significant weaknesses that the SSA found “critical” Dynetic’s failure to include “material details as to development, testing, and analysis of [the CFM] system and the long-term characteristics for its propellant storage capabilities”). Among the specific concerns

identified by the agency was Dynetics's failure to adequately substantiate its estimated cryogenic fuel boil-off estimates, and its approach to related CFM-analysis efforts. AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18746.

Cryogenics is the science and technology of very low temperatures. A cryogenic fluid is typically kept at low temperatures in a storage vessel, and storage presents a major challenge due to the inherent heat input from the environment. When cryogenic fluid is warmed due to constant pressure, the fluid boils and "boil-off" vapors are released from the vessel. Ursan, M., "What is boil-off?," U.N. Economic Commission for Europe (Nov. 3, 2011), available at [http://www.unece.org/fileadmin/DAM/trans/doc/2011/wp29grpe/LNG\\_TF-02-06e.pdf](http://www.unece.org/fileadmin/DAM/trans/doc/2011/wp29grpe/LNG_TF-02-06e.pdf) (last visited July 25, 2021). Significant boil-off losses from cryogenic propellant storage systems in long-duration space mission applications can result in the need for additional propellant and larger tanks. Hedayat, A., Hastings, L.J., Bryant, C., and Plachta, D.W., "Cryogenic Propellant Long-Term Storage With Zero Boil-Off," NASA (Jan. 1, 2001), at 1 available at <https://ntrs.nasa.gov/citations/20020017748> (last visited July 25, 2021); see also AR, Tab 139, SpaceX Proposal, Vol. IV, attach. 38, IPSA, at 25162 ("Boil-off of cryogenic liquid oxygen and liquid methane from various heat sources represents tens of thousands of kg of wasted propellant over the HLS mission.").

Dynetics's initial protest primarily alleges that NASA failed to reasonably consider information it presented to the agency during the base period of performance. See Dynetics Protest at 47-48; see also *id.* at 45-46 (complaining that NASA previously assigned a strength for Dynetics's CFM approach set forth in its proposal submitted in response to the base HLS procurement).<sup>30</sup> As addressed above, to the extent Dynetics's arguments are predicated on prior submissions that it failed to incorporate and explain in its proposal, the fault rests squarely at its own feet.

In addition to its primary objection that NASA should have considered information submitted during the base performance phase, Dynetics also alleges discrete objections to two elements of the multi-faceted significant weakness assessed by the agency. For example, the protester argues that the agency unreasonably found that Dynetics's

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<sup>30</sup> On this point, we note that we generally find no merit to the protesters' general arguments complaining about allegedly inconsistent treatment between their initial HLS base proposals, which were for early design work, and the current Option A BAA proposals, which are for further DDTE maturation efforts. To the extent that NASA may have more critically scrutinized the extent of DDTE maturation and refinement as compared to the offerors' initially proposed designs, the protesters' objections that this resulted in a more critical review, without more, fails to provide a basis on which to object to NASA's evaluation. See, e.g., *Martin Marietta Corp.*, B-259823, July 3, 1995, 96-1 CPD ¶ 265 at 7 (recognizing in a subsequent procurement for further development and acquisition, that the agency's prior competition and award "were legally separate contracting actions" and "the fact that an agency in a prior procurement reached one conclusion concerning the acceptability of an offeror's approach does not preclude that agency from subsequently reaching, upon further consideration, a different conclusion").

proposal identified a required integrated system performance analysis (ISPA) as “to be determined (TBD),” when in fact Dynetics included the required analysis as attachment 38 to its proposal. See Dynetics Protest at 47 n.6. NASA responded that it did not conclude that the ISPA was missing, but, rather, noted that key details within the ISPA were indicated by the protester as TBD. COS (B-419783.2) at 51-52; AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18746 (“Moreover, there was minimal (and therefore inadequate) discussion of CFM-related analysis efforts or the result of such efforts *within* the offeror’s [ISPA]. No such assessment (or plan for such assessment) was provided and instead, was listed as “TBD”) (emphasis added).

In this regard, the record reasonably supports NASA’s assessment that the ISPA indeed indicated that critical analysis was marked as “TBD.” See, e.g., AR (B-419783.2), Tab 60, Dynetics Proposal, Vol. IV, attach. 38, ISPA, at 14655 (“Propulsion system analysis will be found in *HLS-ISPA-TBD-001*. This analysis report will detail the relevant analysis methodology, ground rules and assumptions, analytical results, and margins in order to meet propulsion system mission requirements . . . .”); *id.* (“In addition, *HLS-ISPA-TBD-002* will provide propellant levels and helium levels on the DAE throughout its mission.”); *id.* at 14672 (indicating “TBD” ISPA attachments, including HLS-ISPA-TBD-001 and -002, were expected to be completed [DELETED]) (underlining added for emphasis; italics in original). Thus, where Dynetics proposed that its “comprehensive report containing all propulsion system analysis” (HLS-ISPA-TBD-001) and “[CFM] and Boil-off Analysis” (HLS-ISPA-TBD-002) were to be determined, we find the record fully supports NASA’s evaluated concern. *Id.* at 14672.

Notwithstanding the ISPA’s unambiguous TBD notations, Dynetics suggests that the agency “appears to have relied upon an outdated version of the ISPA” because the ostensibly updated ISPA references Dynetics’s HLS Thermal Analysis Plan (DHLS TAP), NAS14-PLN-10087500. See Dynetics Protest at 47 n.6. The protester’s argument, however, is not supported by the record, as only one proposal was submitted by Dynetics to NASA, and the version in the record includes references to both the DHLS TAP and the analyses marked TBD. See AR (B-47983.2), Tab 60, Dynetics’s Proposal, Vol. IV, attach. 38, ISPA, at 14651, 14653, 14655, 14672. Thus, to the extent Dynetics argues that the DHLS TAP contains the entirety of the analysis contemplated by the “TBD” analyses referenced in the ISPA, we conclude that Dynetics failed to prepare a proposal clearly explaining the firm’s interpretation of “TBD,” as opposed to NASA relying upon outdated information in the protester’s proposal.

In any event, we note that the agency provided a reasoned rebuttal to the protester’s complaints. For example, the protester asserts that its proposal provided “its plan for [DELETED] to refine its CFM system, including [DELETED] to address CFM risks.” Dynetics Comments & Supp. Protest at 60-61 (*citing* AR (B-419783.2), Tab 22, Dynetics’s Proposal, Vol. I – Technical, at 10977). As the contracting officer explained, however, the cited proposal provision does not in fact provide any additional detail regarding the protester’s proposed [DELETED], other than to confirm that the protester

will [DELETED] to address “risks related to propellant transfer and CFM.” AR (B-419783.2), Tab 22, Dynetics’s Proposal, Vol. I – Technical, at 10977.

With respect to the DHLS TAP, the agency explained that it did not believe the document included sufficient supporting detail to allay its concerns. In this regard, the agency found that the document largely listed the trade studies and general analyses Dynetics intends to perform, without any substantiating details. COS (B-419783.2) at 52. Based on our review of the DHLS TAP, we find no basis to question the accuracy of NASA’s assessment that the document merely provides a summary list of proposed trade studies [DELETED], and a summary chart, [DELETED], that does not provide any meaningful detail regarding the specific methodologies or purpose of the protester’s proposed approach. AR (B-419783.2), Tab 66, Dynetics’s Proposal, Vol. IV, Design Review Document Supporting Documents, DHLS TAP, at 17601-17602; *see also id.* at 17592 (“Thermal control systems analysis will address . . . boil-off analysis. . . . This analysis plan will detail relevant analysis methodology, ground rules and assumptions, analytical results, and margins in order to meet thermal control system mission requirements across all phases of the DHLS operation.”). On this record, we agree with NASA’s assessment that this and similarly brief explanations were “minimal (and therefore, inadequate) discussion of CFM-related analysis efforts,” and that the proposal otherwise failed to provide reasonable “detail regarding the development testing and analysis supporting the maturation of this critical capability.” AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18746-18747.

Dynetics also alleges that NASA engaged in a disparate evaluation of SpaceX’s proposal because the awardee’s proposal allegedly suffered from the same lack of detail as the protester’s proposal. We find no basis to object to NASA’s evaluation. As an initial matter, we note that NASA and SpaceX point to numerous areas of the awardee’s proposal that include significantly more detailed and nuanced analyses of the boil-off problem, methodology for calculating and budgeting for boil-off, mitigation approaches, and areas of further analysis. The most compelling evidence highlighted by the agency and intervenor are the significantly detailed aspects of SpaceX’s ISPA, which stand in stark contrast to the limited discussion in Dynetics’s ISPA and DHLS TAP.

SpaceX’s ISPA incorporated a nearly 90-page “Thermal Analysis” that the awardee used to drive overall vehicle architecture, active and passive thermal control system design, material selections, and component designs. AR (B-419783.2), Tab 139, SpaceX Proposal, Vol. IV, attach. 38, ISPA, at 24456. The thermal analysis was organized by [DELETED]. *See generally id.* at 24454.

SpaceX’s ISPA also included a 57-page “Thermal Protection System Analysis” that the awardee used to present thermal protection systems analysis results to date for HLS and its methodology and approach for ongoing efforts. *Id.* at 24546. This analysis followed the same detailed format as the thermal analysis. *Id.* at 24544-24598. Relevant here, the thermal protection analysis included a detailed discussion of

SpaceX's current analysis of [DELETED], including the basis for SpaceX's propellant heating and boil-off estimates. *Id.* at 24560-24561

Additionally, SpaceX's ISPA included a several hundred page "Propulsion System and Performance Analysis" setting forth the intervenor's analysis of its starship propulsion system, including the propellant inventory and final performance margins. *Id.* at 25061. This analysis included a slightly different format than the above-described analyses, specifically organized to address: [DELETED]. *Id.* at 25059.

The analysis also directly demonstrated how the values addressed in the analysis were used as inputs in SpaceX's propellant inventory and performance calculations, including boil-off estimates that were presented in the accompanying propulsion system analysis excel spreadsheet. *Id.* at 25061. Relevant here, the analysis summarizes the applicable requirements relating to boil-off, addresses the impact of natural and induced thermal environments on heat rates, the methodology used to account for boil-off, and addresses propellant usage breakdowns, including accounting for boil-off. *See id.* at 25069, 25073, 25095, and 25108-109.

In addition to the foregoing, the propulsion analysis incorporated as a subsection a nearly 50-page "Propellant Heat Rates" analysis addressing boil-off, in terms of the methodology for accounting for boil-off losses, as well as specific mitigation and management approaches. As with the thermal and thermal protection system analyses, the propellant heat rates analysis was organized by [DELETED]. *See generally id.* at 25160-25209. On this record, we cannot conclude that NASA erred in finding that SpaceX's detailed proposal focus on boil-off warranted the same assessed risk as Dynetics's brief, conclusory and "to be determined" discussion in its proposal.

We note that we do not separately address the protester's objections to all of the weaknesses that share the common defects of inadequate supporting documentation included in the agency's assessment of the protester's Option A BAA proposal. As the above representative examples demonstrate, Dynetics largely ignored the Option A BAA's admonishments to provide detailed information within the four corners of the proposal and instead relied on base period information that it failed to incorporate and explain in its Option A BAA proposal. Additionally, Dynetics's initial protest in many instances then largely ignored our forum's rules prohibiting the piecemeal presentation of protest issues. In this regard, the protester's initial protest included limited challenges to the agency's evaluation, primarily asserting that NASA failed to reasonably consider information submitted during the base period of performance. Dynetics's subsequent filings then pivoted to assert, in the alternative, detailed arguments alleging that its Option A BAA proposal reasonably included the allegedly missing information or that the agency unreasonably evaluated specific information contained therein. Based on

our review of the record, we find that these proposal and pleading defects materially undermine the protester's objections to NASA's evaluation.<sup>31</sup>

We also address a few representative examples of other weaknesses assessed by the agency against Dynetics's proposal. For example, the protester challenges the agency's assessment of a significant weakness for the protester's flawed uncrewed demonstration timeline. See AR (B-419783.2), Tab 70, Dynetics Eval. Report,

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<sup>31</sup> We similarly will not address all of the instances where, contrary to Dynetics's claims of disparate treatment, the record reasonably supports NASA's response that SpaceX's proposal included more meaningfully detailed information as compared to Dynetics, and, therefore, warranted different evaluation results. As an example, as discussed above, NASA was not convinced that Dynetics provided sufficient detail regarding planned trade studies to reduce the mass of its spacecraft. The protester complains that NASA similarly should have critically viewed SpaceX's proposed reliance on planned studies for various aspects of its proposal, including with respect to SpaceX's proposed power system. The record, however, confirms NASA's analysis that SpaceX provided significantly more detail than Dynetics about its respective plans.

In this regard, Dynetics included only minimal details regarding its future planned studies. As an example, the protester identified a future trade study titled [DELETED] with the scope of "Trade capacity vs. mass vs. availability," and listing potential benefits as including "Reduced mass". AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I, Technical, at 10958. In contrast, SpaceX's proposal, in accordance with the terms of the HLS contract and paragraph 4.4.6.6, proposed to execute a government task agreement (GTA) with NASA's Marshall Space Flight Center's (MSFC) Space Environmental Effects Test Facility to conduct a joint combined space environmental effects test of the SpaceX Starship's [DELETED].

Specifically, SpaceX explained that it would subject [DELETED] to testing in simulated [DELETED] environments, including [DELETED]. AR (B-419783.2), Tab 88, SpaceX Proposal, Vol. IV, attach. 6, Government Task Agreements (GTAs) and Optional Government-Furnished Equipment or Property Agreements (OGFPAs), at 19208. The proposed agreement then outlined the various tasks to be allocated as between MSFC and SpaceX and the specific proposed schedule for completion of the testing. *Id.* at 19208-19209.

In response, Dynetics complains that these additional details are insufficient to show a material difference in the proposals because SpaceX otherwise failed to adequately address what it would do with the results of the MSFC testing. This argument, however, is belied by the record. Specifically, SpaceX's ISPA specifically addresses that remaining work following the MSFC collaboration would be incorporated into other specifically addressed analyses being performed by SpaceX, as well as provides details regarding other relevant completed and in work trade studies. AR (B-419783.2), Tab 139, SpaceX Proposal, Vol. IV, attach. 38, ISPA, at 24976-24985. On this record, we find no basis to find that NASA disparately treated offerors where the proposals contained marked differences in the level and quality of supporting information included.

at 18747-18750. Under technical focus area 7, approach to early system demonstrations, offerors were required to describe their respective approaches to early system demonstrations. The solicitation provided that an approach to these demonstrations that demonstrably reduces schedule and technical risk would be more favorably evaluated. AR, Tab 3, Option A BAA, ¶ 4.4.3.7.

As part of the required early demonstrations, offerors will be required to successfully complete an uncrewed lunar landing test. AR, Tab 10, Option A BAA, attach. G, SOW, ¶ 6.7. After completing the test, the contractor will be required to complete a post-test review. *Id.*, ¶ 5.4.3. In addition to demonstrating that the test met the mission performance requirements for the test, the contractor will be required to complete the following reviews:

Review Topics	Review Objectives
Anomaly Identification & Closure Plans	-List of in-flight/ground anomalies -Closure Plan(s) for in-flight anomalies
Post-Test Analyses	-Mission Performance Evaluation Report [ ] -Test performance within predication -Validation of external interfaces, if applicable -Understanding of boundary conditions tested
Risks	-Identification of risk reduction achieved due to Uncrewed Lunar Landing Test
Lessons Learned	-Lessons learned documented

*Id.*

The Option A BAA’s milestone acceptance criteria and payment schedule template, which was incorporated as attachment O, stated that the post-test review must be completed “[b]efore first HLS element launch.” AR, Tab 14, Option A BAA, attach. 14, Milestone Acceptance Criteria & Payment Schedule Template, at Payment Schedule Tab.

Consistent with the Option A BAA’s requirements, Dynetics proposed an uncrewed demonstration mission, which it referred to as its Lunar Lander Advanced Mission Assurance (LLAMA) demonstration. See, e.g., AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I – Technical, at 10978 (including [DELETED] as one of the “LLAMA Mission Highlights” to be demonstrated). However, inconsistent with the solicitation’s requirement that the post-test review be completed before the launch of any HLS element, the protester in fact proposed to complete the post-test review more than [DELETED] months after Dynetics begins launching HLS elements. Specifically, Dynetics proposed launching multiple propellant deliveries via its Centaur Tankers for its crewed mission beginning on [DELETED], 2024, while the post-test review for its

uncrewed mission would not be completed until [DELETED], 2024.<sup>32</sup> AR (B-419783.2), Tab 36, Dynetics Proposal, Vol. IV, attach. 13, Milestone Acceptance Criteria & Payment Schedule, “Payment Schedule” Tab.

The agency assessed a significant weakness for this apparent discrepancy noting several concerns with the protester’s proposed sequencing whereby it would begin launching critical elements for its crewed mission while still conducting its uncrewed LLAMA test review. The evaluators noted that this approach would frustrate the purpose of the post-test review, as Dynetics would not be able to modify the initial activities of its crewed demonstration mission in response to the results of its LLAMA test activities. In this regard, if the protester experiences any issues with [DELETED], it could not address such issues because the propellant for the crewed mission would already have been launched. In sum, the evaluators found that Dynetics’s “proposed mission sequencing and significant overlap between its LLAMA and its crewed demonstration result in an uncrewed lunar landing test that does not meet the intent of the HLS SOW’s requirement for such an activity,” and otherwise was in direct contravention of the solicitation’s milestone acceptance criteria. AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18750-18751.

Among other objections to this assessed significant weakness, Dynetics primarily argues that “*even if* NASA is correct about Dynetics’s proposed timeline, the risk could be mitigated simply by moving back the date of the Flight Readiness Review (and subsequent launch of the DAE)--as NASA acknowledged elsewhere, a crewed mission in 2024 was merely a ‘goal’ and not a ‘requirement.’” Dynetics Supp. Comments at 94-95 (emphasis in original; internal citation omitted). This argument fails for two critical reasons.

First, Dynetics’s focus on the portion of its HLS solution carrying the crew, the protester’s DAE, ignores the agency’s concerns with the propellant tankers, which will be launched prior to completion of the uncrewed LLAMA mission review. Deferring the launch of the DAE element would not rectify the agency’s reasonable concerns if there is a problem experienced with Dynetics’s separate Centaur propellant tankers.

Second, we find no basis to object to NASA’s concerns with the schedule as specifically proposed by the protester. Under technical focus 2, development, schedule, and risk, NASA unequivocally emphasized that a 2024 crewed demonstration mission was an aspirational goal, but was not an explicit requirement. AR, Tab 3, Option A BAA, ¶ 4.4.3.2; *see also id.*, ¶ 1.1 (“[E]ach reference to 2024 for the timing of this mission should be understood as *NASA expressing its goal* that this mission occur in 2024.”)

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<sup>32</sup> As addressed in more detail below in connection with the protesters’ arguments that the agency unreasonably waived mandatory flight readiness review requirements for SpaceX, NASA here contemporaneously treated a tanker supporting spacecraft as an “HLS element” in connection with the post-test review milestone acceptance criteria, while maintaining in response to the protests that a tanker is not an “HLS element” within the meaning of the flight readiness review milestone acceptance criteria.



(emphasis added). In this regard, the Option A BAA provided offerors with flexibility in proposing their respective timeline for their proposed crewed demonstration mission:

In light of NASA's goal of a 2024 crewed demonstration mission, the proposed timing of the Offeror's crewed demonstration mission shall be accelerated as much as possible to attempt to meet that goal while assuring schedule realism and appropriately mitigating risks. While acceleration and realism are important to the Government, neither of these attributes offered in isolation will render a proposal eligible for positive evaluation credit. Rather, a proposal that offers an accelerated timeline for a crewed demonstration mission that the Government evaluates as unrealistic overall may be evaluated negatively. Similarly, a proposal that offers, in the Government's assessment, a realistic schedule that does not demonstrate efforts to accelerate the crewed demonstration mission as much as possible may be evaluated negatively. NASA will evaluate the Offeror's proposed timing of the crewed demonstration mission along with the assessed realism of the Offeror's proposed schedule and may evaluate a proposal more favorably if it demonstrates that the Offeror has proposed an accelerated, yet realistic, schedule.

*Id.*, ¶ 4.4.3.2.

Dynetics proposed a 2024 crewed demonstration mission. See, e.g., AR (B-419783.2), Tab 22, Dynetics Proposal, Vol. I – Technical, at 10956. NASA assessed the relative merits and risks of Dynetics's proposed schedule contemplating a 2024 crewed demonstration mission. We agree with the agency that the protester's objections to that analysis as being unreasonable because Dynetics could simply have shifted its demonstration mission beyond 2024 is unavailing. As NASA cogently argues, "[t]he problem with this argument is that this is *not* what Dynetics proposed and *not* the approach that NASA evaluated." Supp. COS (B-419783.2) at 119 (emphasis in original). In this regard, Dynetics proposed a 2024 demonstration mission and, consistent with the Option A BAA, NASA evaluated the realism of the protester's specific proposed approach. To the extent that the protester argues the agency should have more leniently evaluated its proposal in accordance with a relaxed schedule not proposed by the protester, such arguments are without merit.

As an additional example, the agency assigned a weakness in Dynetics's IMS because the agency was not able to map all of the proposed milestone payment phases to the IMS. AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18745. Here, there is no dispute that Dynetics did not use consistent names or dates for certain events between its proposed milestones and their corresponding entries in its IMS. See Dynetics Supp. Comments at 88 ("While some of these entries were not exact matches for the corresponding milestones, that is beside the point."). The protester contends that NASA nevertheless should have been able to understand the connection between the milestones and IMS events because the "tasks either 'align (or obviously follow)' the supposedly 'missing' payment milestones." *Id.* We disagree. As addressed above, it is

an offeror's responsibility to submit an adequate proposal. In this regard, we have repeatedly recognized that an agency is not required to infer information from an inadequately detailed proposal. *TSC Enter., LLC*, B-415731, Feb. 8, 2018, 2018 CPD ¶ 71 at 2; *Valkyrie Enters., LLC*, B-414516, June 30, 2017, 2017 CPD ¶ 212 at 5. On this record, we find no basis to conclude that NASA was required to infer the correlation between the protester's milestones and IMS events that used different nomenclature and dates.

### Summary

As reflected in the above representative examples, we find that the record adequately supports NASA's evaluation of the protesters' proposals and was consistent with applicable procurement law, regulation, and the terms of the Option A BAA. In this regard, we further note that even if the protesters were to prevail on some of their challenges, as discussed above and in greater detail below, we find that the balance of the agency's evaluation was reasonable and otherwise supports NASA's ultimate evaluation. *Protection Strategies, Inc.*, *supra*.

### Evaluation of SpaceX's Proposal

The protesters also raise a number of challenges to the agency's evaluation of SpaceX's proposal. The protesters contend that the agency unreasonably assessed strengths, failed to reasonably assess weaknesses, or, to the extent it did assess strengths or weaknesses, failed to reasonably weight such findings (*i.e.*, assessed significant strengths should have only been assessed as strengths, and assessed weaknesses should have been assessed as significant weaknesses). As addressed above, in a procurement conducted pursuant to FAR part 35, we limit our review to whether the agency violated any applicable statute, regulation, or solicitation provision, or acted in bad faith. *Wang Electro-Opto Corp.*, *supra*; *INRAD, Inc.*, *supra*.

As an initial matter, NASA and SpaceX requested that, in light of our Office's recognition of the heightened deference applied to agency evaluations when acquiring research and development under FAR part 35, we dismiss all of the protest allegations challenging the evaluation of SpaceX's proposal. See, *e.g.*, SpaceX Req. for Dismissal (B-419783) at 3; NASA Resp. to SpaceX Req. for Dismissal (B-419783) at 2. In large measure, these arguments are predicated on language included in our 1997 decision in the protest of *Microcosm, Inc.*, B-277326 *et al.*, Sept. 30, 1997, 97-2 CPD ¶ 133.

In that decision, also involving a procurement conducted pursuant to FAR part 35, we denied a protest filed by a disappointed offeror after finding that the agency reasonably found that the protester's proposal failed to include sufficient technical information to establish the viability of the protester's proposed research. After providing a detailed discussion confirming the reasonableness of the agency's evaluation of the protester's proposal, we explained that we dismissed several supplemental protest allegations raised by the protester. Relevant here, we dismissed those challenges to the evaluation

of the awardees' proposals and allegations that the agency had conducted an unequal evaluation.

With respect to the evaluation of the awardees' proposals, we explained that "offerors who submit proposals under a BAA are not competing against each other, and thus the various issues [the protester] has raised regarding the evaluation of other offerors' proposals are not for consideration." *Microcosm, Inc., supra*, at 11. We further explained that, with respect to the disparate treatment arguments, "since we have concluded that [the agency's] treatment of [the protester's] proposal was reasonable, the evaluation of other offeror's proposals is irrelevant, and no credible claim of bias has been raised." *Id.* at 11 n.6.

While this language, taken out of context, might support the expansive interpretation argued by the agency and intervenor that any challenges involving the evaluation of SpaceX's proposal are not properly for our consideration in this procurement conducted pursuant to FAR part 35, we do not conclude that *Microcosm* intended to mark a wholesale departure from the standard articulated in prior and subsequent decisions (*i.e.*, we will consider protest allegations that the agency's evaluation violated applicable procurement law, regulation, or solicitation provision, or was conducted in bad faith).<sup>33</sup> In *Microcosm*, we declined to consider challenges to the evaluation of the awardees' proposals only after concluding that the agency had reasonably concluded that the protester's proposal lacked critical information demonstrating the viability of its own proposed approach. Here, NASA did not make a similar finding with respect to the viability of the protesters' proposals.

As addressed herein, we agree that the protesters' general disagreements with the subjective evaluation judgments of NASA are generally not appropriate for our consideration in the context of this procurement conducted pursuant to FAR part 35. However, allegations challenging whether the agency has violated applicable

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<sup>33</sup> We note that the parties failed to--and we did not independently--identify any additional decisions squarely addressing the question of whether a protester can generally be an interested party to challenge the evaluation of an awardee's proposal under a procurement conducted in accordance with FAR part 35. *But see Global Aerospace Corp., supra*, at 6 n.5 (questioning, in light of *Microcosm, Inc.*, whether the protester was interested to challenge the evaluation of an SBIR Phase II awardee's proposal, but dismissing the allegations on timeliness grounds). Other decisions of our Office found that protesters were not interested parties to challenge the evaluation of an awardee in the context of a procurement conducted pursuant to FAR part 35 or the SBIR program on other bases. *See, e.g., Made in Space, Inc.*, B-414490, June 22, 2017, 2017 CPD ¶ 195 at 6-7 (finding protester was not an interested party to challenge the evaluation and award of an SBIR contract where the protester was not a Phase I awardee); *KR3Tech, Inc.*, B-413692, Dec. 14, 2016, 2016 CPD ¶ 364 at 6 n.5 (same, where there were intervening proposals that were not challenged by the protester); *Virginia Accelerators Corp.*, B-271066, May 20, 1996, 97-2 CPD ¶ 13 at 3 n.2 (same).

procurement law, regulation, or solicitation provision are appropriate for our review and consideration in accordance with our established line of decisions.

Turning to the specific protest grounds, the protesters raise a number of objections that do not raise legally and factually sufficient bases of protest demonstrating that the agency violated any applicable procurement law or solicitation provision, or acted in bad faith in accordance with the discretion we afford agencies conducting procurements under FAR part 35. For example, Blue Origin complains that NASA impermissibly relied on an unstated evaluation factor when it assigned SpaceX a strength for its “crew-centric” design that focuses on crew safety, health, and comfort. Specifically, the evaluators credited SpaceX’s design, noting several features including:

- Spacious crew accommodations that [DELETED];
- A [DELETED] configuration for [DELETED] of the mission, which will provide additional protection from [DELETED] by the crew;
- [DELETED] with dedicated [DELETED], which will enable the crew to [DELETED] and [DELETED] the vehicle while providing needed redundancy and crew resource management during high-workload landing tasks;
- A robust medical system including additional capabilities such as [DELETED]; and
- “[E]xceptionally detailed and mature” [DELETED], which “will greatly improve the operability and safety of the final Starship design.”

AR, Tab 185, SpaceX Eval. Report, at 35160.

We think this representative example is exactly why discretion is due when NASA is seeking innovative research and development approaches to fulfilling important scientific and engineering objectives. In this regard, we find nothing unreasonable in NASA positively assessing SpaceX’s commitment to the health, safety, and comfort of the astronauts who will be traveling and working within the awardee’s HLS vehicle within the broader framework of the Option A BAA’s evaluation criteria and the Option A BAA’s request for innovative research and development solutions. Blue Origin’s disagreement that such considerations were not expressly contemplated by the solicitation or otherwise were inappropriate, without more, provides no basis to object to NASA’s evaluation. See, e.g., *Oracle Am., Inc.*, B-417046, Jan. 31, 2019, 2019 CPD ¶ 74 at 10 n.15 (denying protest alleging the agency applied an unstated evaluation preference where the agency reasonably found that the awardee’s unique approach was preferable to (and, therefore, was more positively evaluated than) the protester’s proposed approach, which was otherwise not positively or negatively evaluated); *Cerner Corp.*, B-293093, B-293093.2, Feb. 2, 2004, 2004 CPD ¶ 34 at 8-11 (same); *Forest Regeneration Servs. LLC*, B-290998, Oct. 30, 2002, 2002 CPD ¶ 187 at 6-7 (same).

As another example, Dynetics argues that, notwithstanding the significant weakness NASA assessed against SpaceX's proposal for its highly complex concept of operations, NASA should have even more heavily weighted the risks associated with SpaceX's approach. Dynetics's arguments challenging the weighting of assessed risks associated with SpaceX's technical approach fail to demonstrate that the agency unreasonably evaluated SpaceX's proposal in a manner inconsistent with applicable procurement law or the Option A BAA.

The record reflects that NASA documented concerns with SpaceX's approach, including the risks associated with both the complexity of the approach and the attendant schedule pressures. For example, the agency assigned SpaceX's proposal a significant weakness due to its highly complex concept of operations. AR, Tab 212, SpaceX Eval. Report, at 35754-35755. In this regard, the SSA provided a thorough analysis of the evaluators' findings with respect to the risks associated with SpaceX's technical approach, and documented the basis for her independent judgment that a significant weakness was warranted:

While I find the positive aspects of SpaceX's technical approach to be notably thoughtful and meritorious, these aspects are, *however, tempered by its complexity and relatively high-risk nature*. . . . SpaceX's mission depends upon an operations approach of unprecedented pace, scale, and synchronized movement of the vehicles in its architecture. . . . I acknowledge the *immense complexity and heightened risk* associated with the very high number of events necessary to execute the front end of SpaceX's mission, and this complexity largely translates into increased risk of operational schedule delays.

AR, Tab 93, Source Selection Statement, at 27780 (emphasis added).

Notwithstanding the assessed risk, however, the agency also found that SpaceX's concept of operations presented a novel, "elegant approach" that could appreciably lower the risk of mission failure and risk to the safety and welfare of the astronauts who will be traveling in the lander. Specifically, the agency found that SpaceX's:

[P]roposed architecture reduces risk and mission complexity by using a single-stage vehicle to execute the lunar surface sortie mission. . . . The offeror uses multiple propellant delivery flights to load all propellant for the mission, effectively decoupling launching of propellant from the launching of the lander itself. This enables the lander to [DELETED] after it is launched. Mass closure is always a significant challenge for this type of mission. An oft-utilized strategy to get vehicle element launch masses down is to rely on on-orbit vehicle staging, but here, the offeror's unique architecture that [DELETED] allows the offeror to utilize a simpler, single stage lander design. To summarize, by using this approach, the offeror avoids common mass closure issues with its lander launch vehicle design,

and it also avoids relying on risky on-orbit staging of multiple elements, thereby also eliminating the need for critical inter-element interfaces, all of which increase complexity and risk of failure.

Additionally, the single-stage crewed mission results in [DELETED], reducing complexity in design implementation and operations. This single-stage nature of the offeror's architecture reduces also risk to the crew insofar as the risks created by a multi-stage approach (*e.g.*, staging events during the crewed mission, the critical inter-element interfaces, *etc.*) [that] each represent additional events in which a failure would put the crew's life at risk. Thus, by reducing the risk of the mission profile overall, this aspect of the offeror's architecture reduces risk to the crew. In summation, a single-stage landing element to perform the lunar surface sortie mission is an elegant architecture that provides a simple solution for crew landing and ascent. This aspect of the offeror's design is likely to reduce crew risk and increase the likelihood of mission success.

AR, Tab 185, SpaceX Eval. Report, at 35157.

In this regard, the SSA explained that the above risks were "tempered" by the unique potential benefits associated with SpaceX's proposed approach:

Indeed, despite SpaceX's concept of operations relying on a high number of launches, there is some flexibility in the timing of its required propellant tanker launches prior to the time-critical HLS Starship. This flexibility will allow NASA to time its crewed mission only after SpaceX has successfully achieved its complex propellant transfer activities and is ready to commence launch of its lunar lander. It is this flexibility that allays my concerns with regard to the admittedly riskier aspects of the first phase of SpaceX's concept of operations. And, I further acknowledge that bounding more of the risk associated with these activities within the first phase of SpaceX's mission actually enables the use of a single-element lander for the crewed portion of its mission. By decoupling the launch of propellant from the launch of the lander, SpaceX was able to design a larger lander which will not require any on-orbit aggregation or integration activities. . . . Moreover, I note that SpaceX's complex rendezvous, proximity operations, docking, and propellant transfer activities will occur in Earth orbit rather than at a more distant point in lunar orbit. In my opinion, the closer location of these complex operations mitigates the risk to some degree; as noted above, issues that occur in Earth orbit are more easily overcome or corrected compared to those that occur in lunar orbit.

AR, Tab 93, Source Selection Statement, at 27780.

Although Dynetics clearly disagrees with NASA's assessment of the relative risks associated with SpaceX's proposed approach or their relative weight as compared to

the perceived technical advantages with the approach, such disagreement fails to establish that NASA's evaluation was contrary to the terms of the solicitation. *Protection Strategies, Inc., supra*, at 7-8 (a protester's general disagreement with respect to the agency's weighting of assessed strengths or weaknesses generally provides no basis to object to any agency's evaluation of proposals). NASA is due significant discretion when acquiring cutting edge research and development under FAR part 35. In this regard, while the agency fully appreciated that SpaceX proposed a highly complex and aggressive approach, it also recognized the superior technical advantages that such an approach could offer to the agency. The agency is entitled to wide discretion when balancing the benefits and risks of a proposal and deciding which proposals are suited to meeting the government's needs when it is acquiring research and development of innovative technologies. On this record, we find no basis to disturb the agency's exercise of its independent business judgment as to the risks and merits of SpaceX's proposal.

As these representative examples demonstrate, many of the protesters' challenges to the evaluation of SpaceX's proposal fail to allege--let alone demonstrate--that NASA violated any applicable law, regulation, or solicitation provision, or otherwise acted in bad faith. Therefore, the protesters' objections fail to provide any basis on which to sustain the protests.

#### NASA's Waiver of a Requirement for SpaceX

The protesters, however, did allege a specific instance where it appears that SpaceX's proposal failed to comply with a material solicitation provision. Such an allegation states a legally and factually sufficient allegation that the agency failed to evaluate the proposal in accordance with the applicable provisions of the Option A BAA, which is within the matters we will consider in a procurement conducted pursuant to FAR part 35. Specifically, the protesters allege that SpaceX's proposal failed to include mandatory flight readiness reviews (FRR) for each launch contemplated by the awardee's proposed concept of operations as required by the Option A BAA.

As addressed above, SpaceX's concept of operations contemplated sixteen total launches, consisting of: 1 launch of its [DELETED]; 14 launches of its Tanker Starships to supply fuel [DELETED]; and 1 launch of its HLS Lander Starship, which would be [DELETED] and then travel to the Moon. See, e.g., AR, Tab 213, SSA Briefing Slides – Part I, at 35813. The protesters contend that the Option A BAA requires a FRR for each launch, or a total of 16 FRRs, one for each launch contemplated by SpaceX's concept of operations. The protesters contend that NASA waived this material requirement when it only required SpaceX to propose 3 FRRs, or an FRR for each type of Starship.

NASA argues that the solicitation was ambiguous as to whether an FRR was required for each launch, or for the launch of each type of element. The agency explains that it reasonably assessed a weakness with SpaceX's proposed management approach because the awardee only proposed one overarching FRR milestone review two weeks prior to the launch of its HLS Starship, which would occur after SpaceX had

commenced launching its [DELETED] and Tanker Starships. AR, Tab 212, SpaceX Eval. Report, at 35770. As discussed above, during post-selection negotiations with SpaceX, NASA required SpaceX to amend its proposal to incorporate additional FRRs to be completed no later than two weeks before (i) the launch of the awardee's [DELETED], and (ii) the launch of the first (of fourteen) Tanker Starships. AR, Tab 191, Negotiations Letter, at 35222. NASA asserts that SpaceX's subsequent incorporation of these additional two FRRs brought the proposal into compliance with the agency's intent for the FRR requirements.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Magellan Federal*, B-416254, B-416254.2, June 7, 2018, 2018 CPD ¶ 206 at 4. Here, we think the protesters present the more reasonable interpretation of the Option A BAA's FRR requirements.

As addressed above, the Option A BAA SOW established a requirement for FRRs, which are reviews designed to determine the system's readiness for a safe and successful flight or launch and for subsequent flight operations. AR, Tab 8, Option A BAA, attach. G, SOW, at 15089. The SOW provided that FRRs should be completed two weeks before launch "*of each HLS element.*" *Id.* (emphasis added). The Option A BAA's milestone acceptance criteria and payment schedule template, which was incorporated as attachment O, stated that "[a]n FRR is required prior to *each launch of an HLS element.* Propose multiple FRRs as required." AR, Tab 14, Option A BAA, attach. 14, Milestone Acceptance Criteria & Payment Schedule Template, at Payment Schedule Tab (emphasis added).

Although the solicitation did not define the term "HLS element," the solicitation did define the term HLS to mean:

All objects, vehicles, elements, integrated systems, systems, subsystems, or components thereof that are designed, developed, and utilized by the contractor, its teammates, subcontractors, and suppliers in performance of this contract, and which collectively comprise the contractor's Integrated Lander (or elements thereof), *all Supporting Spacecraft*, all launch vehicles necessary for launch and delivery of the contractor's Integrated Lander (or elements thereof) and its Supporting Spacecraft. . . .

AR (B-419783), Tab 8, Option A BAA, attach. G, SOW, at 15065 (emphasis added); see *also* AR (B-419783.2), Tab 70, Dynetics Eval. Report, at 18749-18750 (treating Dynetics's Centaur Tanker as an "HLS element" for purposes of assessing a significant weakness for Dynetics not completing its post-uncrewed lunar landing test review prior to launching its first Centaur Tanker).



Thus, we find that the Option A BAA required a FRR to be completed prior to *each launch of an HLS element*, which definition includes *supporting spacecraft*. NASA's competing interpretation would essentially require us to read language out of and into the solicitation's requirement. Specifically, we would need to read "supporting spacecraft" out of the definition of "HLS," and the "each" out of "each launch." Additionally, we would need to read in the concept of each element type, specifically, that a FRR is only required to be completed prior to the launch of *each type of HLS element*. As between the two proffered interpretations, we find the protesters' interpretation--which relies on the text as written--to be more natural and compelling than the agency's proffered interpretation. In our view, the agency's interpretation would require us to construe the agency's intent based on information not found in the plain text of the solicitation.

Thus, where the Option A BAA required an FRR before each launch of each HLS element, SpaceX's three proposed FRRs--or one for each *type* of HLS element--were insufficient when SpaceX's concept of operations will require 16 total launches.<sup>34</sup>

### Competitive Prejudice

Accepting the protesters' contentions that NASA waived the Option A BAA's FRR requirements for SpaceX, we nonetheless find no basis on which to sustain the protests because the protesters have failed to establish any reasonable possibility of resulting competitive prejudice.

We have explained that, even where an agency clearly should have amended a solicitation or otherwise apprised vendors that it had waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Complete Packaging and Shipping Supplies, Inc.*, B-412392 *et al.*, Feb. 1, 2016, 2016 CPD ¶ 28 at 8; *see also Illustrious Consultants*, B-416914, Dec. 28, 2018, 2018 CPD ¶ 434 at 3 ("An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other firms.").

Competitive prejudice from such a waiver of solicitation requirements exists only where (i) the requirement was not similarly waived for the protester, or (ii) where the protester would have been able to alter its proposal to its competitive advantage if given the opportunity to respond to the relaxed term. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 7; *Phoebe Putney Memorial Hospital*, B-311385,

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<sup>34</sup> NASA raises other arguments for why it believes that SpaceX complied with the requirement to conduct FRRs for each launch. We do not find the agency's contrary arguments persuasive. For example, the agency argues that SpaceX proposed to [DELETED]. *See, e.g.*, Supp COS (B-419783) at 13-14. This argument, however, is inconsistent with the Option A BAA SOW's provision that "[t]he Government will have responsibility for Certification of Flight Readiness," AR, Tab 8, Option A BAA, attach. G, SOW, at 15066, and that such reviews were not [DELETED].

June 19, 2008, 2008 CPD ¶ 128 at 4. We have further clarified that, in cases where a protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. *Glem Gas S.p.A.*, B-414179, Feb. 23, 2017, 2017 CPD ¶ 60 at 4.

Here, the protesters do not allege that NASA failed to waive the same FRR requirements for the protesters such that offerors only were required to complete an FRR for each type of HLS element (as opposed to an FRR for each launch of an HLS element), or that they otherwise could or would have changed their proposals to substantially increase their likelihood of receiving the award had they known of the waiver of the FRR requirement.<sup>35</sup> With respect to Blue Origin, SpaceX's proposed concept of operations, including multiple launches of its Tanker Starship, was materially different than Blue Origin's proposed concept of operations, which contemplated a single launch for each of the protester's proposed HLS element types. *Compare* AR (B-419783.1), Tab 213, SSA Briefing Slides – Part I, at 35791 (explaining Blue Origin proposed using 3 elements with 3 launches) *with id.* at 35813 (explaining SpaceX proposed using 3 elements with 16 launches). Thus, Blue Origin cannot reasonably establish how it could have improved the competitiveness of its proposal had it known that the agency would relax the FRR requirement as it did. *See, e.g., Gemini Tech Servs., Inc.*, B-418233.5, B-418233.6 Mar. 2, 2021, 2021 CPD ¶ 111 at 4 (denying protest for lack of prejudice where the protester alleged that the agency unreasonably waived the requirement for the awardee to itemize fringe benefit components where the protester failed to allege how waiver of the requirement would have resulted in the protester offering a lower proposed price, and only made a general allegation that it was prejudiced by the agency not excluding the awardee as technically unacceptable).

With respect to Dynetics, we note that the protester primarily couches its objection to the agency's waiver of the FRR requirement for SpaceX as presenting an instance of a disparate evaluation. Specifically, Dynetics alleges that the agency minimized SpaceX's non-compliance with the Option A BAA's milestone acceptance criteria as only warranting a weakness, while Dynetics's similar non-compliance was assessed a

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<sup>35</sup> The protesters suggest that, notwithstanding their allegations that NASA unreasonably waived the FRR requirements, we should analyze competitive prejudice from the perspective of unequal discussions; that is, we should consider whether the protesters could have materially improved their competitive positions had they been afforded the opportunity for discussions or post-selection negotiations. We disagree. First, as set forth above, we find that NASA's conduct of post-selection negotiations with only SpaceX was consistent with the terms of the Option A BAA and otherwise not arbitrary. Second, this case presents a question of whether the protesters were prejudiced by the waiver of the FRR requirement. We resolve the protester's relative competitive prejudice on the basis of the waiver, not on the basis of post-selection negotiations.

significant weakness. We do not find that the protester's arguments demonstrate a reasonable possibility of competitive prejudice under the circumstances here.

In this regard, NASA similarly did not assign a deficiency to Dynetics's proposal for failing to meet the Option A BAA's milestone acceptance criteria. Specifically, as discussed above in our discussion of Dynetics's challenges to the evaluation of its proposed uncrewed test mission review, Dynetics's proposal failed to comply with the mandatory milestone acceptance requirement to complete its post uncrewed landing test review prior to commencing the launch of HLS elements. Thus, the agency did not disqualify either SpaceX or Dynetics from receiving an award notwithstanding that both firms failed to meet all of the required milestone acceptance criteria. Therefore, to the extent both offerors benefitted from a waiver of material milestone acceptance criteria--at least in terms of not being found technically unacceptable and ineligible for award--we can discern no reasonable possibility of competitive prejudice.

At best, Dynetics can only potentially establish that it warranted a weakness, similar to the weakness SpaceX received for failing to propose FRRs in accordance with the applicable milestone acceptance criteria. (Or, in the alternative, Dynetics could potentially establish that SpaceX should have been assessed an additional or more heavily weighted weakness.) Instead, Dynetics was assessed a significant weakness for failing to propose its uncrewed mission post-test review in accordance with the applicable milestone acceptance criteria. Even changing the significant weakness to a weakness (or otherwise assigning an additional or more significantly weighted weakness against SpaceX's proposal), such a limited correction is insufficient to demonstrate that Dynetics would have had a substantial chance of receiving an award but for this error given the other evaluation findings with respect to the proposals and Dynetics's significantly higher proposed price.<sup>36</sup>

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<sup>36</sup> We additionally note that Dynetics failed to adequately demonstrate--and we independently cannot discern--a reasonable possibility that Dynetics was competitively prejudiced under the second prong of the waiver analysis (*i.e.*, had Dynetics known of the waiver it could have altered its proposal to its competitive advantage if given the opportunity to respond to the relaxed term). In this regard, like SpaceX, Dynetics also proposed multiple launches for its Centaur Tanker support craft. See AR (B-419783.2), Tab 46, Dynetics Proposal Vol. IV, attach. 23a, Concept of Operations – Initial, at 12260-12261. The protester did not allege--and it is not apparent based on its proposed fixed-price milestones for the reviews--that if Dynetics only had to perform a minimum number of FRRs for its Centaur Tanker, any accompanying pricing reduction from eliminating the additional FRRs would substantially decrease Dynetics's significantly higher price (approximately three times higher than SpaceX's total proposed price). See AR (B-419783.2), Tab 36, Dynetics Proposal, Vol. IV, attach. 13, Milestone Acceptance Criteria and Payment Schedule, "Payment Schedule" Tab. On this record, we cannot conclude that the protester has demonstrated a reasonable possibility of competitive prejudice. *Cf. DynCorp Int'l LLC, supra*, at 12-15 (notwithstanding agency's failure to conduct a reasonable cost realism evaluation,

In addition to considering prejudice specific to the waiver, it is also important to consider the overall relative competitive landscape. In this regard, the protesters' arguments largely continue to ignore that NASA was not required to--and in fact did not--make a comparative assessment of proposals. As discussed above, SpaceX's proposal was evaluated as offering a strong approach under the non-price factors with a total proposed price that was less than half of Blue Origin's price and less than a third of Dynetics's price.

Even accounting for the waiver, and even allowing for the possibility that the protesters could prevail on some small subset of their challenges to NASA's evaluation, the record reflects that NASA's evaluation was largely reasonable, and the relative competitive standing of the offerors under the non-price factors would not materially change. In light of the broad discretion afforded NASA under FAR part 35 to select the most suitable proposal to fund and its available funding for the HLS program, it is not apparent that the protesters, as detailed herein, have demonstrated that they would have had a substantial chance that they would have received the award but for the alleged errors in the procurement process. See *Information Tech. & Apps. Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (holding, to establish competitive prejudice, that "the protester's chance of securing the award must not have been insubstantial"). In this regard, a protester bears the burden of proving an error in the procurement process "sufficient to justify relief," and "[n]ot every error compels the rejection of an award." *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996) (internal citations omitted).

The protests are denied.

Thomas H. Armstrong  
General Counsel

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finding no competitive prejudice where the task order deciding official understood the relative differences between the offerors' technical approaches, and, even adjusting for the errors, the price difference between the proposals remained substantial); *Ball Aerospace & Techs. Corp.*, B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 6 (finding price evaluation error that reduced the cost differential between proposals to less than 57 percent was insufficient to establish prejudice).