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Decision

Matter of: Microsoft Corporation

File: B-420004; B-420004.2

Date: October 29, 2021

Robert S. Metzger, Esq., Neil H. O'Donnell, Esq., Jeffery M. Chiow, Esq., Lucas T. Hanback, Esq., Alexandria Tindall Webb, Esq., Stephen L. Bacon, Esq., Deborah Norris Rodin, Esq., and Eleanor Ross, Esq., Rogers Joseph O'Donnell, PC, and Kara L. Daniels, Esq., Mark D. Colley, Esq., Sonia Tabriz, Esq., Trevor Schmitt, Esq., and Michael Gwinn, Esq., Arnold & Porter Kaye Scholer LLP, all for the protester. Kevin P. Mullen, Esq., J. Alex Ward, Esq., James A. Tucker, Esq., Sandeep N. Nandivada, Esq., Alissandra D. Young, Esq., and Caitlin A. Crujido, Esq., Morrison & Foerster LLP, for Amazon Web Services, Inc., the intervenor. Tatiana Boza, Esq., and Brian E. Hildebrandt, Esq., National Security Agency, for the agency. Louis A. Chiarella, Esq., Samantha S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency unreasonably evaluated offerors' technical proposals is sustained where the evaluations were unreasonable and inconsistent with the terms of the solicitation.
 2. Protest that the agency unreasonably evaluated offerors' management proposals is denied where the evaluations were reasonable and consistent with the terms of the solicitation.
 3. Protest that the agency failed to evaluate price proposals on a common basis is dismissed as an untimely challenge to the terms of the solicitation.
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DECISION

Microsoft Corporation, of Redmond, Washington, protests the award of a contract to Amazon Web Services, Inc. (AWS), of Seattle, Washington, under request for proposals (RFP) No. H98230-20-R-0225, issued by the National Security Agency (NSA) for cloud services in support of the agency's classified and unclassified computing requirements

(NSA procurement name WILDANDSTORMY, or WandS). Microsoft alleges that the agency's evaluation of proposals and resulting award decision were improper.¹

We sustain the protest.

BACKGROUND

The mission of the NSA is to lead the U.S. government in cryptology that encompasses both signals intelligence and information assurance (*i.e.*, cybersecurity) products and services, and to enable computer network operations so as to gain a decisive advantage for the country. See www.nsa.gov/about/mission-values/ (last visited Oct. 10, 2021). In support thereof, beginning in 2019, NSA developed a statement of objectives (SOO) for its WandS cloud computing services procurement. Contracting Officer's Statement (COS) at 2.

The RFP was issued on November 5, 2020, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15.² Agency Report (AR), Tab 2, RFP at 1; COS at 7. The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract with a 5-year ordering period, with an option for an additional 5-year ordering period, under which fixed-price task orders could be issued.³ *Id.* at 5, 26, 70. In general terms, the contractor is to provide all types of cloud services (*i.e.*, infrastructure as a service, platform as a service, software as a service), for both NSA's classified and unclassified security levels (referred to as "fabrics") in order to achieve an "integrated, interoperable, and secure cloud ecosystem" and allow NSA to perform its mission at any time from any location.⁴ AR, Tab 9, SOO at 3.

The RFP established that contract award would be made on a best-value tradeoff basis, based on a two-phase evaluation approach. AR, Tab 38, Proposal Evaluation Criteria (PEC) at 3. In the first phase, the agency would utilize oral presentations in which offerors were to demonstrate successful deployment, central monitoring, and execution of certain "breadth first search" (BFS) benchmark tests. AR, Tab 35, Proposal Preparation Instructions (PPI) at 8; Tab 38, PEC at 3-4. Here, NSA required each

¹ The record in this protest included classified information. The agency, however, prepared unclassified versions of all the key protest documents and the parties' filings. All citations are to the documents in the unclassified record.

² The solicitation was subsequently amended four times. Citations are to the final version of the RFP.

³ The RFP also included a guaranteed minimum amount of \$1 million for the base period, and a maximum order amount of \$10 billion. RFP at 3.

⁴ The record reflects that the procurement's primary focus was the provision of cloud services for NSA's top secret/sensitive compartmented information (TS/SCI) fabric. AR, Tab 9, SOO at 14-24; COS at 2.

offeror to upload an NSA software tool, BFS Benchmark, onto its native commercial cloud system and run four benchmark tests (BFS 24, 36, 39, and 42).⁵ AR, Tab 35, PPI at 8-10, 28-34. The benchmark tests and corresponding metrics allowed NSA to determine if the offeror was able to meet the minimum requirements for the work. See AR, Tab 38, PEC at 10. The oral presentations were evaluated on an acceptable/unacceptable basis. *Id.* at 4.

In the second phase, those offerors deemed acceptable in phase 1 were to submit written proposals to be evaluated on seven evaluation factors: (1) technical; (2) technical acceptability; (3) management; (4) management acceptability; (5) past performance; (6) facilities acceptability; and (7) price.⁶ *Id.* at 9-10. The technical and management factors (1 and 3) were of approximately equal importance and, when combined, were significantly more important than all other factors. *Id.* at 9. The remaining factors were in descending order of importance as follows: price; facilities acceptability; technical acceptability; management acceptability; past performance; and oral presentation. *Id.* All non-price factors, when combined, were significantly more important than price. *Id.*; see also AR, Tab 39, Memorandum for Record (explaining the overall relative importance of the evaluation factors).

Four offerors, including AWS and Microsoft, participated in the phase 1 oral presentations, and the agency found AWS and Microsoft to be acceptable. COS at 3. As the remaining two offerors competing in phase 2, AWS and Microsoft thereafter submitted phase 2 proposals by the December 18 closing date. *Id.* at 8.

An agency source selection evaluation board (SSEB) evaluated the technical and management proposals using an adjectival rating scheme that was set forth in the RFP as follows: outstanding, good, acceptable, marginal, or unacceptable. AR Tab 38, PEC at 6-7 (defining adjectival ratings). The SSEB utilized a separate adjectival rating scheme to assess offerors' past performance for both relevance (very relevant, relevant, somewhat relevant, not relevant) and performance confidence (substantial confidence, satisfactory confidence, limited confidence, no confidence, or neutral confidence). *Id.* at 15-16. The remaining non-price evaluation factors--technical acceptability, management acceptability, and facilities acceptability--were rated on an acceptable/unacceptable basis. *Id.* at 6.

The SSEB completed its evaluation by March 15, with the final evaluation ratings and prices of the AWS and Microsoft proposals as follows:

⁵ Each BFS test had minimum execution times that offerors were required to meet (e.g., 161 minutes for BFS 36) in order to be found acceptable.

⁶ As detailed below, the technical factor consisted of four subfactors in descending order of importance; some subfactors included multiple elements. Likewise, the management factor consisted of three subfactors, some with multiple elements. AR, Tab 38, PEC at 11-13.

	AWS	Microsoft
Oral Presentation	Acceptable	Acceptable
Technical	Outstanding	Acceptable
Subfactor 1	Outstanding	Acceptable
Subfactor 2	Good	Acceptable
Subfactor 3	Good	Good
Subfactor 4	Acceptable	Outstanding
Technical Acceptability	Acceptable	Acceptable
Management	Good	Good
Subfactor 1	Good	Good
Subfactor 2	Good	Good
Subfactor 3	Acceptable	Acceptable
Management Acceptability	Acceptable	Acceptable
Past Performance	Very Relevant/ Substantial Confidence	Very Relevant/ Substantial Confidence
Facilities Acceptability	Acceptable	Acceptable
Price	\$482,276,169	\$422,499,332

AR, Tab 66, SSEB Consensus Report at 3; Tab 69, Source Selection Decision Document (SSDD) at 3-4.

The agency evaluators also identified strengths and weaknesses—including ones deemed as significant—in the proposals under the technical and management factors in support of the ratings assigned. Similarly, the SSEB made narrative findings regarding the relevance and quality of each offeror’s past performance in support of the assigned ratings. AR, Tab 66, SSEB Consensus Report at 6-16, 21-31; Tab 67, SSEB Briefing at 5-9.

On March 31, the SSEB provided its evaluation results and award recommendation (to AWS) to an agency source selection advisory council (SSAC). AR, Tab 67, SSEB Briefing at 1-14. The SSAC concurred with the SSEB’s award recommendation, but prepared no analysis of its own. AR, Tab 68, SSAC Concurrence Email at 1-2.

On July 6, the agency source selection authority (SSA) received and reviewed the SSEB evaluation ratings and findings. AR, Tab 69, SSDD at 1-44. The SSA found AWS to be technically superior to Microsoft under both the technical and management factors, and the two offerors to be essentially equal with regard to the remaining non-price factors. *Id.* at 37-42. The SSA thereafter concluded that AWS’s non-price advantages outweighed Microsoft’s lower price, such that AWS’s proposal represented the overall best value to the agency. *Id.* at 42-44.

On July 7, the contracting officer made contract award to AWS and provided Microsoft with notice of the agency’s award decision. COS at 9. The agency provided a

debriefing to Microsoft which was completed on July 16. On July 21, Microsoft filed its protest with our Office.

DISCUSSION

Microsoft, in its initial as well as supplemental protest, raises numerous challenges to the agency's evaluation of proposals and resulting award decision. First, Microsoft challenges the agency's evaluation under the technical factor. The protester also contends the agency's evaluation under the management factor was improper.⁷ Microsoft next alleges the agency's evaluation of price proposals was unreasonable. Finally, the protester argues the agency's best-value selection decision was improper, and that NSA failed to meaningfully consider Microsoft's lower price as part of the price/technical tradeoff.⁸ Had NSA properly evaluated the proposals, Microsoft contends, it would have been selected for contract award. Protest at 22-76; Supp. Protest at 5-89.

As detailed below, we find the agency's technical evaluation to be unreasonable in certain regards and sustain the protest on this ground. We have also considered all of the other issues and arguments advanced by Microsoft and, although we do not address them all, find no other bases on which to sustain the protest.

Technical Evaluation of Proposals

Microsoft raises many challenges to the agency's evaluation of proposals under the technical evaluation factor. Most prominently, the protester alleges that: (1) NSA improperly had an unannounced preference for dedicated versus multi-tenant cloud services, and (2) the one significant weakness assigned to Microsoft's proposal regarding its approach to obtaining government authorization for new services was

⁷ Microsoft raised certain technical and management evaluation challenges which it subsequently elected to withdraw after review of the agency report. Protest at 47-51, 62-66; Comments at 5 n.5, 59 n.32. We therefore need not address these aspects of the Microsoft protest.

⁸ Microsoft also protests that NSA improperly failed to investigate or consider organizational conflicts of interest (OCIs) arising from AWS's hiring of the former chief technology officer of the National Geospatial-Intelligence Agency (NGA), a different agency within the U.S. intelligence community. Supp. Protest at 81. Specifically, Microsoft alleges that because NSA and NGA may collaborate on major technology initiatives such as cloud computing, the contracting officer was required to resolve the appearance of impropriety in AWS's hiring of this individual, [DELETED]. *Id.* at 84, citing AR, Tab 57, AWS Proposal, Vol. VI, Price Proposal, at 28-29. Based on Microsoft's failure to identify any hard facts demonstrating the existence or potential existence of an OCI, we dismiss this allegation for failing to state a valid basis of protest. 4 C.F.R. § 21.5(f); *Trailboss Enters., Inc.*, B-415970 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 11; *DGC Int'l*, B-410364.3, Apr. 22, 2015, 2015 CPD ¶ 136 at 7.

unreasonable. Microsoft also contends that various other aspects of the agency's technical evaluation were unreasonable, unequal, and inconsistent with the RFP. Had the agency performed a proper evaluation of the technical proposals, the protester argues, Microsoft's proposal would have represented the overall best value to the agency and been selected for contract award. Protest at 22-47, 51-55, 73; Supp. Protest at 5-37.

In reviewing an agency's evaluation of proposals and source selection decision, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. *Patronus Sys., Inc.*, B-418784, B-418784.2, Sept. 3, 2020, 2020 CPD ¶ 291 at 5. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions when they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. *Deloitte Consulting, LLP*, B-412125.2, B-412125.3, Apr. 15, 2016, 2016 CPD ¶ 119 at 12. Additionally, it is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's stated requirements and evaluation criteria. *Will Tech., Inc.; Paragon TEC, Inc.*, B-413139.4 *et al.*, June 11, 2018, 2018 CPD ¶ 209 at 11.

As discussed below, we find the agency's technical evaluation to be unreasonable in certain regards and sustain the protest accordingly. We also address several of Microsoft's other technical evaluation challenges where we find no additional bases on which to sustain the protest.

Single-Tenant Versus Multi-Tenant Cloud Services

Microsoft contends the agency improperly made award based upon an "unannounced preference" for dedicated, as compared to multi-tenant, cloud services. Protest at 22. Specifically, the protester contends that NSA's award decision turned on an unstated preference not to use multi-tenant cloud services. The agency argues that its consideration of dedicated, as compared to multi-tenant, cloud services was reasonable and consistent with the stated evaluation criteria. Here, we agree with the agency.

The SOO contained a detailed set of requirements regarding NSA's cloud service needs, especially with regard to the TS/SCI fabric. AR, Tab 9, SOO at 1-37. The RFP also established, as part of technical subfactor 1, that the agency would evaluate the extent to which "the [o]fferor's proposal demonstrate[s] the planning, execution, and maintenance of all cloud service offerings." AR, Tab 38, PEC at 11.

Relevant to the protest here, Microsoft proposed [DELETED] data centers to support NSA's TS/SCI fabric requirements, [DELETED] with regard to the region local to the NSA [REDACTED] and [DELETED] with regard to the region local to the NSA [REDACTED]. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 37-39. In

each instance, Microsoft's data centers were not to be used exclusively for the WandS contract, but would also support contracts with other federal intelligence agency customers (*i.e.*, multi-tenant). See *id.* at 61-63 ("Microsoft uses this [facility] exclusively for IC [intelligence community] contracts."). AWS intended to provide unclassified cloud services from its commercial data centers, shared with other customers, and [DELETED] data centers proposed for the exclusive use of NSA's classified fabric, not shared with any other customer (*i.e.*, single-tenant). AR, Tab 51, AWS Proposal, Vol. II, Technical Proposal at 17.

The SSEB found that the Microsoft and AWS proposals met all requirements regarding demonstrating the planning, execution, and maintenance of all cloud services offerings. AR, Tab 59, Microsoft Technical Evaluation Report at 5-7; Tab 62, AWS Technical Evaluation Report at 5-7. However, when summarizing the technical evaluation findings, the SSEB found that "Microsoft's proposal doesn't identify capacity provided directly to [NSA] vs. what is shared with other Government entities or fabrics." AR, Tab 66, SSEB Consensus Report at 35; see *also* Tab 67, SSEB Briefing at 9.

The SSA subsequently found the single versus multi-tenant approach to be a "key differentiator" between the technical proposals. AR, Tab 69, SSDD at 39. Specifically, the SSA concluded that,

AWS offered space, equipment, and services dedicated to the NSA[] mission, thereby reducing the potential competition for resources and priority among different tenants for the services offered on both the TOP SECRET and the UNCLASSIFIED services. [Microsoft] offers an approach with multiple tenants leveraging the same systems and facilities for services . . . , but offered no plan on how to manage space, manage competing priorities, or handle scaling at different rates for different Agencies. The proposed approaches demonstrate that both can offer services, deliver cloud, and meet deadlines established by the Agency requirements. However, only AWS presents the Agency with a focus on making the NSA[] mission the priority; adding confidence that the overall approach will offer the dedicated services to allow the NSA[] [signals intelligence] SIGINT mission to operate a worldwide scale 24x7x365 [24 hours, 7 days a week, 365 days a year] with high availability and high speeds.

Id.

Microsoft alleges that it was improper for the agency to utilize an unstated preference for a single-tenant (or dedicated) facility over a multi-tenant facility. Protest at 22-31; Comments at 5-24. The protester also contends that it would have proposed differently had it known of the agency's preference. The agency argues that it did not have an unstated preference for dedicated cloud services, and that consideration of a multi-tenant versus single-tenant approach did not amount to an unstated evaluation criterion.

It is well established that contracting agencies are required to identify in a solicitation all major evaluation factors that will affect contract award. FAR 15.304(d); *Peraton, Inc.*, B-417088, B-417088.2, Feb. 6, 2019, 2019 CPD ¶ 190 at 14; *Portage, Inc.*, B-410702, B-410702.4, Jan. 26, 2015, 2015 CPD ¶ 66 at 5. Contracting agencies, however, are not required to specifically identify every area that might be taken into account in an evaluation, provided such areas are reasonably related to or encompassed by the stated evaluation criteria. *Portage, Inc.*, *supra*; *MicroTechnologies LLC*, B-403713.6, June 9, 2011, 2012 CPD ¶ 131 at 3.

We find that the alleged “unannounced preference” for single-tenant versus multi-tenant cloud services does not amount to an unstated evaluation criterion nor does it otherwise provide a basis on which to sustain the protest. As a preliminary matter, the RFP did not require multi-tenant cloud services as the protester contends. See Protest at 22 (“The award decision represents a substantial departure from the RFP’s stated requirements for multi-tenant hyperscale commercial cloud service”). Rather, the record reflects that the SOO did not express a preference one way or the other regarding whether offerors elected to propose a dedicated facility or a multi-tenant approach to the delivery of cloud services generally, as well as with regard to TS/SCI network cloud services specifically. See SOO, *passim*.

We also find the agency’s consideration of whether an offeror proposed a single-tenant or multi-tenant approach to be proper. As set forth above, the RFP established that the agency would evaluate, among other things, the extent to which a proposal “demonstrate[s] the planning, execution, and maintenance of all cloud service offerings.” AR, Tab 38, PEC at 11. We find the consideration of a single-tenant versus multi-tenant approach to the delivery of cloud services to be reasonably related to this stated evaluation criterion.⁹ *Information Mgmt. Res., Inc.*, B-418848, Aug. 24, 2020, 2020 CPD ¶ 279 at 6-7 (finding consideration of an offeror’s approach to performing contract requirements to be reasonably related to the solicitation’s evaluation criteria). Moreover, the record reflects that it was not Microsoft’s proposed use of multi-tenant cloud services *per se* that the agency considered flawed. Rather, inherent in the sharing of resources is a risk to determining the prioritization of those resources. COS at 21. The agency reasonably found Microsoft’s proposal to be silent regarding how the offeror planned to address resource prioritization, and without “potential mitigation strategies for overlapping tenant need[s] within its service.” *Id.* Thus, we find unobjectionable the SSA’s conclusion that Microsoft, while offering an approach with

⁹ A single-tenant approach to the delivery of cloud services was also clearly not an unstated minimum requirement; Microsoft was not assigned a deficiency or otherwise considered ineligible for contract award for the lack of a dedicated cloud services. See *Comp. Assocs. Int’l, Inc.*, B-292077.3 *et al.*, Jan. 22, 2004, 2004 CPD ¶ 163 at 12-13 (denying protest alleging that the evaluation was based on an unstated minimum requirement because the agency did not require the alleged unstated minimum requirement--an “integrated multiple platform solution”--and did not deem the protester technically unacceptable for its “two-product solution”).

multiple tenants leveraging the same systems and facilities for services, “offered no plan on how to manage space, manage competing priorities, or handle scaling at different rates for different Agencies.” AR, Tab 69, SSDD at 39.

As a related argument, Microsoft contends that the agency’s unannounced preference for single-tenant cloud services was based on unreasonable concerns regarding the risks believed to be inherent in a multi-tenant approach.¹⁰ Supp. Protest at 6. Microsoft alleges, for example, that the agency’s concerns regarding available computing capacity are unsupported ones, and the “purported ‘prioritization’ risks from a multi-tenant cloud service approach are unfounded and irrational.” *Id.* at 6, 10. The protester essentially argues that its proposed cloud service facilities would possess so much capacity that the existence of other tenants is without relevance to whether Microsoft will have sufficient capacity to meet NSA’s needs. *Id.* at 11-12. We disagree.

First, the record reflects that the agency’s concerns were as much about the prioritization of resources, and customer interests, as they were about computing capacity. See AR, Tab 69, SSDD at 39 (Microsoft “offered no plan on how to manage space, manage competing priorities, or handle scaling at different rates for different Agencies”). Further, while Microsoft’s proposal indicated the existence of other cloud service tenants, it failed to expressly address how the planning, execution, and maintenance of all cloud service offerings for NSA would (or would not) be affected by the existence of such other tenants. In light of Microsoft’s complete absence of detail in this regard, we find the agency’s concerns regarding Microsoft’s proposal here to be reasonable ones.

Microsoft also contends that the agency’s evaluation was based upon an incorrect assumption about the awardee’s proposal. Specifically, the protester argues that the SSA was under the misimpression that AWS had proposed to provide NSA with dedicated cloud services for both the agency’s TS/SCI and unclassified requirements when the latter was incorrect.¹¹ Supp. Protest at 13 (*citing* AR, Tab 69, SSDD at 39)

¹⁰ The protester essentially argues that even if consideration of single versus multi-tenant cloud services was not an unstated evaluation criterion, the agency’s evaluation was still an unreasonable one.

¹¹ Microsoft also contends the agency was wrong to assume that AWS had proposed to provide dedicated TS/SCI cloud services. Supp. Protest at 14. The protester, however, fails to recognize all aspects of the AWS proposal in this regard. See, e.g., AR, Tab 51, AWS Proposal, Vol. II, Technical Proposal, Executive Summary at 1 (“To address performance, reliability, high availability, and survivability on the Classified Fabric, AWS will deploy [DELETED] TS/[SCI] Regions fully dedicated to WILDANDSTORMY.”). We find that based on the whole of the awardee’s proposal, the agency reasonably concluded that AWS proposed to provide the agency with dedicated, i.e., sole and exclusive, TS/SCI cloud services. *Management Sys. Int’l, Inc.; Blumont Eng’g Sols., Inc., B-418080 et al.*, Jan. 9, 2020, 2020 CPD ¶ 24 at 8 (finding the

(continued...)

("AWS offered space, equipment, and services dedicated to the NSA[] mission, thereby reducing the potential competition for resources and priority among different tenants for the services offered on both the TOP SECRET and the UNCLASSIFIED services.").

The agency does not dispute that AWS proposed to supply unclassified cloud services from its multi-customer, commercial facilities, and that the SSA's statement here is an inaccurate one. Supp. Memorandum of Law (MOL) at 10. Rather, the agency argues that the SSA's statement was "clearly a clerical error as all of the other documentation contained within the evaluation reports correctly capture the finding." Supp. COS at 3. The agency also argues that the error was without prejudice to Microsoft because it does not affect the best-value tradeoff decision conducted by the SSA, *i.e.*, AWS still offered space, equipment, and services dedicated to NSA for the TS/SCI Fabric, and Microsoft still did not. Supp. MOL at 11. Here, we agree with the agency's last argument.

The agency's assertion that this was but a clerical error in the SSDD would be an accurate statement regarding the nature of the mistake only if the SSA was in fact aware of the true facts, but wrote them down incorrectly. The agency, however, does not provide any declaration from the SSA or other evidence to indicate the SSA was actually aware that it was only the TS/SCI cloud services, and not also unclassified cloud services, that AWS proposed to be provided by dedicated facilities. Instead, the agency invokes the SSEB's report and refers to the contracting officer's statement of facts filed in response to this protest as support for this argument. We find that whether the SSEB or contracting officer was aware of the true facts regarding the extent of AWS's dedicated cloud services to be irrelevant to whether the SSA, herself, was knowledgeable of such when making the award decision. However, we find that any error here, by itself, was without competitive prejudice to Microsoft because, as reflected in the solicitation, classified cloud services were of primary importance to the WandS procurement, and the SSA accurately recognized the distinction between the offerors' proposals for the provision of classified cloud services when making the best-value award decision.¹² See *MAXIMUS Fed. Servs., Inc.*, B-419487.2, B-419487.3, Aug. 6, 2021, 2021 CPD ¶ 277 (denying protest for lack of competitive prejudice where, even assuming error, the parties' competitive positions would not materially change).

(...continued)

evaluation to be reasonable where the agency's interpretation of the offeror's proposal was reasonable).

¹² Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 17. In light of our recommendation to reevaluate technical proposals and make a new best-value decision, however, the agency may want to address this issue in its new award decision.

Microsoft Significant Weakness

Microsoft alleges the significant weakness assigned to its technical proposal regarding the security authorization process for new service offerings was unreasonable. Specifically, the protester contends that the agency's evaluation was based on a flawed and unreasonable reading of the proposal. Protest at 41-47; Comments at 39-58. The agency argues that its evaluation was reasonable, and that any fault lies with Microsoft's proposal. MOL at 30-38. Here, we agree with the protester and sustain on this basis.

The RFP established, as part of technical subfactor 2, that the agency would evaluate the extent to which the offeror provides an optimized approach to ensure technical parity between WandS services and commercial service offerings. AR, Tab 38, PEC at 11. Microsoft's proposal described its overall plan for maintaining technical parity with commercial services offerings. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 40-48. Additionally, as detailed below, Microsoft explained its approach for introducing new commercial service offerings and the related government security authorization processes. *Id.* at 43-48.

By way of background, the Federal Risk and Authorization Management Program (FedRAMP) is a government-wide program that promotes the adoption of secure cloud services across the federal government by providing a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services. AR, Tab 78, Department of Defense (DOD) Cloud Computing Security Requirements Guide (hereinafter SRG) at 19; see *also* www.fedramp.gov/faqs/ (last visited Oct. 20, 2021). FedRAMP essentially empowers federal agencies to use cloud service technologies, with an emphasis on security and the protection of government information, using a "do once, use many times" framework for security assessments. AR, Tab 78, SRG at 19.

The FedRAMP joint approval board (JAB), consisting of DOD, Department of Homeland Security, and General Services Administration members, is the primary decision-making body for the FedRAMP program. *Id.* Among other things, the JAB reviews cloud service offering authorization packets and grants provisional authorizations for cloud services. *Id.* FedRAMP provisional authorizations constitute an initial approval which other federal agencies can then leverage when granting security authorizations, and the accompanying authority to operate (ATO) for use, to a cloud service offering. The JAB's assessment of the controls in place to ensure security, and the sensitivity of the information to be stored and/or processed, result in a FedRAMP "Low," "Moderate," or "High" rating assigned to the cloud service offering. See www.fedramp.gov/faqs/. The use of FedRAMP is generally mandatory for executive-branch agency cloud deployments and service models. AR, Tab 78, SRG at 19; see *also* Office of Management and Budget Policy Memorandum Regarding FedRAMP, Dec. 8, 2011 (www.fedramp.gov/assets/resources/documents/FedRAMP_Policy_Memo.pdf) (last visited Oct. 20, 2021).

Separate from FedRAMP, the Defense Information Systems Agency (DISA) is the DOD agency responsible for providing a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services for DOD.¹³ AR, Tab 78, SRG at 11. Like the FedRAMP JAB, DISA reviews cloud service offering authorization packets and grants provisional authorizations for cloud services within DOD. *Id.* at 149-50. Similar to FedRAMP's Low, Moderate, and High ratings, DISA uses impact levels (*i.e.*, Impact Level (IL)2, IL4, IL5, and IL6) to assess the sensitivity of the information to be stored and/or processed by the cloud service provider, and the potential impact of an event that results in the loss of confidentiality, integrity, or availability of that information. *Id.* at 23-29; *see also* DISA SRG Briefing at 9 (www.disa.mil/~media/Files/DISA/News/Events/Symposium/Cloud-Computing-Security-Requirements-Guide) (last visited Oct. 20, 2021). For example, IL6 signifies the ability to accommodate DOD classified information up to the secret level. AR, Tab 78, SRG at 29.

FedRAMP and DISA use separate but similar authorization processes, and the controls assessed by the FedRAMP JAB and DISA are often common to both reviews. *Id.* at 20. For example, a determination of "FedRAMP High" is generally accepted by DISA as the basis for an IL4 provisional authorization without additional control assessment. DISA SRG Briefing at 12. Additionally, FedRAMP review is not a prerequisite for DISA review. Stated otherwise, cloud service providers may seek FedRAMP provisional authorization and DISA provisional authorization for a new cloud service offering sequentially or simultaneously. AR, Tab 78, SRG at 33, 65.

Azure is the name of Microsoft's cloud computing platform, with Azure Commercial representing the company's commercial cloud computing services. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal, at 40. Azure Government represents Microsoft's cloud computing platform dedicated to government agency workloads. *Id.* Azure Secret, and Azure Top Secret, represent Microsoft's cloud offerings to government agencies at the secret and top secret classification levels, respectively. *Id.* In its proposal, Microsoft explained that its "Azure Commercial cloud services [DELETED]." *Id.* Microsoft then incorporates "the unique requirements of U.S. Government classified fabrics" when moving from Azure Commercial to Azure Government, followed by a move to the Azure Secret and Azure Top Secret fabrics. *Id.*

In its proposal, Microsoft described its "onboarding" (*i.e.*, introducing and integrating) process for unclassified commercial services or features, that is, moving from Azure Commercial to Azure Government. As part of this process, Microsoft would submit new services for both FedRAMP High and DISA IL4 and IL5 review and provisional authorization. *Id.* at 44, 46. Microsoft's proposal described a separate process for the onboarding of a top secret commercial service or feature with the following steps:

¹³ DISA is the agency that develops and maintains the SRG which "outlines the security model by which DOD will leverage cloud computing along with the security controls and requirements necessary for using cloud-based solutions." AR, Tab 78, SRG at 10.

(1) begin onboarding with [DELETED] from Azure Commercial; (2) determine security relevance; (3) onboard service and gather [DELETED] compliance evidence; (4) obtain NSA approval and ATO. *Id.* at 44, 47-48.

The SSEB, when evaluating Microsoft's approach to ensuring technical parity between WandS and commercial services offerings, assigned a significant weakness to the proposal in this regard. AR, Tab 59, Microsoft Technical Evaluation Report at 11. Specifically, the agency evaluators stated:

The Offeror identifies that DISA is the authorizing agent for the Azure Government Unclassified region under a contract unrelated to WANDS, and establishes a process that would require all services that are deployed to the Azure Top Secret cloud to first be deployed to the Azure Government Unclassified cloud. This process would place DISA, another Government agency, as an approving authority gateway for WILDANDSTORMY Top Secret and Unclassified services. As this approach unnecessarily links the unrelated contract to the WANDS contract, it is possible that services may not be prioritized according to NSA priorities and/or that NSA might not find the services designed to the requirements and accreditation standards of another Government agency acceptable, introducing an appreciable risk of inability to meet performance standards of WILDANDSTORMY.

Id.

This assigned significant weakness became one of the summary features in the SSEB's consensus report. AR, Tab 66, SSEB Consensus Report at 35 ("[T]he proposal introduced significant performance and schedule risk with their authorization and accreditation process for introducing new service offerings to the Cloud"). Similarly, the SSA found this significant weakness to be a key difference between the AWS and Microsoft technical proposals. AR, Tab 69, SSDD at 38 ("The Offeror identified that DISA is the authorizing agency for the Azure Government Unclassified region under a contract unrelated to WANDS, and established a process that would require all services that are deployed to the Azure Top Secret cloud to first be deployed to the Azure Government Unclassified cloud.").

We find the agency's evaluation here to be both unreasonable and prejudicial to Microsoft. As a preliminary matter, the record reflects that there is no contract between Microsoft and DISA which requires DISA to approve Microsoft's new offerings. There is nothing in the Microsoft proposal referencing such a contract, nor does the agency otherwise demonstrate any evidence to support its conclusion that such a contractual relationship exists between DISA and Microsoft. The agency, in response to the Microsoft protest, now contends that it "assumed," or "guessed," that there was a contract between Microsoft and DISA because of the manner in which Microsoft proposed. MOL at 35 ("The Agency made the assumption" that Microsoft's proposed approach "was the result of currently existing contracts"); GAO Conference Call with

Parties, Sept. 29, 2021. The agency nevertheless argues that it was Microsoft's "process and not the [assumed] rationale underlying its inclusion [in the Microsoft proposal] that introduced significant schedule and performance risk." MOL at 35.

We note, however, that the evaluation results on which the SSA relied did not indicate that the SSEB was "assuming" or "guessing" as to the existence of a contract between Microsoft and DISA. Rather, the evaluators erroneously reported--in no uncertain terms--that the existence of such a contract between DISA and Microsoft required DISA to be the authorizing agent for all new service offerings, classified and unclassified, by Microsoft to DOD agencies, including NSA. AR, Tab 66, SSEB Consensus Report at 9. As a result, the SSA, erroneously concluded that DISA was contractually required to be the "approving authority gateway for WILDANDSTORMY Top Secret and Unclassified services."¹⁴ AR, Tab 69, SSDD at 38. Assumption of such action by the agency was prejudicial to Microsoft. See *Celta Servs., Inc.*, B-411835, B-411835.2, Nov. 2, 2015, 2015 CPD ¶ 362 at 8 (finding a source selection authority's reliance upon erroneous information resulted in an unreasonable selection decision); *Ashland Sales & Serv. Co.*, B-291206, Dec. 5, 2002, 2003 CPD ¶ 36 at 7 (finding selection decision to be unreasonable when based upon erroneous information about the evaluated differences in the offerors' proposals).

We also find the agency's evaluation here to be based upon an unreasonable interpretation of Microsoft's proposal. As set forth above, Microsoft detailed one process for its onboarding of an unclassified commercial service or feature, and a separate, distinct process for onboarding a top secret commercial service or feature. While FedRAMP (High) and DISA (IL4 and IL5) reviews and provisional authorizations were part of Microsoft's onboarding process for an unclassified commercial service, they are not mentioned as part of Microsoft's top secret service onboarding process. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 44, 47. Further, Microsoft's proposal does not state, or otherwise indicate, that unclassified onboarding approval (or provisional authorization) is a prerequisite to top secret onboarding. Therefore, the agency was unreasonable in concluding that Microsoft's proposed security authorization process made DISA the "approving authority gateway" for WandS top secret services.

The agency argues, among other things, that Figure 1.2.1.2-1 ("Agile Onboarding Optimizes our Approach to Authorization") in the Microsoft proposal indicates that JAB and DISA were to be approval authorities for the offeror's top secret commercial services offerings. MOL at 32; COS at 48-49. We find NSA's interpretation of the figure unreasonable and, thus, the agency's reliance thereupon misplaced. Figure 1.2.1.2-1 is a graphic representation of the steps in the Microsoft onboarding process of new services offerings, both unclassified and Top Secret, including the offeror's approach to

¹⁴ We note that the agency has not provided a declaration or other evidence showing the SSA was aware that the SSEB was but "assuming" or "guessing" as to the existence of a Microsoft/DISA contract.

government security authorizations. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 44. Contrary to the agency's understanding, the arrows in the figure show the service offering moving from the unclassified fabric to the top secret fabric ("[DELETED]") prior to (*i.e.*, without) the JAB/DISA approval that would occur as part of the process for an unclassified offering. *Id.* We likewise find the agency's own post-protest graphic representation of what it "understood" Microsoft to have proposed, COS at 46-47, to be inconsistent with Microsoft's actual proposal, such that it does not ameliorate the unreasonableness of the agency's evaluation in this regard.¹⁵

Finally, the agency, in response to the Microsoft protest, appears to contend that the assigned significant weakness was also the result of the proposed use of FedRAMP. Specifically, the contracting officer offers the following:

[T]he Agency RFP did not require FedRAMP accreditation before a service could be deployed on the Top Secret Fabric. The Agency has its own accreditation official, and its own team to support NSA accreditation. Although it can be used if available, the NSA accreditation process does not require the FedRAMP body of evidence to support accreditation.

COS at 51.

We find this statement provided as an additional reason for the agency's assignment of a significant weakness to Microsoft's proposal--prepared subsequent to the protest filing, with no support in the contemporaneous record, by an individual who was not even one of the agency evaluators--to be a *post-hoc* rationalization deserving of little weight. See *Si-Nor, Inc.*, B-292748.2 *et al.*, Jan. 7, 2004, 2004 CPD ¶ 10 at 17 n.9; *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Microsoft and AWS Network Latency

Microsoft also argues that the agency failed to evaluate network latency on a common basis, and erroneously assigned a significant strength to AWS's proposal in this regard.¹⁶ Supp. Protest at 17. The agency contends that its evaluation of latency was

¹⁵ While the NSA graphic depicts what may commonly occur, *i.e.*, that new Microsoft service offerings move sequentially from Azure Commercial, to Azure Government, Azure Secret, and Azure Top Secret with JAB and DISA reviews and provisional approvals being part of the unclassified security authorization process, Microsoft's proposal simply does not indicate that DISA approval is a prerequisite for the onboarding of a new commercial service offering to the top secret fabric, as the evaluators concluded.

¹⁶ Latency generally refers to the time it takes for data to "travel from client to server and back." COS at 39. As discussed below, latency depends "on both the physical distance that the data must travel" and "the networks used[.]" *Id.*

reasonable, and that the difference in evaluation findings resulted from differences in the proposals. Here, we agree with the protester.

The SOO contained two related requirements regarding latency for the TS/SCI fabric. First, the SOO stated that “the contractor shall ensure no greater than █ milliseconds (ms) round trip latency, from each [contractor] site demarcation to the area’s supported █.” AR, Tab 9, SOO at 15. Second, the SOO established geographic proximity requirements between the contractor’s data centers and NSA locations. Specifically, “[i]n order to introduce no greater than █ milliseconds (ms) of roundtrip latency,” the contractor’s “█ datacenter(s) shall be no greater than █ straight-line miles from █,” and the “█ datacenter(s) shall be no greater than █ straight-line miles from █.” *Id.* at 26. The RFP provided that, as part of technical subfactor 1, the agency would evaluate the extent to which “the Offeror’s proposal demonstrate[s] proposed facility locations that meet the minimum required network latency requirements and provide diverse Wide Area Network Service Providers.” AR, Tab 38, PEC at 11.

Latency is essentially the sum of two factors. AR, Tab 30, Agency Memorandum Regarding SOO Physical Distance Requirement at 1. Specifically, latency is a function of: (1) the distance that the data must travel at the speed of light in fiber optic cable (travel time); and (2) the delay introduced by the telecommunication provider’s equipment (network equipment delay). *Id.* The agency, when determining the SOO’s aforementioned geographic proximity requirements, was of the view that network equipment delays amounted to █ ms in each direction, or a round trip of █ ms. *Id.* (“The speed of light within fiber . . . and delay introduced by the telecommunications provider . . . are set at 124.188 miles/ms and █ ms (per direction), respectively.”). *Id.*

Microsoft’s proposal provided actual latency values--consisting of both travel time and network equipment delays--for its [DELETED] existing data centers. Although Microsoft provided estimated latency values for its [DELETED] data center, which was under construction, those latency values also incorporate estimated network equipment delays in the calculations. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal, at 38. For example, with regard to Microsoft’s █, which was located █ straight-line miles from █, Microsoft’s round-trip latency values for the primary pathway was “[l]ess than █ ms,” and █ ms for the alternative pathway. *Id.*

AWS’s proposal provided estimated latency values for each of its [DELETED] to-be-built facilities to the corresponding █ and █ locations. AR, Tab 51, AWS Proposal, Vol. II, Technical Proposal at 39-40. AWS’s estimated latency values ranged from █ ms to █ ms from its various data centers to █, and █ ms to █ ms from its various data centers to █. *Id.* AWS’s proposal also qualified its estimated latency values by stating that “[r]ound-trip latency estimates are for optical fiber time of light only and do not include allowances for network equipment (e.g., routers, switches, and encryptor).” *Id.* at 39 n. 2. Consequently, AWS’s latency values represented estimated travel time only, and did not include any network equipment delay in its calculations.

The SSEB determined that Microsoft met the RFP's latency requirements in all instances. AR, Tab 59, Microsoft Technical Evaluation Report at 8. By contrast, the SSEB assigned a significant strength to AWS's proposal based on the finding the awardee would achieve "[REDACTED] latency" from all facilities. AR, Tab 62, AWS Technical Evaluation Report at 8. The SSEB also subsequently considered AWS's "[REDACTED] latency" to be a significant technical advantage over Microsoft, AR, Tab 66, SSEB Consensus Report at 35, and the SSA found AWS's latency values to be one of the attributes that made AWS technically superior to Microsoft. AR, Tab 69, SSDD at 36-37.

Microsoft argues that the significant strength assigned to AWS regarding latency was unwarranted and the agency's comparison of the offerors' proposals here was an "apples to oranges" one. Specifically, Microsoft contends the agency improperly ignored the "stark difference" between the methodologies the offerors used to calculate latency. Supp. Protest at 19. Consequently, the protester argues, the comparison of latency values was not done on an objective, common basis. *Id.* at 20. We agree.

We have consistently found that it is a fundamental principle of government procurement that competition must be conducted on an equal basis; that is, the contracting agency must treat all offerors equally, and even-handedly evaluate proposals and quotations against common requirements and evaluation criteria. *Environmental Chem. Corp.*, B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 10; *Research Analysis & Maint., Inc.; Westar Aero. & Def. Grp., Inc.*, B-292587.4 *et al.*, Nov. 17, 2003, 2004 CPD ¶ 100 at 8. Our Office has also explained that an agency's evaluation that compares proposals that are based on differing assumptions, *i.e.*, an "apples to oranges" comparison, does not result in a meaningful comparison. See *Environmental Chem. Corp.*, *supra* at 17; *Red River Computer Co., Inc.*, B-414183.4 *et al.*, June 2, 2017, 2017 CPD ¶ 157 at 11; *Lockheed Aeronautical Sys. Co.*, B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80 at 7.

The record reflects that AWS's estimated latency values were based only on one of the two elements of latency--travel time. AR, Tab 51, AWS Proposal, Vol. II, Technical Proposal at 39-40. The SSEB knew or should have known from the awardee's proposal that AWS's latency values were but partial estimates and did not include network equipment delays. The agency also was of the view that network equipment delay does, in fact, occur and that it can have a substantial impact upon actual latency achieved. See AR, Tab 30, Agency Memorandum Regarding SOO Physical Distance Requirement at 1. There is also nothing in the RFP indicating that the SOO's latency requirements ("the contractor shall ensure no greater than [REDACTED] millisecond (ms) round trip latency") did not have to account for all aspects of latency (including network delays). AR, Tab 9, SOO at 15. The agency evaluators nonetheless assigned a significant strength to AWS's proposal based upon AWS's partial estimates, without adequately considering what those estimates actually represented.

As such, we find the agency's resulting comparison of latency values to be an improper, apples-to-oranges one. The record reflects that Microsoft provided actual (and in one

instance, estimated) latency values--all of which included network equipment delays in its calculations. By contrast, AWS provided latency estimates--none of which included network equipment delays in the calculations. While AWS notified the agency that its latency values were essentially partial estimates that did not take into account network equipment delays, the agency failed to ensure an equal comparison of proposals, *i.e.*, one based on common assumptions. *Lockheed Aeronautical Sys. Co., supra* at 7. The result was a false appraisal of the proposals regarding their relative latency values, which did not result in a meaningful comparison. *See Environmental Chem. Corp., supra* at 17; *Red River Computer Co., Inc., supra* at 11.

The agency attempts to justify its evaluation by arguing that AWS's latency computation was in accordance with the agency's instructions. Specifically, the agency points to a question-and-answer (Q&A) exchange with industry, which occurred prior to the issuance of the RFP here, to support the assertion that offerors knew they were to submit partial latency values.¹⁷ Supp. MOL at 13-14, *citing* AR, Tab 24, Q&A No. 3 with Industry at 35.

The agency essentially argues that latency values which did not include expected network equipment delay were proper, and that latency values which included expected network equipment delays were improper. The agency also asserts that "[t]he fact that [Microsoft] made a business decision not to bid in accordance with all the instructions does not create an obligation on the part of the Agency to 'fix' or rewrite its proposal." Supp. MOL at 14.

We find the agency's reliance on the Q&A misplaced. "It is well-settled that comments on a draft solicitation do not control the meaning of the solicitation when it is subsequently issued." *Dell Fed. Sys. L.P.*, B-404996, B-404996.3, July 22, 2011, 2011 CPD ¶ 151 at 5 (finding unpersuasive a protester's argument based on a Q&A from the draft solicitation). The agency's pre-final RFP exchanges are only applicable if expressly incorporated in the final RFP. *Advanced Comm'n Cabling Inc.*, B-410898.2, Mar. 25, 2015, 2015 CPD ¶ 113 at 9. Here, the Q&A the agency references were

¹⁷ The relevant Q&A was as follows:

Question: Please confirm the █ ms latency is measured as speed of light point-to-point along the comm[unication] path to the unclass[ified] [wide area network] WAN router?

Answer: Yes. The █ ms latency requirement assumes speed of light travel along the comms paths between unclassified WAN routers. Delay introduced by active equipment such as the government's network and cryptographic devices will be ignored in the calculation.

AR, Tab 24, Q&A No. 3 with Industry at 35. The Q&A here was in response to a draft NSA solicitation for both cloud services and hardware as a service, and the inquiry here "was posed for [the] [h]ardware as a [s]ervice" requirement. Supp. COS at 14.

based upon a draft solicitation the agency issued for a different requirement.¹⁸ Moreover, while the agency provided a response regarding how latency was to be determined, it did not incorporate this Q&A (or the information contained therein) into the RFP that was actually issued. Quite simply, the information on which the agency relies here was not a requirement of the solicitation and therefore cannot be used to find fault in a proposal that did not conform to it, nor favor in a proposal that did.

NSA also contends the SSEB did not know how Microsoft had computed its latency values, *i.e.*, “[t]he proposal . . . did not indicate if the proposed latency included network equipment,” and that the evaluators “were not aware of any differences in the methodologies to calculate latency.” AR, Tab 80, SSEB Declaration at 2. Under the circumstances here, we find the agency evaluators--subject matter experts or personnel having network technical expertise--were sufficiently on notice that the offerors were using different methodologies to compute latency values, especially when Microsoft indicated that it was reporting actual latency values based on existing facilities, and AWS was reporting estimated values for facilities that had not yet been constructed. AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 38; Tab 51, AWS Proposal, Vol. II, Technical Proposal at 39-40.

The record also reflects that the straight-line distances provided by AWS and Microsoft from their data centers to the regional NSA locations were, in all but one instance, very comparable. *Compare* AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 38, *with* Tab 51, AWS Proposal, Vol. II, Technical Proposal at 39-40. Further, there is no dispute that the speed of light in fiber optic cable--which both offerors had proposed to use--is the same for both offerors. Consequently, had both offerors excluded network equipment delays and based their latency values upon travel time alone, the record indicates that the results would have been very similar. However, the latency values reported by AWS and Microsoft--even where the facility distances were very comparable--were so different that the agency knew or should have known that the offerors were utilizing different methodologies to determine latency.

In sum, the record reflects that Microsoft reported actual, realistic latency values using one methodology, while AWS reported estimated, theoretical latency values using a different methodology. The record also indicates that the agency evaluators knew or should have known that the difference in the proposed latency values here did not result from different distances in the data paths, but on different computational assumptions. Under the facts here, we do not find that the agency engaged in a meaningful comparison of proposals and that Microsoft was prejudiced because the agency then

¹⁸ As set forth above, NSA had originally issued a draft solicitation for both cloud services and hardware as a service, and the Q&A upon which the agency relies here was with regard to the hardware-as-a-service requirement.

unreasonably relied on this comparison when making its award decision. We therefore sustain on this basis.¹⁹

Regional Scalability Imbalance

Microsoft also protests the shortcoming assigned to its proposal regarding its plan for future scalability of cloud service offerings.²⁰ The protester maintains that the agency's evaluation was unreasonable and premised upon a requirement that does not exist in the solicitation. Protest at 54. As explained below, we deny this allegation for lack of prejudice.

The RFP instructed offerors to provide details regarding their proposed facilities (e.g., the number, initial size, maximum expansion, power/space/cooling capabilities), and to describe their approach to meeting future scalability needs and growth for agency services offerings. AR, Tab 35, PPI at 16. The RFP also established that, under technical subfactor 3, the agency would evaluate the extent to which the proposal provides "a detailed and thorough approach describing the facility development plan to enable scalability and future growth of the service." AR, Tab 38, PEC at 11.

Microsoft, as part of its technical proposal, detailed its facility development plans, including phased expansion plans with specific power, compute, and data storage capacities, for each of its [DELETED] facilities in support of the two NSA regions (██████████). AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 57-63.

The SSEB found Microsoft proposed a thorough approach that described a facility development plan that enabled scalability and future growth, and assigned a rating of "good" under technical subfactor 3. AR, Tab 59, Microsoft Technical Evaluation Report at 13. The SSEB also noted that Microsoft's facility growth plan demonstrated an imbalance in maximum scalability between the ██████ and ██████ regions, but stated that "[a]lthough there was a noted imbalance between the regions, using the forecasted capacity for ██████ as the lowest common denominator, the proposal provides an acceptable approach to meet the scalability of service offerings. The evaluated risk did not increase the risk to performance." *Id.* at 14. However, the agency evaluators also

¹⁹ We find no merit to Microsoft's related argument that the agency deviated from the solicitation and/or engaged in disparate treatment by evaluating the protester's "worst case" latency. See Supp. Protest at 22-25. The record reflects that the agency reasonably took into account "worst case" latency values for both offerors.

²⁰ Scalability here generally refers to a system's ability to increase or decrease in performance in response to changes in application and system processing demands. AR, Tab 9, SOO at 12; see also COS at 45; Agencies Have Increased Usage and Realized Benefits, but Costs and Savings Data Need to Be Better Tracked, GAO-19-58T at 36 n.49 (Apr. 2019).

stated that “[t]he Offeror’s approach to future scalability . . . introduces a moderate risk, as there is no outlined plan to ensure regional compute balance.” *Id.* at 13.

Microsoft’s regional scalability imbalance also carried over into subsequent parts of the agency’s evaluation. AR, Tab 66, SSEB Consensus Report at 35 (“Microsoft’s facility growth plan shows an imbalance in maximum scalability between the █████ . . . and the █████ . . . regions.”); see *also* Tab 67, SSEB Briefing Slides at 9 (“[T]he Offeror’s facility growth plan shows an imbalance in maximum scalability between the █████ . . . and █████ . . . regions.”).

Microsoft argues the agency’s evaluation regarding scalability was unreasonable. Specifically, the protester contends that: (1) there was no solicitation requirement for scalability parity between the NSA regions; and (2) the fact that Microsoft’s regional scalability plans far exceeded NSA requirements by unequal amounts is without significance when each region was still large enough to meet NSA’s aggregate capacity needs. Protest at 54; Comments at 36-39. The agency, in its response to Microsoft’s protest, ties the protester’s scalability imbalance to the SOO’s requirements regarding continuity of operations. MOL at 43; see AR, Tab 9, SOO at 12. Specifically, the agency argues that Microsoft’s scalability disparity between regions did not adequately address how a smaller capacity region (█████) would absorb a large capacity region (█████) in a failover scenario. MOL at 27.

Here, we find the agency’s evaluation findings regarding Microsoft’s scalability approach to be internally inconsistent. As set forth above, the record reflects that the agency evaluators concluded that “[a]lthough there was a noted imbalance [in maximum scalability] between the [NSA] regions, using the forecasted capacity for █████ as the lowest common denominator, the proposal provides an acceptable approach to meet the scalability of service offerings. The evaluated risk did not increase the risk to performance.” AR, Tab 59, Microsoft Technical Evaluation Report at 14.

However, the agency evaluators also concluded that “[t]he Offeror’s approach to future scalability . . . introduces moderate risk, as there is no outlined plan to ensure regional compute balance.” *Id.* at 13. We fail to see--and the agency fails to explain--how Microsoft’s regional scalability imbalance can introduce a moderate risk, and not increase performance risk, simultaneously. See *Solers, Inc.*, B-414672.3, B-414672.8, Oct. 9, 2018, 2018 CPD ¶ 350 at 13 (finding internally inconsistent or contradictory findings, which are not reasonably reconciled, are unreasonable). Also, the SSEB appears to have concluded, at least in one instance, that although Microsoft’s scalability for the █████ region is less than the offeror’s scalability for the █████ region, it did not impact continuity of operations. *Id.* at 14 (“[U]sing the forecasted capacity for █████ as the lowest common denominator, the proposal provides an acceptable approach to meet the scalability of service offerings.”).

We find, however, that Microsoft was not prejudiced by this aspect of the agency’s evaluation. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency’s

improper actions, it would have had a substantial chance of receiving the award. *Information Mgmt. Res., Inc.*, B-418848, Aug. 24, 2020, 2020 CPD ¶ 279 at 7 n.4. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest even if defects in the procurement were found. *Millennium Eng'g & Integration Co.*, B-417359.4, B-417359.5, Dec. 3, 2019, 2019 CPD ¶ 414 at 10; *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12.

Here, the record reflects that the SSA placed no reliance upon Microsoft's regional scalability imbalance as part of the selection decision.²¹ See AR, Tab 69, SSDD, *passim*. Quite simply, while the SSA did not reconcile the contradictory evaluation findings, neither did the SSA rely upon this aspect of Microsoft's proposal when making the best-value determination. See *Synergy Sols. Inc.*, B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 12-13 (finding no prejudice in the assignment of a significant weakness where the source selection authority did not rely on the weakness in distinguishing between the proposals in the best-value decision); *Dell Servs. Fed. Gov't, Inc.*, B-412340 *et al.*, Jan. 20, 2016, 2016 CPD ¶ 43 at 5 n.3 (finding no indication of prejudice associated with weaknesses in the protester's proposal which the source selection authority did not rely upon when making award decision). Because the protester cannot demonstrate how it was competitively prejudiced even if its challenge to the agency's evaluation here had merit, we deny this allegation. *Epsilon, Inc.*, B-419278, B-419278.2, Feb. 2, 2021, 2021 CPD ¶ 71 at 9.

AWS's Scalability Strengths

Microsoft also protests the evaluation of AWS under technical subfactor 3 regarding scalability. Specifically, the protester contends that the two strengths assigned to the awardee's proposal here were unreasonable, inconsistent with the stated evaluation criteria, and "created a false equivalency between the offerors when, in fact, Microsoft offered an objectively superior facilities development plan under Subfactor 3." Supp. Protest at 31. The agency argues the evaluation of AWS's scalability was reasonable and consistent with the stated evaluation criteria, and that the protest mischaracterizes the assigned strengths. Supp. MOL at 26. Here, we agree with the agency. The SSEB assigned two strengths to AWS's proposal under subfactor 3 regarding its approach to scalability. AR, Tab 62, AWS Technical Evaluation Report at 12 (the offeror provided a thorough understanding of the government's scalability requirements by proposing details of the facilities locations, [DELETED], network, power/space/cooling capabilities of each facility); *id.* at 13 (the offeror's proposal identifies a thorough approach to future scalability including the facility design and network infrastructure).

Microsoft argues the agency deviated from the announced evaluation scheme and assigned strengths to AWS's proposal for attributes that do not relate or contribute to

²¹ While the agency contends that the SSA "noted" and "properly factored" Microsoft's regional scalability imbalance into the analysis, MOL at 27, we find this conclusion is not reflected in the record.

“scalability and future growth of the service.” Supp. Protest at 31 (*quoting* AR, Tab 38, PEC at 11). We disagree, and find Microsoft’s characterization of the assigned strengths to be inaccurate. For example, the agency did not assign the first strength to AWS’s proposal “simply because it offered more locations” or “merely for distributing capacity” as the protester claims. See *id.* at 32. Rather, the record reflects that the evaluators reasonably assigned a strength to AWS’s proposal for its facility design plan which permitted [DELETED], as well as a highly scalable network design which ensured [DELETED]. AR, Tab 62, AWS Technical Evaluation Report at 12. Likewise, AWS’s second scalability strength was not assigned, as Microsoft claims, only because of AWS’s required [DELETED] and utilizing of industry best practices. Rather, the record reflects the SSEB reasonably assigned a strength to AWS’s proposal regarding its “thorough and sound approach, supported by projection analysis over the full ordering period, that the facility plan and network infrastructure will permit rapid growth of services, reducing the risk of capacity not being available when it is needed.” *Id.* at 13.

Finally, we find no merit in Microsoft’s argument that the agency improperly overlooked the protester’s greater expansion capacity as part of the evaluation of scalability. Supp. Comments at 41. We recognize that Microsoft’s proposal provided greater amounts of, and greater detail regarding, future power, compute, and storage capacity than did AWS’s proposal. Compare AR, Tab 41, Microsoft Proposal, Vol. II, Technical Proposal at 58-63 with AR, Tab 51, AWS Proposal, Vol. II, Technical Proposal at 60-67. We also recognize that such capacity amounts represent the limits of an offeror’s scalability. The RFP, however, established that the evaluation of scalability was to be based not only upon the extent of future growth, but also a demonstrated understanding of the process and the risks associated with achieving scalability. AR, Tab 38, PEC at 11. The record also reflects that it was essentially AWS’s detailed description of the process to achieving scalability, including its facility design and network infrastructure, which the agency evaluators found meritorious and for which it assigned strengths. In sum, we find the agency’s evaluation here to be both reasonable and consistent with the stated evaluation criterion, and deny on this basis.

Management Evaluation of Proposals

Microsoft also raises many challenges to the agency’s evaluation under the management factor, under which the agency assigned the same adjectival ratings to Microsoft and AWS for each subfactor and for the factor overall.²² Microsoft makes two principal types of arguments. In the first, Microsoft argues that the agency could not reasonably have evaluated Microsoft and AWS with the same adjectival ratings based on advantages Microsoft asserts only it could and did propose. Protest at 56, 59; see *also* Comments at 59-65. In the second, Microsoft essentially argues that the agency failed to identify risk in AWS’s proposal. Supp. Protest at 39-53.

²² Microsoft’s protest initially included sections challenging the agency’s evaluation under every subfactor of factor 3. Protest at 56-66. Microsoft subsequently withdrew the section of its protest devoted to subfactor 3. Comments at 5 n.5.

As detailed below, we find the agency's management evaluation to be reasonable and consistent with the solicitation. While we do not expressly address all of Microsoft's management evaluation challenges, we have considered them all and find no reason to sustain the protest under this factor.²³

For the management factor, the solicitation instructed offerors to organize their proposals to address three subfactors. AR, Tab 35, PPI at 17. The first two subfactors are relevant to the protest. For subfactor 1, offerors were directed to submit (1) "a schedule and supporting analysis detailing from start of contract award to when services will be available to the Government" as well as "availability of TS/SCI cleared resources"; (2) a "description of the types of Program Management support that will be employed on WILDANDSTORMY"; and (3) "how managing its service offering will meet the WILDANDSTORMY requirements," with a description of "the integrated eco-system to address billing, provisioning, and ability to provide services." *Id.* at 17-18. For subfactor 2, offerors were to provide (1) "details on the mission essential personnel (and associated work roles) and the automation of services which allow the continued [99.999%] of availability" for all services, regardless of circumstances; and (2) "how it will manage the flow of goods from the point of origin to the point of consumption and utilize supply chain risk mitigation strategies." *Id.* at 18; AR, Tab 9, SOO at 35.

The agency explained that it would evaluate the management proposal "to determine the Offeror's ability to manage the WILDANDSTORMY requirements in accordance with the WILDANDSTORMY Cloud Services SOO in an efficient, effective, and successful manner." AR, Tab 38, PEC at 13. Under subfactor 1, the agency would assess "[t]o what extent" the offeror's proposal provides (1) "a sound and realistic schedule and supporting analysis to assure the Government that it will be able to use Cloud Services" by the fiscal year 2023 deadlines; (2) program management support; and (3) "a detailed and thorough approach to provide a cloud service offering." *Id.* Under subfactor 2, the agency was to assess "[t]o what extent" the offeror's proposal provides (1) "a thorough approach of keeping a Data Center staffed with mission essential personnel" at all

²³ Microsoft's arguments regarding factor 3 address not only the management evaluation but the differences between the management evaluation and the SSEB's and SSA's comparative analyses of the proposals. Protest at 56 ("By failing to give any weight to Microsoft's proposal to allow the Agency to reap the cloud service benefits more than 18 months before the Solicitation required, and ignoring all the schedule risks of AWS's proposed approach, the SSA not only failed to provide Microsoft the favorable rating it deserved, but inexplicably and erroneously found that AWS proposed the superior management approach."); Supp. Protest at 53-67; Supp. Comments at 20-26. Although we need not reach the arguments regarding the comparative analyses in light of the protest issues sustained and our recommendation that the agency perform a reevaluation of proposals and make a new source selection decision, we do encourage the agency to ensure that any comparative analyses accurately reflect the results of the underlying evaluations and contain explanations for those instances when the SSEB or SSA disagrees with any evaluation finding.

times, including during disasters and emergencies; and (2) supply chain management. *Id.*

Arguments by Reference to Microsoft's Proposal

Microsoft first challenges the agency's evaluation by touting its own alleged advantages. Protest at 55-62. Microsoft argues that "[n]o reasonable basis exists for the Agency to assign equal ratings to Microsoft and AWS under subfactor 1" because only Microsoft "could and did propose to meet the Agency's stated preference to deliver cloud services meeting the Agency's requirements earlier than 1 QFY [first quarter, fiscal year] 23." *Id.* at 56; see also Comments at 59-63. Returning again to the theme that it has existing data centers, Microsoft alleges that its "approach eliminates any schedule risk" and that the agency could not have assigned the same adjectival rating to AWS because AWS does not have existing data centers. Protest at 57.

We have consistently stated that the essence of an agency's evaluation is reflected in the evaluation record itself, not the adjectival ratings. *Stateside Assocs., Inc.*, B-400670.2, B-400670.3, May 28, 2009, 2009 CPD ¶ 120 at 9. Moreover, as a general matter, adjectival descriptions and ratings serve only as a guide to, and not a substitute for, intelligent decision-making. *Science Applications Int'l Corp.*, B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 9. The relevant question here is not what adjectival rating should have been assigned by the agency, but whether the underlying evaluation is reasonable and supports the source selection decision. See *INDUS Tech., Inc.*, B-411702 *et al.*, Sept. 29, 2015, 2015 CPD ¶ 304 at 4.

As Microsoft acknowledges, the agency recognized that Microsoft proposed to deliver both required data centers at contract award, and awarded Microsoft a significant strength on that basis. AR, Tab 60, Microsoft Management Consensus Report at 3. This recognition continued from the management evaluators through the SSA. AR Tab 69, SSDD at 19-20. In other words, Microsoft is not challenging the underlying evaluation, but the fact that the underlying evaluation resulted in the same adjectival ratings for Microsoft and AWS. Because this argument is essentially a challenge to adjectival ratings, we need not consider it further. *Stateside Assocs., Inc.*, *supra*.

The protester also argues that the agency unreasonably "gave Microsoft and AWS the same credit under Factor 3, Subfactor 2 [because] Microsoft's experience working with the Agency and its supply chain risk management (SCRM) and operational security protections approved by and tailored to the Agency made its offering inherently less risky" than AWS's approach. Protest at 59; Comments at 63-65.

The agency responds, and Microsoft does not contest, that there was nothing in the solicitation that reflected that the agency would accept only systems already approved by the agency. See MOL at 47. Indeed, it appears that the protester's real argument is that it should have received a better evaluation, or at least a better adjectival rating, because it has experience with the agency. This argument amounts to disagreement with the agency's evaluation of proposals, which does not make the evaluation

unreasonable. *CACI-WGI, Inc.*, B-408520.2, Dec.16, 2013, 2013 CPD ¶ 293 at 12. As we have consistently stated, there is no requirement that an incumbent be given extra credit for its status as an incumbent, or that an agency assign or reserve the highest rating to the incumbent offeror or an offeror that can claim incumbent-like experience. *Integral Consulting Servs., Inc.*, B-415292.2, B-415292.3, May 7, 2018, 2018 CPD ¶ 170 at 7-8. This protest ground is therefore denied.

Alleged Risk in AWS's Proposal

Next, Microsoft asserts that the agency misevaluated AWS's proposal. For example, Microsoft argues that "AWS proposed an unrealistic and very aggressive schedule" and that the "scant" evaluation documentation shows that the agency failed to recognize the risk inherent in that schedule. Supp. Protest at 39. Microsoft asserts that AWS's proposal did not include enough detail about either the schedule itself or the historical analysis offered in support of the timeframes. *Id.* at 41-44.

The agency acknowledges that AWS provided a high-level chart depicting milestones in its schedule, but explains that AWS also included a narrative that supported and explained the schedule in more detail, which allowed the agency to assess AWS's schedule according to the solicitation's stated criteria. Supp. MOL at 33-35. The agency defends its analysis asserting that it "fully and thoroughly reviewed AWS proposed build schedule and determined that it met the requirements of the solicitation," and that Microsoft's arguments about AWS's proposal are mere disagreement with the agency's reasonable conclusion. MOL at 46.

The record here reflects that the agency evaluated AWS's subfactor 1 proposal, including its schedule, against the evaluation criteria disclosed in the solicitation, and documented its evaluation conclusions. See AR, Tab 63, AWS Management Consensus Report at 1-3. With respect to the schedule portion of the evaluation, the agency determined that AWS "proposed a schedule and supporting analysis" to deliver the cloud services by the stated deadline that addressed each of the significant requirements to meet that deadline, with a supporting analysis based in AWS's historical experience. *Id.* at 3. We reject Microsoft's invitation to substitute our own judgment for that of the agency regarding the feasibility of AWS's proposed schedule or the detail that it provided in support. *Encentric, Inc.*, B-412368.3, Apr. 19, 2016, 2016 CPD ¶ 121 at 5.

Microsoft also accuses AWS of making material misrepresentations about its schedule, claiming that AWS knew at the time it submitted its proposal that it was already behind schedule, that AWS remains behind schedule today, and that the agency knew or should have known that AWS's proposal was false. Supp. Protest at 44-47. Microsoft invokes public permitting records for one of AWS's proposed data centers to make this argument. The agency counters that AWS's proposal did not contain any false statements, and that Microsoft's assertion otherwise depends on a misreading of AWS's schedule. Supp. MOL at 35-40.

For its part, AWS indicates that it completed acquisition of the property and the design development for each region (██████ and ██████) before award and in accordance with AWS's proposed schedule, and began construction in November 2020. Intervenor Comments at 40-41. Indeed, AWS "remains on target to deliver all [DELETED] sites by the proposed date, with management reserve to spare." Intervenor Supp. Comments at 43 (emphasis omitted).

An offeror's material misrepresentation in its proposal can provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. *Integration Techs. Group, Inc.*, B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. *Sprint Commc'ns Co. LP; Global Crossing Telecommc'ns, Inc.-Protests and Recon.*, B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4. For a protester to prevail on a claim of material misrepresentation, the record must show that the information at issue is false. *Vizada Inc.*, B-405251 et al., Oct. 5, 2011, 2011 CPD ¶ 235 at 9; *Commercial Design Grp., Inc.*, B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 6.

We have generally declined to recommend that an agency disqualify an offeror for misstatements concerning plans or events that will occur in the future, in part because the question of an awardee's capability or ultimate success in performing under a contract are matters of affirmative responsibility or contract administration, which our Office does not review. See, e.g., *Supreme Foodservice GmbH*, B-405400.6, B-405400.7, Mar. 27, 2013, 2013 CPD ¶ 93 at 8 (declining to find a material misrepresentation where the validity of awardee's representations is contingent upon future events because it is a matter of contract administration).

In this case, Microsoft has not shown that AWS made representations about past events that were false. Specifically, both the agency and AWS explain how the public permitting records on which Microsoft relies are consistent with AWS's schedule, which contains a range of dates associated with permitting and construction rather than a specific date for a specific permit, as Microsoft has argued. Whether AWS will perform as promised throughout its schedule is a matter of contract administration. We therefore deny this protest ground.

Microsoft also argues that the agency should have assessed risk in AWS's proposed approach to data center accreditation. Supp. Protest at 49-51. The agency notes that Microsoft's argument here relies in part on Microsoft's mistaken understanding that AWS has no experience in the relevant accreditation: "AWS had documented past performance for Top Secret Cloud Services supporting the Central Intelligence Agency's C2S contract. The facility was accredited by a joint NSA/[Central Intelligence Agency] team, giving AWS direct experience working with the Agency to accredit a facility." COS at 85-86. The agency further asserts that AWS's proposal, which included a "[DELETED]" to contract performance, including accreditation, was entirely consistent with the solicitation. Supp. MOL at 43-45. The agency denies that such a

[DELETED] means that AWS is [DELETED] or otherwise presents risk to successful performance. *Id.*

Because Microsoft has not identified any way in which the agency's evaluation of AWS's proposed approach to data center accreditation departed from the solicitation, its argument, standing alone, in essence represents disagreement with the agency's assessment of a proposal different from Microsoft's own. A protester's disagreement with the agency's judgment, without more, does not establish that an evaluation is unreasonable. *Metropolitan Interpreters & Translators, Inc.*, B-415080.7, B-415080.8, May 14, 2019, 2019 CPD ¶ 181 at 6. Therefore, we deny on this basis.

Agency Price Evaluation

Microsoft also challenges the agency's price evaluation, asserting that the agency improperly compared prices that reflected different periods of performance. Supp. Protest at 68.

Under the price factor for this IDIQ contract, the solicitation dictated a multi-part, interrelated submission. AR, Tab 35, PPI at 21-22. Offerors were required to provide two discounted commercial pricing catalogs: one for the top secret fabric and one for the unclassified fabric. *Id.* at 21. Offerors were then required to rely on the proposed price catalogs to submit fixed-rate proposals for the representative task orders, and "[n]o additional discounts [could] be provided to Task Orders included with the RFP." AR, Tab 38, PEC at 18. The representative task orders were Task Order 1, Cloud Services – Top Secret Fabric; Task Order 2, Cloud Services – Unclassified Fabric; and Task Order 3, Cloud Services – Program Management Office. RFP at 3-4. For each representative task order, offerors were to "assum[e] a steady state at the specific requirements" for the base ordering period and options. AR, Tab 35, PPI at 22. Finally, the offeror was obligated to provide the prices associated with running the benchmark tests performed as part of the oral presentation. *Id.* at 22. Pricing for those tests was to "be consistent with the proposed Unclassified pricing catalog provided as part of the Offeror's proposal." *Id.*

The agency's calculation of total evaluated price was simple. The RFP provided that after "verify[ing] that the pricing for each Task Order is consistent with the overall contract price catalog," the agency would calculate the total evaluated price by adding the proposed prices for the task orders and benchmark tests. AR, Tab 38, PEC at 18. In the Q&A exchange--which was incorporated into the solicitation--several questions were posed regarding the period of performance for task order 1, which was defined to begin "[f]rom date of service availability." See, e.g., AR, Tab 26, Q&A Regarding Final RFP Part 1 at Question 9. One question expressed concern about the fact that each offeror was proposing its own date of service availability, so the period of performance for task order 1 would not be consistent among offerors:

We are trying to understand the period that should be priced for the Top Secret fabric task order. The Top Secret Fabric will not be available on

the day of the contract award (at the beginning of the Base Ordering period). Therefore we are uncertain about pricing the top secret services for the entire base period – which would include a period of time when the service is not available. Will the Government clarify the period that is to be priced for that Task Order? We recommend that the Government be as specific as possible so that all offerors price the same period of time?

Id. at Question 61. The agency however, acknowledged that the periods of performance would vary, and maintained the solicitation’s instructions regarding pricing task order 1:

The availability date of the Top Secret services will be dependent on the offerors proposed schedule. Therefore, the Government will not clarify the period that is to be priced for the Top Secret Task Order. The Offeror shall price the Top Secret Task Order based on the Offeror’s proposed availability date.

Id. A questioner then followed up, referring to the Q&A above and requested that the agency “consider specifying a minimum performance period” for task order 1 prices. AR, Tab 28, Q&A Regarding Final RFP Part 2 at Question 136. The questioner specifically asserted this specification was “necessary to avoid an evaluation in which each [offeror’s] Total Evaluated Price is based on a different period of performance, and where [offerors] with earlier delivery of services have a corresponding price increase.”

Id. The agency again declined, reiterating that it understood and expected that price would be dependent on each offeror’s proposed date of service delivery. *Id.*

Now, after award, Microsoft argues that the agency failed to evaluate prices on a common basis because Microsoft and AWS proposed task order 1 prices based on their different proposed service delivery dates. Supp. Protest at 68-69. Microsoft recognizes that the agency “refused to specify” a common period of performance for task order 1 because the solicitation required pricing based on proposed service delivery dates. *Id.* at 68-69. Microsoft argues that its challenge is nevertheless timely, asserting that, having refused to dictate a common period of performance for task order 1 at the front end, the agency “should have normalized the prices of Microsoft and AWS” at the back end by manipulating the offerors’ proposed fixed-rate prices to calculate monthly prices and then multiplying those monthly prices against a consistent number of months. *Id.* at 70-71.

The agency requests that our Office dismiss this argument regarding price. The agency first contends that any argument that the solicitation’s advertised total evaluated price does not allow the government to meaningfully evaluate price, or that the agency should have altered proposed prices for the sake of comparison, is untimely. MOL at 56; Supp. MOL at 58-59. The agency goes on to argue that, because Microsoft does not allege an error in the agency’s calculation of total evaluated price for either offeror, Microsoft has not provided a sufficient legal or factual basis for its price evaluation challenge. MOL at 57.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. A protester simply may not wait until after an award has been made to protest alleged flaws in the procurement's ground rules that are apparent prior to submission of proposals. See *DynCorp Int'l LLC*, B-415349, Jan. 3, 2018, 2018 CPD ¶ 12 at 9.

Here, the solicitation dictated that the period of performance for task order 1 would vary depending on the offeror's proposed service availability date. AR, Tab 28, Q&A Regarding Final RFP Part 2 at Question 136. The solicitation also specified that the agency's calculation of total evaluated price would be limited to adding proposed prices for the task orders and benchmark pricing. AR Tab 38, PEC at 18. However framed, Microsoft's complaint is that offerors did not propose task order 1 prices based on the same period of period of performance, and the agency used those task order 1 prices to calculate the total evaluated price without manipulation. Microsoft knew, prior to the time for receipt of proposals, how the agency intended to calculate total price based on the solicitation's instructions regarding price or the terms of the solicitation regarding the calculation of total evaluated price. See 4 C.F.R. § 21.2(a)(1). As such, this protest ground is dismissed as untimely.

Best-Value Award Decision

Lastly, Microsoft challenges the agency's best-value determination. The protester first contends the agency's selection decision was unreasonable because it was "tainted" by the underlying evaluation errors. Protest at 71-74. Additionally, Microsoft argues that the agency departed from the RFP's stated evaluation criteria and failed to meaningfully consider Microsoft's price advantage as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a)(3)(A)(ii). *Id.* at 66-71.

In a best-value tradeoff procurement, such as the one here, it is the function of the source selection authority to perform a tradeoff between price and non-price factors to determine whether one proposal's superiority under the non-price factors is worth a higher price. *OGSystems, LLC*, B-414672.6, B-414672.9, Oct. 10, 2018, 2018 CPD ¶ 352 at 14. Even where price is of less importance than various non-price factors, an agency must meaningfully consider cost or price to the government in making its selection decision. *Id.* Specifically, before an agency may select a higher-priced proposal that has been rated technically superior to a lower-priced but acceptable proposal, the award decision must be adequately documented and supported by a rational explanation of why the higher-rated proposal is, in fact, superior, and explain why its technical superiority warrants paying a price premium. *Id.*

Additionally, as part of the tradeoff, an agency may not “so minimize the impact of price to make it merely a nominal evaluation factor because the essence of the tradeoff process is an evaluation of price in relation to the perceived benefits of an offeror’s proposal.” *Sevatec, Inc., et al.*, B-413559.3 *et al.*, Jan. 11, 2017, 2017 CPD ¶ 3 at 8 (citing FAR 15.101-1(c)); see *Technatomy Corp.*, B-414672.5, Oct. 10, 2018, 2018 CPD ¶ 353 at 24 (finding the agency failed to give meaningful consideration to price when the importance of price was nominalized); *Eurest Support Servs.*, B-285813.3 *et al.*, July 3, 2001, 2003 CPD ¶ 139 at 7 (“An evaluation and source selection that fails to give significant consideration to cost [to the government] is inconsistent with CICA and cannot serve as the basis for a reasonable source selection.”).

As discussed above, the RFP instructed offerors, as part of the price proposals, to provide fixed prices for each of the solicitation’s three representative task orders as well as the four benchmark tests (No. 24, 36, 39, 42) performed as part of the oral presentations. AR, Tab 35, PPI at 22. The sum of the task order and benchmark test prices was the “Offeror’s total evaluated price that shall be utilized in the best value determination.” AR, Tab 38, PEC at 18. The prices were as follows:

	AWS	Microsoft
Task Orders		
Task Order 1 - Classified Cloud Services		
Task Order 2 - Unclassified Cloud Services		
Task Order 3 - Program Management		
Subtotal	\$482,054,213	\$422,232,895
Benchmark Tests		
BFS 24	\$11	\$79
BFS 36	\$1,799	\$8,345
BFS 39	\$33,375	\$21,767
BFS 42	\$186,770	\$236,245
Subtotal	\$221,955	\$266,436
Total	\$482,276,169	\$422,499,332

AR, Tab 69, SSDD at 24-25, 35.

The SSA, when making the best-value tradeoff determination, made the following findings and conclusions regarding the AWS and Microsoft prices:

- The Government established that it would not make an award at a significantly higher overall price to achieve only slightly superior technical/management performance.

- AWS had an overall higher price for task orders 1-3, with a net difference of approximately 12%, or \$58,627,213.²⁴
- AWS was 17% less expensive than Microsoft, using the benchmark tests as a point of reference.
- AWS achieved an overall price savings of 17% when compared to Microsoft for operation and delivery of the benchmark tests.
- If operating at a constant level, using the benchmark tests as the exemplar workload, the Government would achieve an overall savings of \$44,480.99 with AWS per run execution. When compounded over hundreds of workloads run daily, this could offer significant operational savings to the agency.
- AWS had a higher evaluated price for three representative task orders, but offered an overall less expensive price to run the benchmark tests.
- The total proposed prices for task orders 1-3 represented only 4.8% of the overall contract ceiling (of \$10 billion).

Id. at 9, 40-43.

The SSA ultimately concluded that AWS's superiority under the technical and management factors--which were the two most important evaluation criteria--was "worth the small premium in total evaluated price." *Id.* at 43.

Microsoft argues that the agency improperly abandoned the RFP's announced price evaluation scheme and failed to meaningfully consider the protester's overall lower price. Specifically, Microsoft contends it was improper for the SSA to minimize the importance of task order pricing--where Microsoft had almost a \$60 million advantage--and to give exaggerated weight to the benchmark test pricing--where AWS had approximately a \$45,000 advantage--when these aspects of the prices were so disparate in relative size. Protest at 69-71. The agency recognized that AWS was lower priced than Microsoft for the benchmark tests, Microsoft argues, without also properly recognizing that in comparison to the task orders, the benchmark tests were 0.06% of the total evaluated prices.²⁵ Supp. Comments at 30-31.

Microsoft also argues that it was improper for the SSA to discount the protester's almost \$60 million overall price advantage by comparing total evaluated prices to the contract's maximum order amount. Protest at 68. The fact that total evaluated prices were approximately 4.8% of the possible maximum order amount, Microsoft argues, should

²⁴ This represents the price difference between the AWS and Microsoft task order prices without the transition cost component. AR, Tab 69, SSDD at 40. The difference between the AWS and Microsoft task order prices overall, including transition costs, is \$59,821,318 (\$482,054,213 - \$422,232,895 = \$59,821,318).

²⁵ Microsoft also points to the fact that the RFP established it was the "total evaluated price that shall be utilized in the best value determination." Protest at 68 (*citing* AR, Tab 38, PEC at 18).

have no bearing on whether AWS's perceived technical benefits were worth the associated price premium in accordance with the price evaluation methodology established by the RFP. *Id.* at 74-75.

The agency argues that it properly considered price in the best-value determination, where the non-price factors, when combined, were significantly more important than price. MOL at 65 (*citing* AR, Tab 38, PEC at 8-9). The agency also argues that it did not improperly weight any element of price ("to be clear, no enhanced weight, or credit, was given to any element of price"), *id.* at 52, as giving equal weight to task order and benchmark test pricing was consistent with "unambiguous" GAO decisions on this point. *Id.* at 53, *citing Public Commc'ns Servs., Inc. (PCS)*, B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154.²⁶ The agency also argues that the SSA did not look outside of total evaluated prices when making the best-value determination, and the comparison of total evaluated prices to the contract's maximum order amount was--although part of the SSA's tradeoff analysis--but a factual statement without any significance. *Id.* at 68; GAO Conference Call with Parties, Sept. 29, 2021.

We find the agency's reliance upon our decision in *PCS* to be misplaced. As a general matter, where a solicitation lists multiple price or cost elements but does not state how they are weighted, offerors may assume that each cost or price element will be weighted equally. *PCS, supra* at 10; *Beneco Enters., Inc.*, B-283154, Oct. 13, 1999, 2000 CPD ¶ 69 at 8. Here, however, unlike in *PCS*, the RFP did provide separate quantities for each item to be priced, such that there was no uncertainty when calculating offerors' evaluated prices. Moreover, based on the solicitation's price elements and quantities, the representative task orders collectively represented 99.94% of the total evaluated price and the benchmark tests collectively represented 0.06% of the total evaluation price. To the extent the agency was of the view that our decisions required it to give equal weight to task order and benchmark test pricing here, that view is mistaken.

In light of our determination that certain aspects of the evaluation of technical proposals were not reasonable, and our corresponding recommendations, we need not determine whether the agency here failed to meaningfully consider price, or departed from the

²⁶ In *PCS*, the Department of Homeland Security was procuring detainee telephone services. *PCS, supra* at 2. Although offerors were required to propose separate rates for both debit and pre-paid calls, the data in the solicitation did not distinguish between debit and pre-paid calls and provided a combined volume associated with these call types. *Id.* at 3. *PCS* alleged the agency's price evaluation unreasonably assumed an equal distribution of debit and pre-paid calls. *Id.* at 9. The agency argued that its evaluation approach was reasonable because where the solicitation did not distinguish between the volumes of each type of call, it was reasonable to weigh the calls equally. *Id.* at 9-10. We agreed with the agency that in the absence of data showing separate call-type volume, the solicitation required the two categories of calls to be weighted equally. *Id.* at 12.

solicitation's stated evaluation scheme, as part of its selection decision. *Innovative Test Asset Sols., LLC*, B-411687, B-411687.2, Oct. 2, 2015, 2016 CPD ¶ 68 at 19 n.26. The agency, however, may want to consider this discussion when performing a new best-value tradeoff consistent with our recommendation below.

RECOMMENDATION

As detailed above, we find the agency's evaluation of technical proposals to be unreasonable in certain regards. We recommend that NSA reevaluate technical proposals, consistent with this decision, and based on that reevaluation, perform a best-value tradeoff and make a new source selection decision. If, upon reevaluation, Microsoft is determined to offer the best value to the government, NSA should terminate AWS's contract for the convenience of the government and make award to Microsoft. We also recommend that Microsoft be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Microsoft should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel