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## Decision

**Matter of:** Supreme Foodservice GmbH

**File:** B-405400.6; B-405400.7

**Date:** March 27, 2013

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Thomas P. Humphrey, Esq., David Z. Bodenheimer, Esq., Jonathan M. Baker, Esq., James G. Peyster, Esq., Grant J. Book, Esq., Olivia L. Lynch, Esq., and Robert J. Sneckenberg, Esq., Crowell & Moring LLP, for the protester. Eric J. Marcotte, Esq., Kevin P. Connelly, Esq., Kelly E. Buroker, Esq., Jacob W. Scott, Esq., and Kyle E. Gilbertson, Esq., Vedder Price P.C., for ANHAM FZCO, the intervenor.

Judith Pullman Gever, Esq., Jeremiah Kline, Esq., R. Zen Schaper, Esq., Daniel K. Poling, Esq., and Young S. Lee, Esq., Defense Logistics Agency, for the agency.

Matthew T. Crosby, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that awardee's proposal should have been disqualified from competition based on alleged material misrepresentation regarding authorization to use facility is denied where record does not show awardee's representation to be false.
  2. Protest that agency unreasonably failed to consider available relevant information bearing on awardee's responsibility is denied where record reflects that agency considered available relevant information and determined that it was not credible enough to warrant further investigation.
  3. Protest that agency unreasonably considered nonrelevant contracts when evaluating awardee's key personnel and past performance is denied where record reflects that evaluation was reasonable and consistent with solicitation's terms.
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### DECISION

Supreme Foodservice GmbH, of Ziegelbrücke, Switzerland, protests the award of a contract to ANHAM FZCO, of Dubai, United Arab Emirates, under request for proposals (RFP) No. SPM300-11-R-0063, issued by the Defense Logistics Agency, Troop Support, for the supply and distribution of subsistence products to locations

throughout Afghanistan. Supreme asserts that the agency should have disqualified ANHAM's proposal from the competition because it allegedly included a material misrepresentation; the agency unreasonably failed to consider available relevant information bearing on ANHAM's responsibility; and the agency's evaluation of ANHAM's and Supreme's proposals was unreasonable in various respects.

We deny the protest.

The solicitation, which was issued on April 26, 2011 and amended 12 times, sought a full-line food distributor to act as the prime contractor responsible for the supply and delivery of food items to the military and other federally-funded customers at more than 200 locations throughout Afghanistan. RFP at 1, 125, 127. This type of contractor is known as a subsistence prime vendor (SPV). See, e.g., id. at 245. The solicitation contemplated the award of a single indefinite-delivery/indefinite-quantity fixed-price contract, with economic price adjustment, for a term of 66 months. Id. at 125-26. Award was to be made to the offeror whose proposal was determined to be the most advantageous to the government considering price and the technical factors, subfactors, and elements shown in the table below.

Factor 1 - Experience/Past Performance
Subfactor A - Experience
Element 1 - Size and Complexity
Element 2 - Key Personnel
Subfactor B - Past Performance
Subfactor C - Socioeconomic Past Performance
Subfactor D - AbilityOne Past Performance
Factor 2 - Distribution System/Quality Assurance
Subfactor A - Warehouse Location/Capacity and Resource Availability
Subfactor B - Airlift Capability
Subfactor C - Quality Control, Assurance, and Warehouse Procedures
Subfactor D - Product Protection/Food Defense
Subfactor E - Surge and Sustainment Capability
Factor 3 - Private Convoy Security Capability
Factor 4 - Operational Support
Subfactor A - Afghanistan National Employment - Afghanistan First - Southern Caucasus/Central and Southern Asian States
Subfactor B - Civil Reserve Air Fleet/Voluntary Intermodal Sealift Agreement
Factor 5 - Socioeconomic Considerations

RFP at 260-61. The non-price evaluation factors were listed in descending order of importance and were “significantly more important” than price. Id. at 261. With regard to factor 1, experience/past performance, subfactors A and B were of equal importance and were more important than subfactors C and D. Id. at 260. The factor 2 subfactors were of equal importance. Id. at 261. Of the factor 4 subfactors, subfactor A was more important than subfactor B. Id. at 263.

The agency received four proposals by the solicitation’s closing date, including proposals from Supreme and ANHAM. Agency Report (AR), Tab 42, Source Selection Advisory Council (SSAC) Recommendation, at 4. A technical evaluation panel (TEP) evaluated the proposals under the non-price factors and identified proposal strengths, weaknesses, and deficiencies. See, e.g., AR, Tab 76, Final Technical Report--Supreme. A business/pricing evaluation team evaluated the offerors’ pricing. See AR, Tab 42, SSAC Recommendation, at 13. The agency then conducted multiple rounds of discussions and requested and received final proposal revisions (FPR) from all four offerors. AR, Tab 79, Revised Source Selection Decision Document (SSDD), at 6.

Following the evaluation of FPRs, the proposals were assigned final ratings. Supreme’s and ANHAM’s proposals each received an overall proposal rating of good and were the two highest-technically-rated proposals. AR, Tab 42, SSAC Recommendation, at 9. Supreme’s total evaluated price was \$4,723,740,821, while ANHAM’s total evaluated price was \$3,274,432,221. Id. at 13.

The source selection authority (SSA) performed a price/technical tradeoff between the four proposals and determined that ANHAM’s proposal represented the best value to the government. On June 22, 2012, the agency made award to ANHAM. AR at 13. After a debriefing, Supreme challenged the award in a protest filed with our Office. On October 11, our Office sustained Supreme’s protest on the basis that certain aspects of the agency’s evaluation of Supreme’s and ANHAM’s proposals under factor 1, experience/past performance, were unreasonable or inadequately documented. Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 6-13. We recommended that the agency reevaluate Supreme’s and ANHAM’s proposals in a manner consistent with the solicitation’s evaluation criteria and our decision. Id. at 14.

On October 20, the agency notified the offerors that it would follow our Office’s recommendation by conducting a reevaluation of the proposals under factor 1, experience/past performance. See AR, Tab 63, Notice of Corrective Action--Supreme. On October 26, Supreme submitted a letter to the agency asserting that if ANHAM was again selected for award, then the agency should “revisit the issue of Anham’s responsibility” by considering “recent, negative information regarding Anham and its ability to perform the SPV contract.” AR, Tab 64, Supreme Response to Scope of Corrective Action (October 26 Letter), at 3, 5. As relevant to this protest, the letter included the following allegations regarding a large

warehouse facility in the vicinity of Bagram, Afghanistan that ANHAM had proposed to use in performing the SPV contract:

As has been widely reported in the press, Anham faces major legal problems and Afghan Government and community opposition to its Bagram warehouse. According to the National Economy Committee of the [Afghanistan] National Assembly and local Afghan community leaders, Anham is constructing a warehouse on land it does not own and for which it does not have proper authorization to use for that purpose.<sup>[1]</sup> . . . As a result of these issues, **the Afghan government and local community leaders have sought to force Anham to demolish the warehouse.**

AR, Tab 64, October 26 Letter, at 3-4 (emphasis in original).

As an attachment, Supreme's letter included an August 27, 2012 letter by the referenced Afghanistan National Economy Committee (NEC).<sup>2</sup> AR, Tab 64, October 26 Letter, attach. 5, NEC Letter (translated), at 1. The August 27 letter stated that at a recent session, the NEC had considered a complaint regarding the "confiscation of land and building warehouses in [a] residential area . . . related to Bagram district by the company named ANHAM, who has a contract [to] supply . . . goods to the military units of USA in Afghanistan." Id. The letter stated that the NEC "took the following decisions":

-- Ministry of Finance should close all accounts of mentioned company till they resolve the issue.

\* \* \* \* \*

-- [M]entioned company is required to destroy mentioned buildings in confiscated land . . . .

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<sup>1</sup> Following this sentence, Supreme's letter included a footnote stating: "Supreme is not sufficiently familiar with the facts and Afghan law to verify that Anham has acted unlawfully as alleged. However, Supreme understands that a similar incident occurred in Kuwait when Anham improperly attempted to take control of public property, causing authorities to use bulldozers to destroy a security fence improperly constructed by Anham on public property." AR, Tab 64, October 26 Letter, at 4 n.1.

<sup>2</sup> The NEC is a committee of the Wolesi Jirga, which is the lower house of Afghanistan's bicameral parliament. See generally Parliament of Afghanistan, <http://wj.parliament.af/english.aspx> (last visited Mar. 19, 2013). The NEC letter was addressed to "the Military Contractors of USA." AR, Tab 64, October 26 Letter, attach. 5, NEC Letter (translated), at 1.

AR, Tab 64, October 26 Letter, attach. 5, NEC Letter (translated), at 1.

After receiving Supreme’s letter, the agency reevaluated each proposal under each of the factor 1, experience/past performance, subfactors and elements. AR, Tab 78, SSAC Recommendation Addendum, at 2. As a result of the reevaluation, the TEP made several changes to the ratings assigned to ANHAM’s and Supreme’s proposals, including changing ANHAM’s rating under subfactor A, element 1, size and complexity, from outstanding to marginal, and changing ANHAM’s rating under subfactor A, experience, from outstanding to acceptable. Id. at 3. The SSAC reviewed the evaluation documentation and concurred with the TEP’s changes. Id. at 1, 4-5. The SSAC, however, recommended to the SSA that in addition to the TEP’s changes, Supreme’s overall proposal rating should be changed from good to outstanding. Id. at 5-6.

The SSA reviewed the evaluation documentation and concurred with all of the changes, including the change of Supreme’s overall proposal rating from good to outstanding. AR, Tab 79, Revised SSDD, at 1, 11, 15, 93. The final evaluation ratings under factor 1,<sup>3</sup> together with the risk ratings, overall proposal ratings, and total evaluated prices for each offeror, are shown in the table below.

	<b>ANHAM</b>	<b>Supreme</b>	<b>Offeror 3</b>	<b>Offeror 4</b>
<b>Factor 1</b>	<b>Acceptable</b>	<b>Good</b>	[DELETED]	[DELETED]
Subfactor A	Acceptable	Outstanding	[DELETED]	[DELETED]
Element 1	Marginal	Outstanding	[DELETED]	[DELETED]
Element 2	Outstanding	Outstanding	[DELETED]	[DELETED]
Subfactor B	Acceptable	Acceptable	[DELETED]	[DELETED]
Subfactor C	Acceptable	Acceptable	[DELETED]	[DELETED]
Subfactor D	Marginal	Outstanding	[DELETED]	[DELETED]
<b>Risk</b>	<b>Low</b>	<b>Very Low</b>	[DELETED]	[DELETED]
<b>OVERALL RATING</b>	<b>GOOD</b>	<b>OUTSTANDING</b>	[DELETED]	[DELETED]
<b>Evaluated Price</b>	<b>\$3,274,432,221</b>	<b>\$4,723,740,821</b>	[DELETED]	[DELETED]

Id. at 7-8.

The SSA made a detailed comparative analysis of the proposals. Id. at 102-24. He then made a best value tradeoff, wherein he again determined that ANHAM’s

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<sup>3</sup> The ratings under the other evaluation factors are not relevant to this decision.

proposal represented the best value to the government because Supreme's technical superiority was not worth the 44 percent price premium associated with Supreme's proposal. AR, Tab 79, Revised SSDD, at 124-25.

Before acting on the SSA's determination, the contracting officer prepared a memorandum for the record regarding Supreme's October 26 letter. AR, Tab 72, Memorandum for Record. In the memorandum, the contracting officer ultimately concluded that further inquiry into Supreme's letter was not warranted because he was "not aware of any independent information substantiating the allegations raised by Supreme." Id. at 1.

On December 7, the agency affirmed the award to ANHAM. AR, Tab 80, Notice of Award Affirmation, at 1. On December 17, Supreme filed a protest with our Office.

## DISCUSSION

Supreme asserts that ANHAM's proposal included a material misrepresentation regarding the firm's authorization to use the Bagram warehouse facility, and, therefore, ANHAM's proposal should be disqualified from the competition. Supreme also asserts that the agency unreasonably failed to consider Supreme's October 26 letter in its responsibility determination for ANHAM. Finally, Supreme asserts that various aspects of the agency's reevaluation of both ANHAM's and Supreme's proposals under factor 1, experience/past performance, were unreasonable. For the reasons discussed below, we find that none of Supreme's assertions furnishes a basis on which to sustain the protest.

### Misrepresentation

By way of background, the government of Afghanistan owns the land underlying the Bagram facility and has leased it to ANHAM's teaming partner, Bostan-e-Sabz (BES). AR, Tab 47, Defense Contract Management Agency Pre-Award Survey, at 6. Supreme argues that terms of the lease limit the land's use to agricultural purposes, thereby precluding its use for military food warehousing.<sup>4</sup> Protest at 20-21; Supreme Comments at 9-11. In this context, Supreme also argues that because ANHAM's proposal stated that the ANHAM team had "already secured all licenses and permissions to construct the facility," ANHAM's proposal included a material misrepresentation regarding the firm's authorization to use the Bagram facility. Protest at 19-23 (quoting ANHAM Proposal at 84); Supreme Comments at 8-11; Supreme Supp. Comments at 6-10. On this basis, Supreme argues that ANHAM's proposal should be disqualified from the competition. Protest at 23-24.

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<sup>4</sup> Supreme's argument is based on a version of the lease that Supreme had translated into English. Supreme Comments, exh. A, [DELETED] Decl. ¶ 5.

As an initial matter, the agency and ANHAM maintain that Supreme's claim is untimely, arguing that Supreme was aware of the basis for the claim in August, 2012, yet did not file its protest until December, 2012. AR at 34-36; ANHAM Comments at 10-15.

Our Bid Protest Regulations require that protests other than those based on alleged solicitation improprieties shall be filed not later than 10 days after the basis of protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2) (2012). Protesters are required to diligently pursue all information that may give rise to protest grounds. HG Properties A, LP, B-290416, B-290416.2, July 25, 2002, 2002 CPD ¶ 128 at 5; Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. We resolve doubts regarding timeliness in favor of protesters. Sigmattech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 at 5; Precise Constr. Mgmt., B-278144.2, Feb. 24, 1998, 98-1 CPD ¶ 63 at 2-3.

In response to the agency's and ANHAM's arguments regarding timeliness, Supreme's group director for corporate and legal affairs states in an affidavit that after hearing rumors about the Bagram facility issue in late August 2012, he undertook efforts to obtain information on the matter. Supreme Comments, exh. A, [DELETED] Decl. ¶ 3. He further states that as result of these efforts, he obtained the translated August 27 NEC letter on October 4; the translations of several of relevant Afghanistan parliamentary sessions on December 12; and the translated lease on December 14. Id. ¶¶ 4-6. Supreme asserts that the documents obtained in December formed the factual basis of the firm's misrepresentation claim. See Supreme Comments at 75.

Given the circumstances here, we see no reason to conclude--and the agency and ANHAM have offered no substantive argument in opposition to this point--that Supreme failed to diligently pursue the information that formed the basis of the misrepresentation claim. We consider the factual basis of the misrepresentation claim to be the terms of the translated lease that Supreme interprets as precluding the Bagram site's use for SPV purposes. We find that Supreme learned of this information on the date that it received the translated document, which, as stated above, was December 14. Supreme filed its protest with our Office within ten days of December 14. Accordingly, we consider the misrepresentation claim to be timely.

In response to the misrepresentation claim, ANHAM asserts that the lease permits "necessary" structures--including warehouses--to be built on three percent of the land and that its facility occupies three percent of the land. ANHAM Comments at 18. Additionally, ANHAM's chairman and chief executive officer states in an affidavit that before submitting its proposal, the firm met with Afghanistan government officials and received their approval and support for construction on the site of a facility that would support the SPV contract. ANHAM hearing exh. 1, [DELETED] decl. ¶ 7. Finally, ANHAM asserts that three post-protest letters from high-ranking Afghanistan government officials show that no misrepresentation

occurred. See ANHAM Comments, exh. 1, Ludin Letter, at 1 (letter from deputy foreign minister of Afghanistan stating that following the August 27 NEC letter, Afghanistan authorities investigated the matter and found that the land “was being utilized legally”); ANHAM Supp. Comments, exh. 1, Ramazan Letter, at 1 (letter from NEC member stating same); ANHAM hearing exh. 1, [DELETED] decl., attach. 4, Ershad Letter, at 1 (letter from Afghanistan parliament member stating that use of the Bagram facility to support the SPV contract is legal and has the support of the relevant government officials and agencies).<sup>5</sup>

An offeror’s misrepresentation that materially influences an agency’s consideration of its proposal generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. ACS Gov’t Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 4; ManTech Advanced Sys. Int’l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5. For a protester to prevail on a claim of material misrepresentation, the record must show that the information at issue is false. Vizada Inc., et al., Oct. 5, 2011, 2011 CPD ¶ 235 at 9; Commercial Design Group, Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 6.

We cannot conclude on the record here that ANHAM’s representation that the firm had “already secured all licenses and permissions to construct the facility” was false. As shown above, the record reflects that the issue of whether the Bagram site may be used for SPV purposes is in an apparent state of dispute involving ANHAM/BES and various entities of the government of Afghanistan. Evidence regarding the dispute and representations that ANHAM has made to our Office are sufficiently consistent with ANHAM’s proposal statement to preclude our finding that a misrepresentation occurred. Ultimately, it is up to one or more branches of the government of Afghanistan to resolve the dispute.<sup>6</sup> Whether future actions by the government of Afghanistan ultimately enable or prevent ANHAM from using the site for SPV purposes is a matter of contract administration, which our Office does not review. 4 C.F.R. § 21.5(a); United Segurança, Ltda., B-294388, Oct. 24, 2004, 2004 CPD ¶ 207 at 4. Supreme’s claim of a proposal misrepresentation is denied.

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<sup>5</sup> Supreme submitted post-protest letters from high-ranking Afghanistan government officials that counter the letters submitted by ANHAM. Supreme Comments, exh. B, AlhajMirurrahman Letter, at 1 (letter from NEC president stating that no commercial activities are authorized on the Bagram site); Supreme hearing exh. 1, Nazari E-Mail (e-mail from NEC secretary officer stating that the Bagram site may not be used for International Security Assistance Force logistical purposes).

<sup>6</sup> The translated lease states: “In case of conflict, both parties are required to refer to an authorized court [of] Afghanistan.” Protest, exh. 8, Lease Between Afghanistan Ministry of Agriculture & Livestock and BES (translated), § XIII.

## Responsibility

Supreme argues that its October 26 letter put the agency on notice that ANHAM may lack the capacity to perform the contract. Protest at 24-25. Supreme argues that the agency failed to consider this information in its affirmative responsibility determination for ANHAM, and, therefore, the agency's determination was improper. Protest at 24-25; Supreme Comments at 16-20; Supreme Supp. Comments at 6-10; Supreme Post-Hearing Comments at 15-30.

The agency and ANHAM maintain that Supreme's claim is untimely based on the same arguments raised against Supreme's misrepresentation claim. AR at 35-36; ANHAM Comments at 15-16.

The factual basis of Supreme's claim is that actions of Afghanistan's government may jeopardize ANHAM's ability to perform the SPV contract. Supreme first learned of the governmental action through the August 27 NEC letter, which Supreme obtained on October 4. On October 11, less than 10 days later, our Office sustained Supreme's initial post-award protest. Thus, within 10 days of receiving the August 27 letter, the only responsibility determination that the information in the letter could have been used to challenge was the prospective responsibility determination that would occur if the agency affirmed the award to ANHAM.

A protester need not file a "defensive" protest where an agency has not made a final determination regarding responsibility since a protester may presume that the agency will act properly. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23 at 6; see also American Multi Media, Inc.--Recon., B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158 at 3. If Supreme had protested within 10 days of receiving the NEC letter, the protest would have been premature because, at that time, the agency had not yet acted in response to our decision. See Alatech Healthcare, LLC--Protest; Custom Servs. Int'l, Inc.--Costs, B-289134.3, B-289134.4, Apr. 29, 2002, 2002 CPD ¶ 73 at 6 n.6; Johnson Controls World Servs., Inc., B-286714.3, Aug. 20, 2001, 2001 CPD ¶ 145 at 5. After the agency affirmed ANHAM's award (which implicitly meant that the agency had found ANHAM to be responsible), Supreme filed a protest with our Office within 10 days. Accordingly, we consider Supreme's challenge to the agency's responsibility determination here to be timely.

The agency and ANHAM also assert that we should dismiss Supreme's responsibility claim because in their view, it is outside the scope of matters that our Office will review. Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, our Office generally will not consider a protest challenging an affirmative determination of responsibility except under limited specified exceptions. 4 C.F.R. § 21.5(c); ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 13. One specific exception is where a protest identifies evidence raising serious concerns that a

contracting officer, in making an affirmative determination of responsibility, unreasonably failed to consider available relevant information. 4 C.F.R. § 21.5(c); ESCO Marine, Inc., supra. In this context, we will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 24; ESCO Marine, Inc., supra.

Here, we conclude that the protest is within our jurisdiction to review because Supreme has argued that the contracting officer unreasonably failed to consider specific information--namely, the October 26 letter--regarding whether ANHAM would have the capacity to perform the contract. See Active Deployment Sys., Inc. B-404875, May 25, 2011, 2011 CPD ¶ 113 at 3; ESCO Marine, Inc., supra, at 13.

The agency responds to the merits of Supreme's claim by asserting that the contracting officer did consider the October 26 letter, as documented in his memorandum for the record. AR at 78. The contracting officer's memorandum is the only contemporaneous document that addresses Supreme's October 26 letter. In relevant part, the memorandum states:

Anham was determined responsible at the time the original award was made. If the original award decision is affirmed, [the agency] would not need to reconsider the original responsibility determination because the requirements of the solicitation were not otherwise amended or changed. Similarly, the Contracting Officer is not aware of any independent information substantiating the allegations raised by Supreme which would warrant further inquiry. To the extent any of the concerns raised by Supreme affect the ultimate awardee's performance, such issues will be dealt with as a matter of contract administration.

AR, Tab 72, Memorandum for Record, at 1. In our view, these statements do not adequately reflect whether or not the contracting officer, in making his responsibility determination, unreasonably failed to consider the information in Supreme's letter.<sup>7</sup> Accordingly, our Office convened a hearing to take testimony from the contracting officer regarding his consideration of the letter.

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<sup>7</sup> There is no requirement that a contracting officer explain the basis for an affirmative responsibility determination. See Federal Acquisition Regulation (FAR) § 9.105-2(a)(1); FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8. Nevertheless, documents and reports supporting a determination of responsibility or nonresponsibility must be included in the contract file. FAR § 9.105-2(b)(1).

In the course of the hearing, the contracting officer testified that after receiving the letter, he shared and discussed it in multiple meetings with two other contracting officers involved with Afghanistan food service contracts, his supervisor, counsel, and the director and deputy director of the agency's subsistence directorate.<sup>8</sup> Tr. at 15, 31, 155-57. He testified that based on these meetings and his experience with other relevant contracts, he determined that the allegations in the letter were not credible. See id. at 51, 93, 116, 155.

The contracting officer also provided testimony regarding specific reasons that he did not find the letter credible. For example, he testified that in his view, the allegations were undercut by the footnote in the letter stating that Supreme itself could not verify the allegations. Id. at 51, 133-34. He also testified that with regard to the state-ordered removal of a fence at an ANHAM facility in Kuwait, he was aware that ANHAM eventually prevailed in the dispute and rebuilt the fence. Id. at 53-55, 62-63. As another reason why he did not find the letter credible, he testified that he was not aware of any press coverage of an issue with the Bagram facility, and that he had not received any information about such an issue from agency personnel in Afghanistan, the Department of State, or from any other United States agency. Id. at 42-43, 52, 71-72, 135-36. He testified that ordinarily he would receive communications regarding such issues in the normal course of business, although he also testified that he did not solicit information to substantiate the letter from anyone outside of his contracting office. Id. at 52, 92-93.

The contracting officer also testified that he did not find the letter credible because the NEC letter was from a committee of Afghanistan's lower legislative body, rather than from an executive branch of the government, and because the NEC letter was not specifically addressed to ANHAM. Id. at 45, 47-48. He testified that in his experience, when the government of Afghanistan has a concern about a contractor's compliance with a local law, the executive branch of government--i.e., one of the ministries--communicates directly with the contractor. Id. at 46-48, 108. Finally, he testified that he had seen photographs of the Bagram facility that ANHAM had submitted on October 4, and the photographs seemed to him to be consistent with ANHAM's proposed use of the land. See id. at 141-42.

The record here shows that the contracting officer was aware of and considered the specific allegations and information in Supreme's October 26 letter. For various reasons, including those discussed above, the contracting officer concluded that the allegations were not credible enough to warrant further inquiry. While Supreme maintains that the contracting officer gave "virtually no consideration" to the October 26 letter, Supreme Post-Hearing Comments at 10, the record shows otherwise. Accordingly, Supreme's claim that the agency unreasonably failed to

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<sup>8</sup> The agency's subsistence directorate is responsible for the purchase of foodstuffs for the military and other authorized customers. Hearing Transcript (Tr.) at 12.

consider available relevant information in connection with the responsibility determination is denied. See USS Chartering, LLC, B-407601, Jan. 15, 2013, 2013 CPD ¶ \_\_\_ at 4; T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 6; Brian X. Scott, B-298568, Oct. 26, 2006, 2006 CPD ¶ 156 at 4.

Supreme argues that the contracting officer did not adequately investigate the allegations in the October 26 letter, and that if he had, he would have found information to substantiate the allegations. Protest at 18; Supreme Comments at 19; Supreme Post-Hearing Comments at 8-9, 21-22, 30-33, 38, 40, 47. We recognize that Supreme is able to point to certain evidence that the contracting officer apparently did not consider--e.g., the lease and transcripts of certain Afghanistan parliamentary sessions. However, a dispute over the amount of information on which an affirmative responsibility determination is based, or disagreement with the contracting officer's determination, does not fall within the circumstances under which our Office will review such a determination. See USS Chartering, LLC, *supra*, at 4; Nilson Van & Storage, Inc., B-310485, Dec. 10, 2007, 2007 CPD ¶ 224 at 4; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 4; see also 67 Fed. Reg. 79,833, 79,834 (Dec. 31, 2002) (GAO's review of protests under the exceptions specified in 4 C.F.R. § 21.5(c) involves "a contracting officer's failure to consider 'available relevant information,' rather than the reasonableness of the contracting officer's judgments based on that information, or his or her failure to obtain information through an exhaustive investigation"); but see FN Mfg., Inc., *supra*, at 11-12; Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 7-11. Our inquiry is whether the contracting officer unreasonably failed to consider available relevant information in making the responsibility determination. Based on the record here, we cannot conclude that such a failing occurred. Supreme's challenge to the agency's responsibility determination is denied.<sup>9</sup>

#### Evaluation of Experience/Past Performance

Supreme asserts that the agency's evaluation of ANHAM's proposal under factor 1, experience/past performance, was unreasonable because, according to Supreme, the agency considered ANHAM contracts that were not relevant. Protest at 27-41; Supreme Comments at 22-27; 32-40; Supreme Supp. Comments at 11-18; 27-36.

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<sup>9</sup> Supreme also asserts that the contracting officer unreasonably failed to consider the alleged proposal misrepresentation discussed above when he determined that ANHAM had a satisfactory record of business integrity and ethics under FAR § 9.104-1(d). Protest at 25; Supreme Comments at 16-19. Because, as discussed above, we conclude that the record does not show that ANHAM made a misrepresentation, this protest ground is denied.

Our Office examines an agency's evaluation of experience and past performance to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. Herve Cody Contractor, Inc., B-404336, Jan. 26, 2011, 2011 CPD ¶ 27 at 3; JVSCC, B-311303.2, May 13, 2009, 2009 CPD ¶ 138 at 5. As a general matter, the evaluation of an offeror's past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. TPMC-EnergySolutions Env'tl. Servs., LLC, B-406183, Mar. 2, 2012, 2012 CPD ¶ 135 at 11; Family Entm't Servs., Inc., d/b/a IMC, B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5.

As stated above, factor 1, experience/past performance, was comprised of four subfactors, including subfactor A, experience, and subfactor B, past performance. RFP at 260. Subfactor A, experience, included two elements: element 1, size and complexity; and element 2, key personnel. Id. One of the grounds on which our Office sustained Supreme's initial post-award protest was that the agency had assigned the highest-possible evaluation rating to ANHAM's proposal under the size and complexity element, yet the record showed that none of the contracts that ANHAM submitted for evaluation under factor 1 met a specific dollar threshold set forth in the size and complexity element evaluation criteria. Supreme Foodservice GmbH, supra, at 6-8.

In the reevaluation, the TEP found that only one of the contracts that ANHAM submitted was "relevant for the purposes of [the size and complexity] evaluation element." AR, Tab 75, Final Technical Report--ANHAM, at 14. That contract was ANHAM's Iraq, Kuwait, and Jordan SPV contract. Id. After making this finding, the TEP changed ANHAM's rating under the size and complexity element from outstanding to marginal and changed ANHAM's rating under subfactor A, experience, from outstanding to acceptable. AR, Tab 78, SSAC Recommendation Addendum, at 3. The TEP did not, however, change ANHAM's original rating of outstanding under the key personnel element. Id. Nor did the TEP change ANHAM's original rating of acceptable under the past performance subfactor. Id.

Supreme asserts that with respect to the evaluation of ANHAM's proposal under the key personnel element, it was unreasonable for the agency to consider experience that ANHAM key personnel had with contracts that were deemed not relevant under the size and complexity element, and that ANHAM's rating under the key personnel element should have matched its rating of marginal under the size and complexity element. Protest at 35-37; Supreme Comments at 22-28. Similarly, Supreme asserts that with respect to the agency's evaluation of ANHAM's proposal under the past performance subfactor, it was unreasonable for the agency to consider information regarding contracts that were deemed not relevant for the evaluation under the size and complexity element, and that ANHAM's rating under the past performance subfactor should have matched its rating of marginal under the size

and complexity element. Protest at 37-41; Supreme Comments at 32-40. Based on the record and the particular evaluation scheme in this solicitation, we disagree.

With respect to subfactor A, experience, the solicitation instructed offerors to submit performance records for “comparable” prime vendor contracts. RFP at 244. The solicitation also instructed that the contracts

should be of similar size and complexity (e.g. 85%-100% of estimated dollar value, battlefield experience, number of delivery stops, number of delivery orders, etc.) of [the] requirements . . . in this solicitation. Contracts determined not to be of similar size and complexity may result in a lower rating or may be determined to be irrelevant and not used in the evaluation.

Id. With respect to the information to be submitted for subfactor B, past performance, the solicitation stated:

The information provided in subfactor A Experience will also be used to evaluate Past Performance (quality of performance) as well. No additional information needs to be submitted separately for this subfactor.

Id. at 245. Thus, the solicitation contemplated that the agency would evaluate the same information under both of the subfactor A elements and under subfactor B.

In contrast to the solicitation’s proposal submission instructions, the solicitation included different sets of evaluation criteria for each of the factor 1 subfactors and elements. For the size and complexity element of subfactor A, the solicitation stated:

The Government will evaluate the offeror’s experience in fulfilling similar requirements of similar size (85%-100%), and complexity for customers in a prime vendor/regular dealer capacity . . . .

Id. at 264. For the key personnel element of subfactor A, the solicitation stated:

The offeror’s identification of key personnel, by position, and their relevant individual experience, will be examined in order to determine the anticipated success of the firm in providing service to its customers.

Id. at 265. For subfactor B, past performance, the solicitation stated:

The Government will evaluate the offeror’s record of performance . . . for its provided contracts. The government will determine whether the

firm has a successful history of conformance to contractual requirements[;] provided consistently high fill rates; a commitment to customer satisfaction; and timely delivery of quality products.

RFP at 265.

Based on these provisions, we do not view the solicitation as requiring that the agency's relevancy determinations regarding the evaluated contracts be identical across the size and complexity and key personnel elements and the past performance subfactor. Although the solicitation's proposal submission instructions provided that contracts that were not of similar size and complexity to the solicited contract "may" result in a lower rating, only the size and complexity element included size and complexity as an express evaluation criteria. *Id.* at 264. Further, as discussed below, the record reflects that the agency's relevancy determinations under the key personnel element and the past performance subfactor were documented and were not unreasonable.

With respect to the key personnel element, the record reflects that the individuals that the agency evaluated had experience under ANHAM's Iraq, Kuwait, and Jordan SPV contract. AR, Tab 75, Final Technical Report--ANHAM, at 17-18; AR, Tab 16, ANHAM Proposal, at 48-55; AR, Tab 100, ANHAM Proposal attach. N, Key Personnel Résumés. As stated above, ANHAM's Iraq, Kuwait, and Jordan SPV contract was the contract that the agency found to be relevant under the size and complexity element. In evaluating these key personnel, the TEP found that "[t]he experience of the personnel identified is relevant to the requirements of the current solicitation," noting that the proposed individuals "are knowledgeable of the food distribution industry," and that they all had "a minimum of [DELETED] years or more experience in several areas of prime vendor support." AR, Tab 75, Final Technical Report--ANHAM, at 17. On this record, we do not view the agency's evaluation as unreasonable.

With respect to the past performance subfactor, the record reflects that the agency contemporaneously documented the distinction between its relevancy determination under the size and complexity element and its relevancy determination under the past performance subfactor. Specifically, the TEP's report states:

[S]ome contracts included in Anham's offer were relevant for the evaluation of Factor I, Sub-factor B: Past Performance, but not for Factor I, Subfactor A, element A1 [size and complexity]. The [TEP] found that those contracts should be evaluated for "Sub-factor B: Past Performance" as those contracts contained elements, such as fill rates in two [SPV] contracts, customer service, and other quality factors that are relevant to "Sub-factor B: Past Performance" but not for Subfactor A, element A1 [size and complexity].

AR, Tab 75, Final Technical Report--ANHAM, at 34.

Additionally, the TEP's report states that ANHAM's contracts were relevant under the past performance subfactor because they had "delivery requirements that are comparable to the SPV Afghanistan solicitation requirements" and because "the customer satisfaction, review of performance, and timely response/resolution to problems on other contracts . . . are relevant to how Anham may perform if awarded the contract under the current solicitation." Id. at 23. Finally, the TEP's report states that the TEP gave "the most weight" to ANHAM's Iraq, Kuwait, and Jordan SPV contract (the contract that was found relevant under the size and complexity element) and "less weight" to the contracts that were not found relevant under of the size and complexity element. Id. at 34. For all of these reasons, we see no merit to Supreme's claims that the agency's evaluation of ANHAM's proposal under the past performance subfactor was unreasonable.

The protest is denied.<sup>10</sup>

Susan A. Poling  
General Counsel

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<sup>10</sup> Supreme challenges various other aspects of the agency's evaluation under factor 1, experience/past performance. For example, Supreme asserts that the agency unreasonably credited ANHAM's proposed key personnel with experience in Afghanistan; unreasonably evaluated ANHAM's proposal under subfactor D, AbilityOne past performance; and unreasonably evaluated Supreme's proposal under subfactor B, past performance, and subfactor C, socioeconomic performance. Supreme also challenges the agency's assessment of ANHAM's proposal risk and the agency's best value determination. We have carefully considered all of Supreme's arguments, along with the record, and conclude that none furnish a basis on which to sustain the protest.