



Decision

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Matter of: Delta Risk, LLC

File: B-416420

Date: August 24, 2018

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DIGEST

1. Protest challenging the agency's technical evaluation and its decision to exclude the protester's proposal from the competitive range is denied where the record shows that the decision was reasonable, and there is no evidence that the protester was prejudiced by any alleged evaluation errors.
2. Protest alleging that the establishment of the competitive range was improper is denied where the solicitation expressly provided that the agency reserved the right to initiate discussions if necessary.
3. Protest challenging the scope of the agency's corrective action is dismissed as untimely where the protester waited to file its protest until after the completion of the corrective action.
4. Protest alleging that awardee's pricing is unbalanced is dismissed where the protester fails to make the threshold showing that one or more of the awardee's prices was overstated.
5. Protest alleging that awardee's pricing is unrealistically low is dismissed where the protester fails to allege that the solicitation provided for a price realism evaluation.

DECISION

Delta Risk, LLC, a small business concern of Arlington, Virginia, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract and the issuance of three task orders to G2, Inc., a small business concern of Annapolis Junction, Maryland, under request for proposals (RFP) No. SB1341-17-RP-0007, issued by the Department of Commerce, National Institute of Standards and Technology (NIST), for cybersecurity research, development, and implementation services. The protester argues that the agency improperly evaluated its proposal, resulting in its improper exclusion from the competitive range. The protester also argues that G2 is affected by an incurable organizational conflict of interest (OCI) and that G2's pricing is unbalanced and unreasonable.

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

BACKGROUND

The agency issued the RFP on March 16, 2017, as a set-aside for small business concerns. The solicitation sought proposals to provide information security and cybersecurity services. RFP at 29. The primary objective of the procurement is to serve the consulting, engineering, research, outreach, and development needs of the NIST Information Technology Laboratory's Computer Security Division. Id. at 30.

The solicitation contemplated the award of multiple IDIQ contracts consisting of a base year, followed by four 12-month options. RFP at 33. Despite a stated preference for multiple awards, the RFP nevertheless provided that "the Government reserves the right to make a single award if deemed to be in the best interest of the Government after evaluating proposals." Id. at 41, 109. Orders issued under the contract would be either fixed-price or labor hour type orders, or a hybrid of both, and would be issued to a single contractor only. Id. at 29, 41, 113.

The solicitation provided for award on a best-value tradeoff basis considering price and three non-price evaluation factors: (1) technical approach, (2) management approach, and (3) past performance.¹ RFP at 109. The RFP made clear that the agency would evaluate proposals for the award of the base contract, as well as for the first eight task orders. Id. at 109-113. The agency reserved the right to conduct discussions if deemed to be in the agency's best interest. Id. at 109. Proposals were due May 1, 2017. Id. at 1.

¹ The technical approach factor had four subfactors: (1) project plan for IDIQ contract; (2) technical approach for the first eight task orders; (3) key personnel for the first eight task orders; and (4) specialized experience. RFP at 109-111. The management approach factor had three subfactors: (1) recruitment and retention plan; (2) contract management plan; and (3) transition plan. Id. at 111-112.

Under the first two factors, i.e., technical approach and management approach, the agency assigned proposals one of the following adjectival ratings: excellent, good, satisfactory, marginal, or unacceptable. Agency Report (AR), Tab 6, Source Selection Decision Document (SSDD), at 4. Under the past performance factor, the agency assigned an offeror’s past performance one of the following adjectival ratings: excellent, good, satisfactory, marginal, unacceptable, or neutral. Id. All three non-price factors were assigned an overall risk assessment of low, medium, or high. Id. With respect to price, the RFP provided that the agency would evaluate prices for the base contract and the first eight task orders to determine whether the prices were fair and reasonable. RFP at 112.

For the purposes of the best value determination and tradeoff analysis, the RFP provided that the non-price evaluation factors, when combined, were more important than price. Id. at 109. As between the non-price factors, the technical approach and management approach factors were of equal importance; past performance was considered less important than the first two non-price factors. Id.

The agency received nine timely proposals in response to the solicitation, including proposals from Delta Risk and G2. Contracting Officer’s Statement (COS) at 2. The agency, however, inadvertently overlooked Delta Risk’s proposal and, therefore, evaluated only eight proposals. Id. After an initial evaluation, the agency determined that discussions were necessary and established a competitive range, consisting of the two most highly rated proposals--those of G2 and another offeror, hereinafter “Offeror A.” Id. at 2-3; AR, Tab 5, Initial Competitive Range Determination, at 1-5.

The agency’s initial evaluation of these two offerors’ proposals under the non-price factors is summarized in the table below:

Offeror	Technical Approach	Management Approach	Past Performance
G2	Satisfactory Low Risk	Good Low Risk	Excellent Low Risk
Offeror A	Unsatisfactory High Risk	Satisfactory Medium Risk	Satisfactory Medium Risk

AR, Tab 5, Initial Competitive Range Determination, at 1.² As indicated in the table, Offeror A’s proposal received an initial rating of unsatisfactory/high risk under the technical approach factor due to the assessment of several deficiencies. Id. at 4. Despite this initial rating, the agency believed that the deficiencies could be remedied in order to merit a rating of satisfactory or better on all non-price factors. Id.; COS at 3.

² The prices for both offerors were found to be closely aligned with the independent government cost estimate. AR, Tab 5, Initial Competitive Range Determination, at 4.

The agency conducted discussions with G2 and Offeror A beginning in December 2017. AR, Tab 6, SSDD, at 19. Although both proposals improved, Offeror A was not able to remedy all of the deficiencies in its proposal and the overall ratings of Offeror A's proposal did not change. Following discussions, the agency rated the proposals of G2 and Offeror A as follows:

Offeror	Technical Approach	Management Approach	Past Performance
G2	Good Low Risk	Good Low Risk	Excellent Low Risk
Offeror A	Unsatisfactory High Risk	Satisfactory Medium Risk	Satisfactory Medium Risk

Id. at 30. Because Offeror A's proposal was rated as unsatisfactory, the agency concluded that the proposal "cannot form the basis for award." Id. at 33; AR, Tab 12, Revised Competitive Range Determination, at 5 ("In order to receive an IDIQ award under this RFP, an offeror must have cured any deficiencies in its proposal, as the Government cannot issue an award to an offeror that presents an unacceptable risk of unsuccessful contract performance.").

As a result, NIST determined that a single award to G2 was appropriate. AR, Tab 6, SSDD, at 33. Accordingly, on March 16, 2018, the agency awarded the IDIQ contract to G2 and, at the same time, issued three task orders to G2.³ AR, Tab 7, Notice of Award, at 1, 3. On March 19, the agency posted notice of the award on the government-wide point of entry, FedBizOpps.gov. Id. In the same announcement, the agency also posted notice of the orders and their respective dollar amounts.⁴ Id. at 3.

The very next day, on March 20, Delta Risk emailed the agency to inquire whether additional awards would be made. AR, Tab 8, Delta Risk Email, Mar. 20, 2018, 11:31 a.m. Operating under the assumption that Delta Risk was simply a firm seeking information regarding the procurement, not an actual offeror, the contract specialist replied that "[t]he posted award announcement is complete" and directed Delta Risk to section M of the RFP, which provided that the agency reserved the right to make a single award if determined to be in the agency's best interest after evaluating proposals. Id., Agency Email, Mar. 20, 2018, 11:40 a.m. See also, COS at 5.

On March 29, the agency received an agency-level protest from Offeror A, the unsuccessful offeror whose proposal was included in the competitive range. COS at 5. During the pendency of the agency-level protest, NIST stayed performance of the three

³ In the source selection decision, the agency explained that it was issuing the first three task orders based on a current need for the services. AR, Tab 6, SSDD, at 33.

⁴ The dollar values of the first three task orders were \$2,678,271, \$4,448,120.68, and \$3,169,178.40, respectively. AR, Tab 7, Notice of Award, at 3.

task orders awarded to G2. Id. On April 18, the agency denied Offeror A's protest and lifted the stay of performance. Id.

On April 6, 18 days after the public notice of award, Delta Risk emailed the contracting officer "to express [its] disgust and objection to NIST's decision NOT to provide formal notice regarding any award decision to Delta Risk regarding this solicitation." AR, Tab 9, Delta Risk Email, Apr. 6, 2018, 5:20 p.m. Delta Risk requested "that formal notice regarding this award decision be provided to our company and that we be afforded the opportunity to review this notice and determine if we want to request a debrief, per the terms in Section L of this RFP, as well as the additional terms in said section detailing our rights to protest this award decision."⁵ Id.

Upon receipt of Delta Risk's email, the contracting officer and contract specialist searched their email accounts and discovered that Delta Risk had submitted a timely proposal, which the agency inadvertently overlooked and, therefore, failed to evaluate. COS at 6. Accordingly, on April 9, the contracting officer responded to Delta Risk, acknowledging a procurement error--the inadvertent failure to evaluate Delta Risk's proposal. The agency's response explained, in relevant part, as follows:

Upon receipt of your April 6, 2018 email, I researched the issue and found that your company, Delta Risk, LLC, had submitted a timely proposal in response to the subject RFP via email. Unfortunately, my team and I inadvertently failed to see and record the proposal coming through. I assure you that there was no malicious intent involved, and that this was an honest mistake, one that I sincerely apologize for.

AR, Tab 9, Agency Letter to Delta Risk, Apr. 9, 2018. The contracting officer proposed the following corrective action to remedy the error:

[I]n order to ensure that Delta Risk receives the same opportunity as all other offerors did, we will evaluate your proposal, beginning immediately, in accordance with the terms and conditions of the original RFP (as amended prior to its closing date). NIST has every intention of providing Delta Risk, LLC the same opportunity that every other offeror received under this RFP.

The RFP reflects NIST's hope to make multiple awards for this requirement. The fact that a single Indefinite-Delivery, Indefinite-Quantity (IDIQ) award was made originally does not preclude us from issuing another IDIQ contract award if doing so is in the best interest of the Government. Therefore, your company will be afforded the same

⁵ Section L of the RFP set forth the information that the agency would disclose in a debriefing "[i]f a post-award debriefing is given to requesting offerors[.]" RFP at 92.

opportunities that all other offerors received to receive an IDIQ contract award.

I believe that this solution is the best way forward to provide Delta Risk a fair opportunity for award, and to rectify the mistake made by NIST.

Id. After further apologies and reiterating that the mistake was “an honest, human error,” the contracting officer invited Delta Risk to contact the agency if it wished to discuss the matter further. Id.

On April 13, Delta Risk asked the contracting officer whether the agency had stayed performance of the first three task orders awarded to G2 and whether Delta Risk would be eligible for award of these three task orders. AR, Tab 9, Delta Risk Email, Apr. 13, 2018, 3:44 p.m. On April 16, the agency responded, unambiguously, that Delta Risk would not be eligible for the award of the first three task orders. The contracting officer’s response provides, in relevant part, as follows:

The work under the first three task orders awarded to G2 Inc. is currently suspended; however, the suspension is the result of a timely protest and is unrelated to the Delta Risk proposal being evaluated late. . . . Provided a favorable award determination is made concerning Delta Risk’s proposal, Delta Risk would be eligible for any of the remaining five funded task orders included in the RFP, as well as all future task orders under the IDIQ contract.

AR, Tab 9, Agency Email Apr. 16, 2018, 4:04 p.m.

On April 17, Delta Risk emailed the agency asking to discuss “NIST’s refusal to consider Delta Risk for the first three task orders[.]” Protest, Exh. 7, Affidavit of Delta Risk Vice President and General Manager, at ¶ 9. During a subsequent phone call on April 20, Delta Risk again objected to “NIST’s refusal to comply with Delta Risk’s request to suspend G2’s work on the first three task orders pending completion of NIST’s evaluation of the Delta Risk proposal.” Id. at ¶ 10. During this phone call, the agency reiterated that it “would not suspend G2’s performance on the first three task orders[.]” Id. at ¶ 10.

On May 10, the agency completed its evaluation of Delta Risk’s proposal. Delta Risk’s proposal was rated as follows under the non-price factors:

Offeror	Technical Approach	Management Approach	Past Performance
Delta Risk	Unacceptable High Risk	Marginal Medium Risk	Satisfactory High Risk

AR, Tab 12, Revised Competitive Range Determination, at 2. Specifically, under the technical approach factor, Delta Risk’s proposal was assigned 20 deficiencies, 8 significant weaknesses, 16 weaknesses, and 15 strengths, resulting in an overall

rating of unsatisfactory/high risk. AR, Tab 14, Debriefing, at 2. Under the management approach factor, the proposal was assigned 5 significant weaknesses, 3 weaknesses, and 2 strengths, resulting in an overall rating of marginal/medium risk.⁶ Id. at 2, 10. Delta Risk's past performance was rated satisfactory/high risk because the agency found that Delta Risk did not have experience performing work related to four of the eight anticipated task orders and did not have experience managing an IDIQ contract on a scale similar to the one procured here. Id. at 2, 12. The firm's proposed price was the fourth lowest. AR, Tab 12, Revised Competitive Range Determination, at 4. However, the agency determined that, on average, Delta Risk's proposed price for each individual task order was significantly higher than the government's estimate.⁷ Id. at 5.

On May 10, the agency executed a revised competitive range determination. The agency determined that Delta Risk's proposal would not have been included in the competitive range had the proposal been evaluated at the same time as the other proposals. Id. at 4. This was due, in large part, to the high number of deficiencies, significant weaknesses, and weaknesses that were assigned to Delta Risk's proposal across all factors, subfactors, and tasks. Id. In this respect, the agency found that, "without essentially re-writing its entire proposal," it was unreasonable to expect Delta Risk to remedy the multiple problems identified in its proposal in order to improve its overall rating to satisfactory. Id. at 5; COS at 7. Therefore, the agency excluded Delta Risk's proposal from the competitive range.

On May 11, the agency notified Delta Risk via telephone and in writing that its proposal had been excluded from the competitive range. COS at 7; AR, Tab 13, Notice of Exclusion. That same day, Delta Risk timely requested a debriefing. COS at 7. On May 21, the agency conducted an oral debriefing and provided Delta Risk with a 13-page summary of the debriefing "talking points." COS at 7-8; AR, Tab 14, Debriefing. This protest followed on May 25.

⁶ The issues in Delta Risk's proposal were widespread. Under the technical approach factor, there were nine deficiencies identified under both subfactors two and three, and one deficiency identified under both subfactors one and four. AR, Tab 12, Revised Competitive Range Determination, at 4. Under the management approach factor, there were two significant weaknesses identified under both subfactors one and two, and one significant weakness identified under subfactor three. Id.

⁷ Delta Risk does not challenge the agency's evaluation of its past performance or price. Accordingly, we do not address further these aspects of the agency's evaluation.

DISCUSSION

Delta Risk alleges that the agency improperly evaluated its proposal and, as a result, unreasonably excluded its proposal from the competitive range. Delta Risk also challenges the award of the IDIQ contract and the issuance of the first three task orders to G2. In particular, Delta Risk alleges that G2 is affected by an incurable OCI that the agency failed to recognize. The protester's primary complaints in this respect are that: (i) G2 allegedly developed the evaluation criteria for this procurement; (ii) G2's incumbent status gives it unique insight into the agency's operations and requirements; and (iii) an agency program manager, who allegedly oversaw some of G2's performance on the incumbent contract, previously worked for G2. The protester further asserts that G2's proposed price is unbalanced and unreasonable. Delta Risk contends that the agency should terminate G2's contract, exclude G2 from the competition, reevaluate Delta Risk's proposal, and award an IDIQ contract to Delta Risk. For the reasons below, we dismiss the protest in part and deny the protest in part.⁸

As an initial matter, the agency requested partial dismissal of Delta Risk's challenges to the award of the IDIQ contract and task orders to G2 on the basis that those issues are untimely at this juncture. Agency Req. for Dismissal, June 2, 2018, at 3-7. The agency did not seek dismissal of Delta Risk's challenge to the evaluation of its own proposal or the agency's exclusion of its proposal from the competitive range. Id. at 6. On June 6, the intervenor requested summary dismissal of all protest grounds. On June 11, the protester filed a combined response to the requests for dismissal.

On June 28, our Office granted the agency's request for partial dismissal and granted in part and denied in part the intervenor's request for summary dismissal. In our notice, we requested that the agency report address the grounds not dismissed by our Office, specifically (1) any grounds challenging the reasonableness of the agency's evaluation

⁸ Although we do not address all of Delta Risk's arguments, we have fully considered them and conclude that none furnishes a basis upon which to sustain the protest. For example, Delta Risk accuses the agency of providing inconsistent statements regarding whether its proposal was inadvertently deleted, lost, or overlooked. Protest at 5, 27. See also Protesters' Resp. to Req. for Dismissal, June 11, 2018, at 4. It is not obvious to us how such a distinction is relevant. To the extent the protester is implying that the agency's actions were not inadvertent, but rather intentional, Delta Risk has failed to support its allegations of bad faith with convincing proof. As a general matter, government officials are presumed to act in good faith, and a protester's contention that procurement officials were motivated by bad faith must be supported by convincing evidence; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. East West, Inc., B-412719.2 et al., June 21, 2016, 2016 CPD ¶ 170 at 6. Although the record contains evidence of an error on the part of the agency, i.e., the failure to evaluate a timely submitted proposal, there is no convincing proof to support an allegation that the error was intentional or the result of bad faith on the part of the agency.

of Delta Risk's proposal and (2) any grounds challenging the reasonableness of the agency's exclusion of Delta Risk's proposal from the competitive range.

That same day, Delta Risk requested clarification of our notice. Among other things, the protester asked that we clarify the rationale relied upon to support the partial dismissal in order to enable Delta Risk to potentially seek reconsideration of the dismissal. Protester's Req. for Clarification, June 28, 2018, at 1.

On July 2, we informed the protester that there was no requirement to seek reconsideration at that time. In this respect, our Bid Protest Regulations, 4 C.F.R. § 21.14, do not contemplate interlocutory appeals of partial dismissals. Until a final decision has been issued by our Office, there is no requirement for a party to seek reconsideration.

On July 3, the agency filed its agency report, to which the protester and intervenor responded with comments on July 12.

Evaluation of Delta Risk's Proposal

Delta Risk contends that the agency improperly evaluated its proposal, resulting in its improper exclusion from the competitive range. In this respect, Delta Risk argues that the agency committed "numerous errors" when evaluating its proposal and "improperly interpreted and assigned weaknesses, significant weakness, or deficiencies to Delta Risk's proposal, which should have been rated far higher." Protest at 29. The protester argues that, but for these errors, Delta Risk would have been included in the competitive range and selected as an awardee. Id. at 30-31; Comments at 6.

Where a protest challenges an agency's evaluation of an offeror's proposal, and its decision to exclude a proposal from a competitive range, we first review the propriety of the agency's evaluation of the proposal, and then turn to the competitive range determination. Straughan Envtl., Inc., B-411650 et al., Sept. 18, 2015, 2015 CPD ¶ 287 at 5; PTSI Managed Servs. Inc., B-411412, July 20, 2015, 2015 CPD ¶ 236 at 3. Our Office will review an agency's evaluation and exclusion of a proposal from the competitive range for reasonableness and consistency with the solicitation criteria and applicable statutes and regulations. Straughan Envtl., Inc., supra; ABM Gov't Servs., LLC, B-410991.2, Apr. 17, 2015, 2015 CPD ¶ 130 at 4-5. An agency is not required to include a proposal in the competitive range where the proposal is not among the most highly rated proposals. Federal Acquisition Regulation (FAR) § 15.306(c)(1); Straughan Envtl., Inc., supra.

Challenge to Evaluation Under Technical Approach Factor

Although Delta Risk claims that the agency committed "numerous errors" in evaluating its proposal, Delta Risk challenges only two of the 20 deficiencies assigned to its proposal and only one of the 13 significant weaknesses. Protest at 30-31. The three errors alleged by Delta Risk all pertain to the agency's evaluation under the technical

approach factor. Id.; AR, Tab 10, Technical Evaluation, at 6, 14, 20. Delta Risk contends that these three alleged errors are “just a few specific, representative samples of the errors committed when evaluating Delta Risk’s proposal.” Protest at 31.

As an initial matter, our Bid Protest Regulations do not permit a protester to plead or preserve protest issues by means of examples. BillSmart Solutions, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 at 13 n.17; Jacobs Tech., Inc., B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 6. Nor do our Regulations permit a protester to file a protest containing a broad basis of protest with the intent to supply the specific facts and argument in support of that basis of protest at a later time during the protest process. Metasoft, LLC--Recon., B-402800.2, Feb. 17, 2011, 2011 CPD ¶ 47 at 3. To the contrary, our Regulations require a protester to set forth a detailed statement of the legal and factual grounds of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f). This requirement contemplates that the protester will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. Accordingly, to the extent Delta Risk was aware of and wanted to challenge additional deficiencies, significant weaknesses, or weaknesses attributed to its proposal, it was required to identify those in its protest, which it failed to do.⁹ Any attempt to do so in subsequent filings would be untimely. BillSmart Solutions, LLC, supra.

Returning to the two deficiencies and one significant weakness challenged by Delta Risk in its protest, we find that the protester was not prejudiced by any alleged evaluation errors in this regard. Even were Delta Risk to prevail in its arguments, there remain 18 deficiencies, 12 significant weaknesses, and 19 weaknesses that the protester has not challenged. In light of the number of remaining deficiencies, significant weaknesses, and weaknesses, as well as the scope of the identified concerns, we conclude that there is no reasonable possibility that the agency’s decision

⁹ For this same reason, we dismiss Delta Risk’s claim that the alleged OCI adversely affected the evaluation of its proposal. In this regard, Delta Risk claims that the agency “appeared to go out of its way to assign Delta Risk deficiencies when no such deficiencies existed” and that, “[c]learly, the impetus for these ratings was the pervasive OCI affecting the procurement.” Protest at 29-30. Elsewhere, Delta Risk claims that the pervasive OCI “made it impossible for the Agency to fairly evaluate or score Delta Risk’s proposal, and the factor ratings, weaknesses, significant weaknesses, and deficiencies issued by the Agency were meritless and erroneous as applied to Delta Risk’s proposal, and contrary to the terms of the RFP.” Id. at 6. See also Protesters’ Resp. to Req. for Dismissal, June 11, 2018, at 3, 6, 13. Despite such broad claims, Delta Risk fails to specifically identify any deficiencies, significant weaknesses, or weaknesses that were assigned to its proposal as a result of the alleged OCI. See generally, Protest at 6, 27, 29-31, Protester’s Resp. to Req. for Dismissal, June 11, 2018, at 3, 6, 13. Accordingly, we dismiss this ground as legally and factually insufficient. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

to exclude Delta Risk's proposal from the competitive range would be affected by the elimination of two deficiencies and one significant weakness.¹⁰ Competitive prejudice is an essential element of every viable protest; where, as here, the record establishes no reasonable possibility of prejudice, we will not sustain a protest even if a defect in the procurement is found. See Procentrix, Inc., B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12. Accordingly, we deny Delta Risk's challenge to the agency's evaluation of its proposal.

As a final point, we note that the intervenor first raised this argument regarding lack of competitive prejudice in its request for dismissal of the protest, arguing that, due to the number of unchallenged deficiencies, significant weaknesses, and weaknesses, there was a "complete absence of any possibility of competitive prejudice." G2's Req. for Dismissal, June 6, 2018, at 10. At the time, however, the limited record before us demonstrated that the agency had included Offeror A's proposal in the competitive range despite rating the proposal as unsatisfactory under the technical approach factor--the same rating assigned to Delta Risk's proposal. Without information regarding the substantive differences between the two proposals, if any, we could not determine whether Delta Risk suffered any prejudice as a result of the two deficiencies and one significant weakness it challenged. For that reason, we denied the intervenor's request for dismissal of this ground, explaining that, "[a]lthough it appears highly unlikely that a proposal with such a large number of deficiencies, significant weaknesses, and weaknesses would be included in the competitive range, we cannot not reach a final conclusion without reviewing the underlying record[.]" GAO Notice, June 28, 2018, at 2.

Now, having reviewed the full record as it pertains to this issue, we are able to conclude that, notwithstanding the same adjectival rating under the technical approach factor, the agency's assessment of the two proposals was markedly different. The record shows that the overall number of deficiencies identified in the two proposals was significantly different (20 deficiencies for Delta Risk versus 9 deficiencies for Offeror A). AR, Tab 12, Revised Competitive Range Determination, at 6; COS at 7. Furthermore, the deficiencies identified in Delta Risk's proposal spanned all subfactors under the

¹⁰ A key factor in the agency's decision to exclude Delta Risk's proposal from the competitive range was the fact that the deficiencies assigned to the protester's proposal were pervasive, spanning all subfactors under the technical approach factor. The record reflects that, even if the two deficiencies and one significant weakness challenged by Delta Risk were removed, the overall scope of deficiencies assigned to the proposal would remain largely unaltered. In this respect, one of the challenged deficiencies was assigned under subfactor 2 of the technical approach factor. There are eight unchallenged deficiencies remaining under this subfactor. AR, Tab 14, Debriefing, at 3. The other challenged deficiency was assigned under subfactor 3 of the technical approach factor. There are also eight unchallenged deficiencies remaining under this subfactor. Id. at 7. The significant weakness challenged by Delta Risk was assigned under subfactor 4 of the technical approach factor. There remains an unchallenged deficiency under this subfactor. Id. at 9.

technical approach factor, whereas the deficiencies in Offeror A's proposal were limited to two subfactors and generally pertained to one issue, *i.e.*, the lack of qualified key personnel. AR, Tab 12, Revised Competitive Range Determination, at 4, 7; COS at 2-3, 4. In its competitive range determination, the agency concluded that Delta Risk could not improve its proposal rating to satisfactory or better without "essentially re-writing its entire proposal," while Offeror A, in contrast, "stood a reasonable chance of addressing" the deficiencies identified in its proposal during discussions. COS at 3, 7; AR, Tab 12, Revised Competitive Range Determination, at 4, 7. We find the agency's conclusions in this regard to be reasonable.

Competitive Range Determination

Delta Risk does not, for the most part, challenge the substance of the agency's competitive range determination. See generally Comments at 2-4. Rather, as noted above, Delta Risk primarily challenges the underlying evaluation of its proposal, which resulted in its exclusion from the competitive range. However, the protester does raise three procedural challenges to the agency's competitive range determination, which we address below.

First, Delta Risk contends that the very establishment of the competitive range violated the terms of the RFP. Protest at 26. In this regard, Delta Risk alleges that RFP did not call for the establishment of a competitive range, and thus, the agency "used evaluation criteria not permitted by the RFP, which constitutes procurement error." Id. Delta Risk is mistaken. The RFP expressly provided that the agency intended to award without discussions, but reserved the right to initiate discussions if necessary. RFP at 109. The record reflects that, after an initial evaluation, the agency determined that discussions were necessary. COS at 3. The FAR provides that "if discussions are to be conducted, [agencies shall] establish a competitive range." FAR § 15.306(c)(1); Department of Commerce--Req. for Modification, B-283137.7, Feb. 14, 2000, 2000 CPD ¶ 27 at 2 n.1. In this respect, "[e]stablishment of a competitive range is merely a precursor to an agency's decision to hold discussions with a limited number of firms." Earth Resources Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 5 n.4. Accordingly, we deny this ground.

Next, Delta Risk complains that, during the debriefing, the contracting officer was not able to articulate the rationale for the competitive range determination and that "had [the contracting officer] answered Delta Risk's questions in an open and forthcoming [manner] during the course of the debriefing, the parameters of Delta Risk's grounds of protest may have changed significantly."¹¹ Comments at 4. See also Protest at 16;

¹¹ Although we have no transcript of the debriefing itself, the written summary of the debriefing, which was provided to Delta Risk on the day of its debriefing, explained that the "primary deterrents" in excluding Delta Risk's proposal from the competitive range "were the deficiencies identified under each subfactor of" the technical approach factor. AR, Tab 14, Debriefing, at 12. The written summary also explained that "the

(continued...)

Protest, Exh. 7, Affidavit of Delta Risk Vice President and General Manager, ¶ 12. In essence, Delta Risk challenges the adequacy of the debriefing it received from the agency. The adequacy of a debriefing, however, is not an issue that our Office will consider because it is a procedural matter that does not involve the validity of the award itself. InGenesis, Inc., B-412967.3, B-412967.4, Sept. 26, 2017, 2017 CPD ¶ 336 at 3 n.3. Accordingly, we dismiss this ground.

Finally, Delta Risk requests that we disregard the contracting officer's statement of facts submitted during the pendency of the protest because the statement allegedly contradicts information provided to Delta Risk during its debriefing. Comments at 2-4. Specifically, Delta Risk claims that, during the debriefing, the contracting officer was unable to articulate the criteria used to establish the competitive range (or alternatively stated that no criteria were used), and, then, during the pendency of the protest, submitted a statement detailing the quantifiable and measurable criteria used to establish the competitive range. Id. at 2, 3. Delta Risk contends that "the Agency should be estopped from being able to change its story 180 degrees from its debriefing position through the submission of a shifting Agency Report." Id. at 4.

We find no basis to disregard the contracting officer's statement. Our Office generally considers post-protest explanations, such as those presented here, where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. Straughan Env'tl., Inc., supra, at 7 n.5. We find that the explanations in the contracting officer's statement are credible and entirely consistent with the contemporaneous evaluation record. Compare COS at 2-5, 7 with AR, Tab 12, Revised Competitive Range Determination, at 4-7. The protester has failed to present any evidence to call into question the credibility of the post-protest submission aside from the fact that the criteria for the establishment of the competitive range was allegedly not disclosed to Delta Risk's satisfaction during the debriefing.

In sum, we find no basis to sustain either Delta Risk's challenge to the agency's underlying evaluation of Delta Risk's proposal or to the agency's exclusion of its proposal from the competitive range.

Evaluation of G2's Proposal

Delta Risk also challenges the propriety of the award of the IDIQ contract and the issuance of the task orders to G2 on the basis that G2 is affected by an incurable OCI, and that G2's proposed prices are unbalanced and unreasonable. As an initial matter,

(...continued)

Contracting Officer determined that it was not reasonable to expect the Offeror to remedy all of the 20 deficiencies found across all subfactors and a variety of task areas as set forth in the solicitation." Id.

notwithstanding our determination that Delta Risk was properly excluded from the competitive range, the protester remains an interested party to raise those issues that pertain to the eligibility of G2's proposal for award.¹² This is because, as set forth above, G2's proposal was the only proposal determined by the agency to be acceptable after discussions, and thus, if the protester's complaints pertaining to G2's proposal were to be sustained, the agency would have to rescind the award, potentially giving the protester another chance to complete. DOER Marine, B-295087, Dec. 21, 2004, 2004 CPD ¶ 252 at 2 n.2. We nonetheless dismiss Delta Risk's challenges to the evaluation of G2's proposal on other grounds, as detailed below.

Task Orders

First and foremost, we will not consider a challenge to the issuance of the first three task orders because our Office does not have jurisdiction to entertain protests of task orders issued against multiple-award IDIQ contracts that are valued at less than \$10 million, except where the protester alleges that the order increases the scope, period, or maximum value of the contract under which the order is issued. 41 U.S.C. § 4106(f)(1)(B). As set forth above, all three orders at issue here are valued at less than the statutory dollar threshold, and Delta Risk does not allege that the orders increase the scope, period, or maximum value of the contract under which they were issued. Because Delta Risk's challenge does not fit within the statutory exceptions, we dismiss the challenge.

Allegations of OCI

As noted above, Delta Risk alleges that the award of the IDIQ contract to G2 was improper due to that firm's alleged OCI. We dismiss this ground as untimely raised. The record shows that Delta Risk was on notice no later than April 20 (and likely earlier) that the scope of the agency's corrective action did not encompass any aspect of the award to G2. Rather, the agency advised that its corrective action would consist of an evaluation of Delta Risk's proposal and a potential additional IDIQ award to Delta Risk with the possibility of competing for future task orders--all while leaving G2's IDIQ contract and task orders in place. If Delta Risk had concerns regarding the scope of the agency's corrective action on the basis that G2 possessed an incurable OCI, Delta Risk should have raised that issue to the agency within 10 days of when the agency announced the scope of its corrective action. Instead, because the protester did not challenge the scope of the agency's corrective action until May 25--more than a month later--the protester's challenge is untimely.

¹² Delta Risk would not be an interested party to maintain any other challenge to the evaluation of G2's proposal or the award decision. See Priority One Servs., Inc., B-415201.2, B-415201.3, Apr. 13, 2018, 2018 CPD ¶ 182 at 4.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. W K Eng'g. Int'l, Inc., B-414932, Oct. 13, 2017, 2017 CPD ¶ 316 at 6. Pursuant to these rules, a protest based on alleged solicitation improprieties that are apparent prior to the deadline for submitting proposals must be filed before that deadline. 4 C.F.R. § 21.2(a)(1). A protest allegation that challenges the ground rules that the agency has announced for performing corrective action and recompetition is analogous to a challenge to the terms of the solicitation and must be filed prior to the deadline for submitting revised proposals. Veterans Evaluation Servs., Inc. et al., B-412940.26 et al., Jan. 5, 2017, 2017 CPD ¶ 17 at 11; Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7. Where, as here, no further submissions are anticipated, such challenges must be raised within 10 days of when the scope of the agency's corrective action was known or should have been known. 4 C.F.R. § 21.2(a)(1). The record shows that Delta Risk's arguments concerning the scope of the agency's corrective action are based on information that was known or should have been known to the protester no later than April 20.

On April 9, after discovering that it had inadvertently failed to evaluate Delta Risk's proposal, the agency promptly announced corrective action in the form of evaluating Delta Risk's proposal. AR, Tab 9, Agency Letter to Delta Risk, Apr. 9, 2018. In its notice, the agency did not propose to cancel the IDIQ awarded to G2. See id. To the contrary, the agency informed Delta Risk that, if the evaluation was favorable, the agency would award Delta Risk an IDIQ contract in addition to the one already awarded to G2, and would provide Delta Risk the opportunity to compete for future task orders, but not the three initial task orders already awarded to G2. Id. (NIST "hope[s] to make multiple awards for this requirement.") (emphasis added); id. ("The fact that a single Indefinite-Delivery, Indefinite-Quantity (IDIQ) award was made originally does not preclude us from issuing another IDIQ contract award if doing so is in the best interest of the Government.") (emphasis added). Thus, the scope of the agency's proposed corrective action did not include any action with respect to G2's award.

Moreover, on April 16, the agency unambiguously reiterated that it was not canceling the award to G2 or rescinding the issuance of the first three task orders to G2. In this respect, the agency represented to Delta Risk that Delta Risk would not be eligible for the award of the first three task orders. AR, Tab 9, Agency Email Apr. 16, 2018, 4:04 p.m. ("Provided a favorable award determination is made concerning Delta Risk's proposal, Delta Risk would be eligible for any of the remaining five funded task orders included in the RFP, as well as all future task orders under the IDIQ contract.") (emphasis added). On April 20, the agency told Delta Risk a third time that the agency "would not suspend G2's performance on the first three task orders[.]" Protest, Exh. 7, Affidavit of Delta Risk VP/GM, at ¶ 10. Despite these statements from the agency, Delta Risk failed to challenge these aspects of the corrective action.¹³

¹³ Delta Risk does not characterize any of its correspondence with the agency as an agency-level protest. Protester's Resp. to Req. for Dismissal, June 11, 2018, at 7 ("[N]othing about Delta Risk's emails . . . constituted an agency bid protest."). The

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Accordingly, on this record, we conclude that Delta Risk knew or should have known no later than April 20 (and likely earlier) that the scope of the agency's corrective action did not encompass any aspect of the award to G2, thus providing the basis for protest prior to its exclusion. Delta Risk did not protest the scope of the agency's action until May 25, more than a month later. For this reason, we conclude that Delta Risk's objection to the scope of the agency's corrective action, namely the agency's decision not to terminate the award to G2, is untimely.

Delta Risk argues that the debriefing exception to our timeliness rules should apply here. This exception, set forth in 4 C.F.R. § 21.2(a)(2), provides that, where a requested and required debriefing is provided, an initial protest may not be filed before the offered debriefing date and must be filed no later than 10 days after the date on which the debriefing is held. Delta Risk claims that we should consider its challenge to the agency's corrective action to be timely raised because it was raised within 10 days of Delta Risk's required debriefing.¹⁴ Protesters' Resp. to Req. for Dismissal, June 11, 2018, at 4-6. We disagree. Our decisions are clear that the debriefing exception does not toll the deadline to protest the scope of an agency's corrective action.

As previously explained, an objection to the scope of an agency's corrective action is analogous to a challenge to the terms of the solicitation and must be filed within the time limitations set forth in 4 C.F.R. § 21.2(a)(1). Veterans Evaluation Servs., Inc., *supra*; Domain Name Alliance Registry, *supra*. The debriefing exception as set forth in our Bid Protest Regulations specifically states that it does not apply to any protest basis that "involve[s] an alleged solicitation impropriety covered by [4 C.F.R. § 21.2(a)(1)]." 4 C.F.R. § 21.2(a)(2); Impact Res., Inc., B-416093, June 11, 2018, 2018 CPD ¶ 207 at 6. Accordingly, this debriefing exception is not applicable here.

In other words, a required debriefing does not provide a basis for reviving an otherwise untimely challenge to the scope of an agency's corrective action or any other aspect of the agency's evaluation that was not subsequently affected by the agency's corrective action. See Loyal Source Gov't Servs., LLC, B-407791.5, Apr. 9, 2014, 2014 CPD ¶ 127 at 6-7; see also Protect the Force, Inc.--Recon., B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306 at 4-5; Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7. The protester's challenge to the scope of the agency's

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protester claims that its emails of April 6 and 13 were "nothing more than" requests of information and/or clarification. *Id.* at 4, 7, 8 (citing AR, Tab 9, Delta Risk Email, Apr. 6, 2018, 5:20 p.m.; Tab 9, Delta Risk Email, Apr. 13, 2018, 3:44 p.m.). Thus, by its own admission, Delta Risk did not file a protest challenging the agency's corrective action until May 25.

¹⁴ Delta Risk does not claim to have first learned of the alleged OCI during the debriefing. See Protester's Resp. to Req. for Dismissal, June 11, 2018, at 9.

corrective action and, by extension, the protester's challenge to the award of the IDIQ contract to G2 are dismissed as untimely.

Other Challenges to the Scope of the Corrective Action

For the foregoing reasons, we also dismiss as untimely other aspects of the protest challenging the scope of the agency's corrective action. For instance, much of the protester's frustration appears to center on the agency's refusal to voluntarily stay performance of the first three task orders during the implementation of the agency's corrective action. See e.g., Protest at 28 ("G2 was allowed to start performance of those task orders . . . , which was contrary to what NIST had promised to do."); id. at 2. However, as noted above, the agency unambiguously informed Delta Risk on more than one occasion--but no later than April 20--that it did not intend to voluntarily stay performance of G2's award while it evaluated Delta Risk's proposal. Accordingly, Delta Risk's challenge to this aspect of the agency's corrective action is untimely raised.¹⁵ 4 C.F.R. § 21.1(a)(1).

Likewise, Delta Risk's challenge to the agency's delayed evaluation of Delta Risk's proposal is dismissed as untimely. In this respect, Delta Risk contends that the agency violated the terms of the RFP when it evaluated Delta Risk's proposal 12 months after the agency evaluated the proposals of the other offerors. Protest at 13, 27-29. The protester claims that "[t]he RFP did not allow the Agency to evaluate proposals at different times or to conduct the tradeoff analysis at different times."¹⁶ Id. at 13. Rather, "[a]ll proposals were to be evaluated as one collective whole." Id. at 13, 28.

As an initial matter, it is not evident to us what Delta Risk believes the agency should have done upon discovering that it had inadvertently overlooked a timely submitted proposal. As Delta Risk concedes, the agency "cannot undo the fact that it failed to evaluate Delta Risk's proposal when it should have[.]" Protest at 29. In any event, on April 9, the agency informed Delta Risk that, to correct its mistake, the agency would evaluate Delta Risk's proposal "to ensure that Delta Risk receive[d] the same

¹⁵ To the extent Delta Risk is alleging that, after the filing of its protest before our Office, the agency failed to adhere to the statutory stay requirement set forth in the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(3), (d)(4)(A), see Protester's Resp. to Req. for Dismissal, June 11, 2018, at 2, we dismiss this ground because an agency's failure to adhere to the statutory stay requirement is not a valid basis of protest. 4 C.F.R. § 21.6; GovSmart, Inc.--Protest and Costs, B-415871.3, B-415871.4, Apr. 19, 2018, 2018 CPD ¶ 146 at 5.

¹⁶ Delta Risk relies upon two provisions in section M of the RFP: (1) "Upon receipt of proposals, the Contracting Officer will review them to determine if each Offeror followed all of the proposal preparation/submission instructions in this solicitation;" and (2) "The Government will utilize a best value trade-off method when evaluating proposals." Protest at 13 (citing RFP at 109) (emphasis in original).

opportunity as all other offerors did[.]” Tab 9, Agency Letter to Delta Risk, Apr. 9, 2018. To the extent Delta Risk objected to the delayed evaluation of its proposal, it should have raised that objection to the agency within 10 days of the agency’s notice of corrective action, which it did not do. Accordingly, we dismiss this challenge to the scope of the agency’s corrective action as untimely raised. 4 C.F.R. § 21.2(a)(1).

G2’s Pricing

Delta Risk also alleges that G2 submitted “unbalanced” and “unreasonable” pricing for task orders 5 and 6.¹⁷ Protest at 31. Delta Risk fails, however, to make the threshold showing required to prevail on these allegations. Accordingly, we dismiss these allegations for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Delta Risk’s only basis for alleging that the pricing is “unbalanced” is that, for two task orders, G2’s price was lower than Delta Risk’s price. *Id.* at 32, 34. See also Protester’s Resp. to Req. for Dismissal, June 11, 2018, at 12. To prevail on an allegation of unbalanced pricing, a protester must show that one or more prices in the allegedly unbalanced proposal are overstated; it is insufficient for a protester to show simply that some line item prices in the proposal are understated. DynCorp Int’l LLC; AAR Supply Chain, Inc., B-415873 et al., Apr. 12, 2018, 2018 CPD ¶ 157 at 6 n.7; Marine Terminals Corp.--East, Inc., B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 11. Although both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices, because low prices (even below cost prices) are not improper and do not themselves establish, or create the risk inherent in, unbalanced pricing. American Access, Inc., B-414137, B-414137.2, Feb. 28, 2017, 2017 CPD ¶ 78 at 5; Crown Point Sys., B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 5. Here, Delta Risk fails to make the threshold showing required to prevail on this allegation, namely that one or more of G2’s prices was overstated. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); DynCorp Int’l LLC; AAR Supply Chain, Inc., supra.

Delta Risk’s allegation that G2’s pricing was “unreasonable” appears to be an allegation that the pricing was unrealistically low, in essence a challenge to the realism of G2’s price. Protest at 32, 33 (alleging that it is “infeasible” for G2 to perform the contract requirements at the prices proposed). In fact, Delta Risk itself refers to G2’s pricing as “unrealistic.” *Id.* at 6. The RFP, however, did not provide for a price realism evaluation, see RFP at 112, nor does Delta Risk allege that one was required. Absent a solicitation

¹⁷ To be clear, Delta Risk is not challenging the issuance of task orders nos. 5 and 6 as these task orders have not been issued. Rather, Delta Risk alleges that the agency should have rejected G2’s proposal for the award of the IDIQ contract on the basis of the allegedly unbalanced and unreasonable pricing in these task orders. See RFP at 112-113 (providing that the agency would evaluate offerors’ proposed prices for the first eight task orders in awarding the IDIQ contract).

provision providing for a price realism evaluation, agencies are neither required, nor permitted to conduct one in awarding a fixed-price or labor hours contract. See Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 4; PricewaterhouseCoopers LLP; IBM U.S. Fed., B-409885 et al., Sept. 5, 2014, 2014 CPD ¶ 289 at 16 n.13; IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 at 17. Moreover, absent a price realism provision, there is nothing objectionable in an offeror's proposal of low, or even below-cost, prices. Ultimate Concrete, L.L.C., B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 15. For these reasons, we conclude that Delta Risk has failed to make the threshold showing required to prevail on this allegation, namely that the solicitation required a price realism analysis. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

The protester is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel