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## Decision

**Matter of:** The Mission Essential Group, LLC

**File:** B-421504.4; B-421504.5

**Date:** November 29, 2023

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### DIGEST

1. Protest that the awardee had disqualifying organizational conflicts of interest is denied where the agency waived the alleged conflicts and the waiver was consistent with the requirements of the Federal Acquisition Regulation.
  2. Protest challenging the agency's failure to amend the solicitation to incorporate a limitation of future contracting clause is denied where the protester did not establish that it was competitively prejudiced by the agency's actions.
  3. Protest alleging inadequate and unequal discussions is dismissed as an untimely challenge to the terms of the solicitation where the solicitation stated that the agency had the discretion to conduct discussions and request proposal revisions from only one offeror, and the protester failed to timely challenge these terms by the closing date.
  4. Protest challenging the agency's evaluation of proposals under technical factor is denied where the evaluation was reasonable and consistent with the terms of the solicitation and the protester could not establish that it was competitively prejudiced by the agency's evaluation errors.
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### DECISION

The Mission Essential Group, LLC, of New Albany, Ohio, protests the issuance of a task order to Edge Analytic Solutions, LLC, a joint venture of McLean, Virginia, under an unnumbered task order proposal request (TOPR), issued by the Defense Intelligence Agency (DIA) for non-personal services to support the U.S. Space Command (USSPACECOM) with the establishment and execution of intelligence missions, functions, and operations. In challenging the agency's source selection decision, Mission Essential contends, among other things, that the evaluation of proposals was unreasonable and that the agency failed to reasonably consider Edge Analytic's impaired objectivity organizational conflict of interest (OCI).

We deny the protest.

## BACKGROUND

On October 21, 2022, the agency issued the solicitation to all holders of DIA's Solutions for Intelligence Analysis Three multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. Agency Report (AR), Tab 7, TOPR at 1.<sup>1</sup> The "SPACECOM Personnel for Analysis Contributing to Excellence II [SPACE II]" TORP sought proposals to provide non-personal services supporting USSPACECOM<sup>2</sup> with the establishment and execution of intelligence missions, functions, and operations. *Id.* at 1, 38. The solicitation contemplated the award of a single labor-hour task order for a 1-year base period and four 1-year option periods. *Id.* at 1, 82.

The TOPR provided for award to the highest technically evaluated proposal with a fair and reasonable price, considering price reasonableness and a single non-price technical factor. *Id.* at 9. The TOPR advised offerors that the agency would make its award decision using a two-step evaluation process. First, the agency would evaluate offerors' technical proposals to determine the extent to which they demonstrated sound technical and management approaches. *Id.* at 9-10. Second, the agency would evaluate the price proposal of only the highest technically evaluated proposal. *Id.* at 6.

The TOPR specified that offerors would provide technical proposals via an oral presentation. *Id.* The oral presentations were to consist of (1) responses to the same three questions posed to all offerors, "covering program and technical management

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<sup>1</sup> The agency amended the solicitation once. See TOPR at 1. Unless otherwise noted, citations to the TOPR are to the amended solicitation. Also, the solicitation provided by the agency in its report contains several separately paginated sections and attachments, resulting in multiple page numbers within the document. For clarity, citations are to the consecutive numbered pages in the Adobe PDF document.

<sup>2</sup> USSPACECOM, the eleventh unified combatant command within the Department of Defense, performs various missions and functions related to military operations and capabilities in space. TOPR at 38. The TOPR notes that this includes satellite communications as well as military intelligence surveillance and reconnaissance. *Id.*

focus areas” provided by the agency ahead of time, and (2) a scenario provided by the agency to the offeror at the time of the oral presentation. *Id.* at 7, 9. Through their responses to the questions and scenario, offerors were to demonstrate their proposed technical and management approaches to performing the task order. *Id.* at 9-10.

When evaluating offerors’ oral presentations under the technical factor, the TOPR required the agency to assess the strengths, weaknesses, adequacy, deficiencies, and risks presented by each presentation. *Id.* at 10. Under this factor, the agency was to assign each proposal an adjectival rating based on a “consideration of risk in conjunction with the strengths, weaknesses, uncertainties, and deficiencies” assessed to the proposal.<sup>3</sup> *Id.* If, after the evaluation of all technical proposals, two or more offerors received the same highest technical/risk rating, the agency was to then “consider the comparative significant strengths and strengths, as well as any weaknesses or significant weaknesses as well as risks, to determine which Offeror provided the highest technically evaluated proposal.” *Id.*

With regards to organizational conflicts of interests, paragraph 20 of the TOPR directed offerors to include in their price proposals, either:

A statement certifying that, to the best of its knowledge, it is not aware of any facts which create any actual or potential organizational conflicts of interest relating to the award of this contract, or

A statement that describes concisely all relevant facts concerning any past, present, or planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed under the proposed contract and bearing on whether the Offeror has a possible organizational conflict of interest.

*Id.* at 17. The TOPR provided that the agency may require “further relevant information” from the offerors regarding any potential OCIs. *Id.*

Relevant here, the solicitation advised that this procurement was issued pursuant to section 16.505 of the FAR, and that “the policies and procedures of FAR [subpart] 15.3 and DFARS [(Defense Federal Acquisition Regulation Supplement) subpart] 215.3 do not apply to this TOPR.”<sup>4</sup> *Id.* at 1. The TOPR also expressly provided that the agency could “conduct communications with one or only some Offerors.” *Id.* at 15.

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<sup>3</sup> The available ratings for the technical/risk evaluation of proposals were: outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 11.

<sup>4</sup> Subpart 215.3 of the DFARS, as well as FAR subpart 15.3, contain provisions which govern exchanges with offerors after the receipt of proposals. See FAR 15.206, DFARS 215.306.

Between November 7 and November 9, 2022, five offerors conducted oral presentations in response to the TOPR, including Mission Essential and Edge Analytic. AR, Tab 14, Initial Step 1 Selection Decision Document (SDD) at 1. The agency evaluated both Mission Essential and Edge Analytic's proposals as outstanding under the technical factor. *Id.* at 3. The source selection authority (SSA) compared the assessed significant strengths and strengths of the two offerors' proposals based on their oral presentations and ultimately concluded that Edge Analytic's technical proposal was superior to Mission Essential's and was therefore the highest technically evaluated. *Id.* at 11-14. The SSA subsequently determined that Edge Analytic's proposed price of \$470,301,440 was fair and reasonable and selected Edge Analytic for the issuance of the task order. AR, Tab 15, Step 2 SDD at 3.

On March 6, 2023, Mission Essential filed a protest with our Office asserting, among other grounds, that the agency had failed to reasonably consider a potential "impaired objectivity OCI" related to Edge Analytic's joint venture member Metis and Metis's affiliate, Amentum. Protest, B-421504, Mar. 6, 2023; Comments & Supp. Protest, B-421504.2, May 1, 2023. On May 31, after a thorough review of the record, the GAO attorney assigned to the protest conducted a conference call with the parties to provide outcome prediction alternative dispute resolution. During the call, the GAO attorney notified the parties that it appeared the agency had not adequately considered whether Edge Analytic had an impaired objectivity organizational conflict of interest, that Edge Analytic had not submitted the OCI statement required by paragraph 20 of the TOPR, and that certain aspects of the agency's technical evaluation were not supported by the record. Thereafter, the agency notified our Office that it intended to take corrective action by, at a minimum, reevaluating proposals and making a new source selection decision. We subsequently dismissed Mission Essential's protest as academic based on the agency's pending corrective action. *The Mission Essential Group, LLC*, B-421504, B-421504.2, June 6, 2023 (unpublished decision).

On June 29, the contracting officer sent a letter to Edge Analytic to gather information as part of the agency's inquiry into the potential OCI it may have in relation to the procurement. AR, Tab 18, June 29 DIA Letter to Edge Analytic. The contracting officer notified Edge Analytic of the potential impaired objectivity organizational OCI that had been identified, requested a response to several items related to the potential OCI, and allowed Edge Analytic to submit the OCI statement required by paragraph 20 of the TOPR. *Id.* Edge Analytic's response to the letter was due to the agency on July 10. *Id.* at 3. In its response, Edge Analytic proposed a mitigation plan to address the potential impaired objectivity OCI that included using firewalled subcontractor personnel. AR, Tab 20, Edge Analytic OCI Response.

On August 10, the contracting officer informed Mission Essential that it was reaffirming its decision to issue the task order to Edge Analytic. AR, Tab 26, Letter to Mission Essential Affirming Source Selection. The contracting officer explained that the agency had completed its OCI review and concluded that the "only viable solution to avoid, neutralize, or mitigate a significant potential impaired objectivity OCI in this case" was to modify the issued task order to insert a limitation of future contracting clause. *Id.* at 2.

The contracting officer also explained that the reevaluation of proposals did not change the outcome of the agency's source selection decision. *Id.* at 5. On August 21, Mission Essential filed the instant protest with our Office.<sup>5</sup>

## DISCUSSION

The protester challenges various aspects of the procurement, including the agency's consideration of potential OCIs, the agency's failure to amend the solicitation in the face of a material change in requirements, the conduct of discussions, and the evaluation of proposals. The protester also raises other, collateral arguments. While our decision does not specifically address every argument, we have reviewed all the arguments and conclude that none provides a basis to sustain the protest. We discuss several representative challenges below.

### Organizational Conflicts of Interest

Mission Essential primarily argues that the agency did not properly investigate or mitigate Edge Analytic's impaired objectivity OCI. The FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. *Strategic Mgmt Sols., LLC*, B-416598.3, B-416598.4, Dec. 17, 2019, 2019 CPD ¶ 426 at 5. As relevant here, an impaired objectivity OCI arises where a firm's ability to render impartial advice to the government in connection with an evaluation of its own products or services, or those of a competitor, is impaired because of the firm's competing interests. FAR 9.505-3; *Serco, Inc.*, B 404033, et al., Dec. 27, 2010, 2010 CPD ¶ 302 at 2. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by the firm's competing interests. *PURVIS Sys., Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

The protester contends that Edge Analytics has an impaired objectivity OCI stemming from the TOPR requirement for the awardee "to conduct and provide to the government multiple analyses that could affect decisions by the Agency regarding the use and procurement of space intelligence technology." Protest at 18. According to Mission Essential, this poses an impaired objectivity OCI for the awardee because an affiliate of Edge Analytic, Amentum Services, Inc., is "an active contractor for multiple elements of the U.S. space defense enterprise, including the Army's Program Executive Office for

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<sup>5</sup> Because the value of the task order issued here is in excess of \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

Missiles & Space, the U.S. Space Force, and USSPACECOM.”<sup>6</sup> *Id.* The protester argues that Edge Analytic cannot objectively perform certain tasks required by the task order because of the current business interest of its affiliates that are providing intelligence gathering technologies and services. Protest at 20. The protester also contends that the limitation on future contracting clause inserted by the agency is insufficient to address the potential OCI because, among other things, the clause is not a specific response to the issues presented by the potential OCI, and the clause improperly limits the focus for mitigating impaired objectivity OCIs to future contracts at the expense of existing conflicts. Protest at 32-33.

On September 15--after the protest was filed--DIA’s head of contracting activity (HCA) executed an OCI waiver, pursuant to the authority of FAR section 9.503.<sup>7</sup> First, the waiver identifies the various OCI allegations raised by Mission Essential’s protests, addressing each respective allegation. AR, Tab 24, OCI Waiver at 1-5. Next, the waiver describes the contracting officer’s OCI investigation, analysis, and conclusions. *Id.* at 1-6. Finally, under the heading “Waiver,” the HCA concludes:

I concur in the analysis of the Contracting Officer and hereby waive the general rules and procedures of FAR subpart 9.5 as they relate to impaired objectivity OCIs because the application thereof to the SPACE II TO clearly would not be in the Government's interest.

*Id.* at 6.

In its supplemental protest, the protester challenges the sufficiency of the agency’s OCI waiver, arguing that the waiver fails to set forth the extent of the potential conflicts as required by FAR section 9.503. Comments & Supp. Protest at 5. In this regard, the protester argues that DIA unreasonably limited the scope of its OCI investigation and waiver to current and future contracts issued by DIA, while the protester alleges to have identified potential conflicts arising from other space-based programs and agencies that Edge Analytic and its affiliates support. *Id.* at 6.

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<sup>6</sup> Edge Analytic Solutions, LLC identifies itself as a joint venture between Prescient Edge Corporation and Metis Solutions, LLC. AR, Tab 20, Edge Analytic Response to OCI Inquiry at 2. Edge Analytic states that Metis is a wholly owned subsidiary of Amentum Services, Inc. *Id.*

<sup>7</sup> With regards to waiver of OCIs, the FAR provides:

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government’s interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

FAR 9.503.

The FAR provides that, as an alternative to an agency's obligation to avoid, neutralize, or mitigate potential significant conflicts of interest, an agency "may waive any general rule or procedure of [subpart 9.5] by determining that its application in a particular situation would not be in the Government's interest." FAR 9.503. While our Office will review an agency's execution of an OCI waiver, our review is limited to consideration of whether the waiver complies with the requirements of FAR 9.503; that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency. *Perspecta Enter. Solutions, LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 10; *Dell Servs. Fed. Gov't, Inc.*, B-414461.6, Oct. 12, 2018, 2018 CPD ¶ 374 at 6.

Here, as noted above, the waiver: (1) is in writing; (2) is executed by the HCA for DIA; and (3) identifies the OCI allegations raised in Mission Essential's protest. AR, Tab 24, OCI Waiver. Further the record shows that, contrary to the protester's assertions, the agency contracting officials did consider the potential for conflicts beyond those stemming from current and future contracts with DIA. For example, the waiver identifies the following allegation by Mission Essential: "The SPACE II contractor will provide advice and guidance to the Agency in all phases of its space operations, including providing input into assessments of current technology (as emphasized in the original)." *Id.* at 2 (quoting Protest at 21). In response to this allegation, the waiver explains that DIA does not conduct space operations of its own, but rather "relies on the supporting space operations of other [DOD (Department of Defense)] components such as the US Air Force and US Space Force, when necessary." *Id.* The waiver, however, clarifies that DIA's intelligence activities--presumably also including those under this task order--have "no influence" over how other DOD agencies conduct their space operations.<sup>8</sup> *Id.* Further, the waiver plainly rejects, as speculative, any allegation that the work under this task order could provide Edge Analytic the power to broadly "recommend expansion and establishment of new counterspace or other collection activities that rely more heavily on technologies or services" provided by their affiliates. *Id.* at 4.

Finally, while the OCI investigation concluded that no current impaired objectivity OCIs exist from contracts between Edge Analytics or its affiliates and DIA, the waiver acknowledges that other potential OCI risks may still exist, observing that, given "the nature of defense and intelligence analytics," any firm that provides such services could offer a related supporting technology. *Id.* at 6. Notwithstanding the risks of potential OCIs, the waiver determined that "the benefit of avoiding **all** OCI risk by not awarding to [Edge Analytics] (or [Mission Essential] as well) is miniscule in comparison to the serious damage that would be caused by materially reducing competition." *Id.* Although Mission Essential clearly disagrees with the depth of analysis and the agency's conclusions regarding the potential impaired objectivity OCI's due to products and services provided to other agencies, an agency need not concede that a protester's

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<sup>8</sup> The waiver also reiterates that "DIA has no contract with any affiliate of [Edge Analytics] that might be related to any of the SPACE II TO intelligence analytics." AR, Tab 24, OCI Waiver at 3.

allegations are correct as a condition to executing a valid waiver. *CACI, Inc.-Federal; General Dynamics One Source, LLC, B-413860.4 et al.*, Jan. 5, 2018, 2018 CPD ¶ 17 at 14 n.9.

Based on our review of the record, we conclude that DIA waived application of FAR subpart 9.5 with regard to all the conflicts identified by the protester, as authorized by section 9.503. The waiver complies with the requirements of the FAR, including the requirement to set forth the extent of potential conflicts. In light of DIA's execution of a valid OCI waiver, we find no basis to sustain Mission Essential's protest in this respect.

#### Limitation of Future Contracting Clause

The protester next contends that the agency improperly modified Edge Analytic's task order to include a limitation on future contracting clause without amending the TOPR. Protest at 34-36; Comments & Supp. Protest at 22-27. In this regard, the protester argues that the agency was required to amend the solicitation to account for this restriction on future contracting and obtain revised proposals.<sup>9</sup> *Id.* The agency responds that Mission Essential has failed to demonstrate that it was prejudiced by the modification of the issued task order. Memorandum of Law (MOL) at 11-14. In this regard, the agency argues that Mission Essential fails to explain how it would have made its proposal stronger in response to the new limitation on future contracting clause, and notes that Edge Analytic agreed to the modified task order without making any changes to its technical proposal or price. *Id.*

Where an agency's requirements change in a material way after a solicitation has been issued, the agency must generally issue an amendment and afford all offerors an opportunity to compete for its changed requirements. *Lumen Techs. Gov't Sols., Inc.*,

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<sup>9</sup> The protester also argues that DIA was required to amend the solicitation based on section 9.507-2 of the FAR, which states:

If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint.

FAR 9.507-2. The agency, however, waived the application of this provision for this procurement, which is intended to address potential impaired objectivity OCIs. Section 9.503 of the FAR allows agencies to "waive any general rule or procedure of" FAR subpart 9.5. As discussed above, the agency executed a broad waiver of "the general rules and procedures of FAR subpart 9.5 as they relate to impaired objectivity OCIs." AR, Tab 24, OCI Waiver at 6. Again, because the purpose of the limitation of future contracting clause at issue is to address potential impaired objectivity OCIs, OCIs which the agency has waived for this procurement along with the related rules of subpart 9.5, it necessarily follows that the agency also waived the application of FAR section 9.507-2.



B-420945 *et al.*, Nov. 16, 2022, 2022 CPD ¶ 301 at 11-12 (*citing Qwest Gov't Servs., Inc. d/b/a CenturyLink QGS*, B-419597, B-419597.2, May 24, 2021, 2021 CPD ¶ 217 at 10; *see also* FAR 15.206(a)).<sup>10</sup> However, our Office will not sustain a protest of an agency's failure to modify a solicitation to incorporate a material change in solicitation requirements unless the protester demonstrates a reasonable possibility of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *See Triad Logistics Servs. Corp.*, B-406416, Mar. 19, 2012, 2012 CPD ¶ 118 at 3.

The protester argues it was prejudiced by the agency's actions here because "a future contracting prohibition clause could have an impact upon the makeup of the price, technical approach and performing team of the offerors." Comments & Supp. Protest at 26. Mission Essential maintains that the agency "imposed this clause on the awarded task order with no idea of how the revision" would impact the performance of Mission Essential or Edge Analytic. *Id.*

We find the protester's claims of competitive prejudice unpersuasive. In this regard, the protester has offered no evidence to establish that the agency's limitation on future contracting clause modified the task order's performance requirements in any way. Further, we see nothing in the record that demonstrates that Edge Analytic modified its proposal in response to the new clause.<sup>11</sup> Competitive prejudice is an essential

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<sup>10</sup> Section 15.206 of the FAR requires that, "[w]hen, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation." FAR 15.206(a). The regulations governing task and delivery order competitions under FAR part 16 do not specify whether the requirements of FAR section 15.206 apply. *See* FAR 16.505. However, for task order competitions exceeding \$6 million--such as the one here--the FAR requires the agency to provide all IDIQ contract holders the fair opportunity to be considered for each order, which includes a "notice of the task or delivery order that includes a clear statement of the agency's requirements." FAR 16.505(b)(iv)(A). As such, our Office has considered challenges to whether an agency should have amended a solicitation after a change in the agency's requirements in task and delivery order competitions. *See Qwest Gov't Servs., Inc. d/b/a CenturyLink QGS, supra.*

<sup>11</sup> The protester maintains that the agency's reliance on Edge Analytic's agreement to the clause without changes to its proposal is unreasonable because, during the corrective action OCI exchanges with the agency, Edge Analytic proposed a mitigation plan that included changes to its technical and pricing approach. Comments & Supp. Protest at 26 (*citing* AR, Tab 20, Edge Analytic Response to OCI Letter at 6). The record demonstrates, however, that the awardee's proposed mitigation plan was provided to the agency on July 10, a month before the agency notified offerors it was inserting the limitation on future contracting clause into the task order on August 10. *Compare* AR, Tab 20, Edge Analytic Response to OCI Letter at 5-6, *with* AR, Tab 25, Letter to Edge Analytic Affirming Source Selection at 2. The protester has not explained how a rejected mitigation plan sent to the agency a month before the insertion of the

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element of every viable protest; our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Trident Vantage Sys., LLC; SKER-SGT Eng'g & Sci., LLC*, B-415944 *et al.*, May 1, 2018, 2018 CPD ¶ 166 at 22. Here, Mission Essential has not asserted in any detail how it would have modified its proposal such that it would have overcome or matched the awardee's evaluated advantages.<sup>12</sup> In sum, because the protester has offered no basis on which we could conclude that it was competitively prejudiced by the agency's action here, we have no basis to sustain this allegation.

#### Exchanges with Offerors

Mission Essential next alleges that the agency engaged in unequal or inadequate discussions. Mission Essential contends that during corrective action, the agency allowed Edge Analytic to revise its proposal by inserting a missing OCI certification statement and incorporating a new mitigation plan. Comments & Supp. Protest at 16-22. The protester argues that the agency failed to provide Mission Essential with an equal opportunity to revise its proposal, and that had the agency done so, "Mission Essential would have submitted the highest rated proposal." *Id.* at 22. Mission Essential separately contends that several post-award communications between DIA and Edge Analytic regarding the awardee's corporate structure constitute unequal discussions because the agency allowed Edge Analytic to revise its proposal without allowing revisions from Mission Essential. Supp. Comments at 24-30.<sup>13</sup>

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limitation of future contracting clause is somehow evidence of proposal changes in response to clause's insertion.

<sup>12</sup> Mission Essential argues that the insertion of the limitation of future contracting clause could result in a subcontractor withdrawing from the competition. Protest at 36 (*citing Planning Research Corp. v. United States*, 4 Cl. Ct. 283 (1983)); Comments & Supp. Protest at 26. The protester, however, does not explain how such a possibility would allow Mission Essential to submit an improved or more competitive technical proposal.

<sup>13</sup> Where an agency holds exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, we have stated that such exchanges do not constitute discussions and therefore, do not trigger the requirement to hold discussions with other offerors. *Cahaba Safeguard Adm'rs, LLC*, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 at 10 (*citing Overlook Systems Technologies, Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185). However, we have explained that where, as here, an offeror fails to submit an OCI statement that is a substantive solicitation requirement, exchanges with that offeror requesting the omitted statement would constitute discussions. See *Global Accounting, LLC*, B-417822.2, B-417822.3, Nov. 27, 2019, 2019 CPD ¶ 48 at 6. Regardless, given our dismissal of these protest grounds below as untimely, we need not reach whether each challenged set of exchanges constitute discussions here.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *CSRA LLC*, B-417635, *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 7. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotations must be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

As noted above, the TOPR clearly stated that the policies and procedures of FAR subpart 15.3 did not apply to this procurement. Moreover, the solicitation specifically advised offerors of the following:

The Government need not conduct communications with all Offerors. Rather, the Government may, at its discretion, conduct communications with one or only some Offerors. Furthermore, the Government need not permit all Offerors to submit proposal clarifications, modifications, or revisions. Rather, the Government may, at its discretion, seek proposal clarifications, modifications, or revisions from only one or only some Offerors.

TOPR at 15. In this respect, it was apparent from the face of the solicitation that the agency was not required to communicate with all offerors, nor was the agency prohibited from seeking revised proposals from only one offeror.<sup>14</sup>

Although presented in terms of a challenge to the sufficiency and equality of exchanges conducted by the agency, the gravamen of Mission Essential's argument here is essentially an objection to the permissible scope of the agency's exchanges with offerors allowed by the TOPR. As noted above, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. More specifically, underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not

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<sup>14</sup> The TOPR also provided:

The Government is not obligated to communicate with Offerors during the evaluation process. However, solely at its discretion, the Government may communicate with an Offeror for any purpose such as to gain a better understanding of the proposal or to address Government concerns . . . . Communications may be held at any time such as during, preceding, or following any step of the process. However, communications are not required in any or every step of the process.

TOPR at 15.

afterwards. *Continental Staffing, Inc.*, B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 4. Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. *Draeger, Inc.*, B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 at 5. It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. *Id.*

To the extent Mission Essential now objects to the solicitation's provisions allowing the agency discretion to communicate with only one offeror or seek proposal revisions from one offeror and not from others, the protester was required to file its protest of the terms of the solicitation by the closing date for receipt of proposals. Mission Essential failed to do so. Accordingly, we dismiss these allegations as untimely challenges to the terms of the solicitation. *Id.*

#### Technical Evaluation

Mission Essential contends that the agency's evaluation of proposals under the technical factor was unreasonable and insufficiently documented. Protest Annex at 4-16; Comments & Supp Protest at 27-40; Supp, Comments at 34-40.<sup>15</sup>

#### OCI Mitigation Plan

First, Mission Essential contends that the agency's technical evaluation failed to properly consider Edge Analytic's OCI mitigation plan. Comments & Supp. Protest at 27-28; Supp. Comments at 33-37. The protester argues that agencies "are required to consider the effect that a firm's OCI mitigation measures have on its technical approach, and whether or not such OCI mitigation measures either directly contradict a firm's proposed technical approach, or otherwise call into question the agency's original evaluation conclusions concerning the merit of a firm's proposed approach." Comments & Supp. Protest at 27-28 (quoting *ARES Tech. Servs. Corp.*, B-415081.2, B-415081.3, May 8, 2018, 2018 CPD ¶ 153 at 6). The protester notes that in *ARES*, like here, the proposed mitigation plan involved "the assignment of work directly to a subcontractor

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<sup>15</sup> The protester initially submitted its allegations challenging the agency's technical evaluation as a classified annex to its unclassified protest because portions of the agency's evaluation record are classified. See Protest Annex. After performing a security classification review, DIA informed our Office that nothing in the protest's annex contained classified information. None of the subsequent pleadings discussing these protest grounds were classified. In its agency report, DIA provided the classified documents that comprised part of the agency's technical evaluation record. We have reviewed all the information in the classified documents and conclude that the protesters' arguments can be addressed without reference to any classified information.

and the addition of firewalls,” and that the agency had completed the technical evaluation well before the awardee submitted its mitigation plan. *Id.*

The agency concedes that it did not consider the effect of Edge Analytic’s OCI mitigation plan on the firm’s technical approach. The agency argues, however, that it was not required to do so because it did not accept or implement the awardee’s mitigation plan. Supp. Contracting Officer’s Statement/MOL at 24. We agree.

Significantly, in *ARES*, unlike here, the agency accepted the awardee’s mitigation plan. *ARES Tech. Servs.*, *supra* at 4 (stating that the agency’s award decision was “[b]ased on the mitigation strategy” submitted by the awardee). In the instance here, the record shows that the agency did not find Edge Analytic’s proffered OCI mitigation plan to be adequate. Instead, after receiving mitigation plans from both parties, the agency concluded that the “only viable solution” to mitigate the potential OCI at issue was to utilize the above-referenced limitation of future contracting clause. AR, Tab 25, Letter to Edge Analytic Affirming Source Selection at 2.

In response, Mission Essential contends that incorporation of an OCI mitigation plan is not necessary to trigger the requirement that an agency consider the OCI mitigation plan’s impact on the technical approach. Supp. Comments at 34-35. However, the protester does not meaningfully explain how an unincorporated OCI mitigation plan would affect an offeror’s technical proposal. Nor, for that matter, does the protester elaborate on how Mission Essential was competitively prejudiced by the agency’s failure to perform such an evaluation here.<sup>16</sup> Given that Edge Analytic’s proposed OCI mitigation plan would not be incorporated into the task order, we see no basis to conclude that the agency was required to evaluate the OCI mitigation plan’s theoretical effect on the awardee’s technical approach. On the record before us, we find no basis to sustain this allegation.

#### Remaining Challenges to the Technical Evaluation

The protester’s remaining challenges to the technical evaluation primarily concern the agency’s assessment of strengths and significant strengths related to the offerors’ responses to the scenario during oral presentations; Mission Essential specifically objects to each of the four discriminators highlighted by the SSA in the award

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<sup>16</sup> Rather, the protester simply cites to other decisions that are similarly distinguishable from the current protest. See *e.g.*, *Booz Allen Hamilton, Inc.--Costs*, B-414822.4, May 7, 2018, 2018 CPD ¶ 183 at 6-7 (the agency concluded that the awardee’s proposed approach to mitigating potential OCIs “was acceptable”), *Alion Science & Tech. Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 5 (“Based on the agency’s assessment regarding the ‘maximum potential’ for OCIs, and [the awardee’s] stated intent to rely on ‘firewalled’ team members to perform conflicted portions of the contract, the agency concluded that [the awardee’s] OCI plan was acceptable”).

decision.<sup>17</sup> *Id.* We have reviewed the protester's arguments and, with the exception of two discriminators discussed below, we find that the agency's evaluation under the technical factor was reasonable and supported by the evaluation record.

First, the protester challenges the agency's assessment of strengths related to the applicable time horizons for scenario activities. Protest Annex at 6-9; Comments & Supp. Protest at 29-32. The protester contends that the agency's assessment of a significant strength to Edge Analytic's proposal in this area is not supported by the agency's record of the oral presentations. *Id.* Further, Mission Essential argues that the agency's evaluation is unequal because it discussed the relevant aspects that caused the agency to assess a significant strength to Edge Analytic but was not similarly credited with a significant strength. *Id.*

The agency responds that its evaluation was reasonable and the differences in the evaluations were due to differences between the two proposals. Specifically, the agency argues that Edge Analytic's proposal merited a significant strength due to its "additional understanding of the significance of resource requirements to effect the best analytical approaches to answer intel questions within the given time horizons," which DIA claims was not addressed in Mission Essential's proposal. MOL at 30.

In reviewing protests of an agency's evaluation and source selection decision in a task or delivery order competition, we do not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *Sapient Gov't Servs., Inc.*, B-412163.2, Jan. 4, 2016, 2016 CPD ¶ 11 at 4. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria, undocumented, or not reasonably based. *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 5. An agency that fails to adequately document its evaluation of proposals or source selection decision bears the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations. *AT&T Corp.*, B-414886 *et al.*, Oct. 5, 2017, 2017 CPD ¶ 330 at 6.

Here, we agree with the protester that this aspect of the agency's evaluation is not supported by the contemporaneous record. As noted above, the TOPR explained that offerors technical proposals would consist only of an oral presentation. TOPR at 7-8. The TOPR also specified that the agency would "either videotape, audio record, and/or take written notes" of the oral presentations. *Id.* at 8. The agency attempted to audio record the oral presentations but, with respect to Edge Analytic, failed to record a portion of the firm's oral presentation. See Protest Annex at 4. Consequently, the record of technical proposals before us consists of (1) an audio recording of Mission

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<sup>17</sup> As noted above, the oral presentations consisted of (1) an offeror's responses to the same three (program and technical management) questions, and (2) a scenario provided by the agency to the offeror at the time of the oral presentation. TOPR at 7, 9.

Essential's full oral presentation; (2) an audio recording of part of Edge Analytic's oral presentation; and (3) handwritten evaluator notes taken during the Edge Analytic's oral presentation to fill in for the missing portion of the audio recording.

The evaluation record demonstrates that the SSA assigned a significant strength to Edge Analytic's proposal for highlighting "the very nuanced relationships between the intel questions, analytical approaches, labor mix, and labor hours, and also identified and applied applicable time horizons to the scenario."<sup>18</sup> AR, Tab 17, Revised Step 1 SDD at 14. Later, the SSA explained the differences identified in the offerors' evaluated strengths, stating that "Edge Analytic Solutions' Scenario Presentation was rated as a significant strength because it included a more detailed discussion of the sometimes subtle nuances that attend the interconnection between intelligence questions, appropriate analytic approaches, the specific labor categories to utilize, and the amount of labor." *Id.*

The agency, however, does not, and cannot, point to anything in the existing record of oral presentations that clearly support several aspects of the assessed significant strength that differentiate from the regular strength that was assessed to Mission Essential's proposal.<sup>19</sup> While the agency cites an evaluator comment that "explicitly notes the efficiency of [Edge Analytic's] proposed solution," the agency tellingly does not reference any basis in the record to specifically support the "more detailed discussion" or "subtle nuances that attend the interconnection" of the aspects of the scenario. See MOL at 30. Further, the protester notes that the other aspect of the assessed significant strength--that Edge Analytic's scenario presentation included a detailed discussion of the labor categories to utilize and the amount of labor--is very similar to a separate significant strength assessed to both proposals for their "excellent breakdown" of labor categories and number of full-time equivalents in the scenario response. *Compare* AR, Tab 17, Revised Step 1 SDD at 14 *with, Id.* at 15.

On this record, we are unable to determine whether the agency's different evaluation conclusions were the result of differences in the proposals. We therefore agree with the protester that this aspect of the agency's evaluation is unsupported by the record.<sup>20</sup>

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<sup>18</sup> The agency assessed a similar strength to Mission Essential that stated "Mission Essential Group identified and applied applicable time horizons to the scenario regarding publication timelines and coordination deadlines." AR, Tab 17, Revised Step 1 SDD at 14.

<sup>19</sup> Given the agency's failure to record the entirety of the oral presentation, our review of this aspect of Edge Analytic's proposal is limited to the evaluator notes taken during the oral presentation.

<sup>20</sup> Mission Essential further contends that, because its proposal discussed the relevant aspects that caused the agency to assess a significant strength to Edge Analytic's proposal--even though it was not reflected in Edge Analytic's oral presentation--the agency should have considered this aspect to be a discriminator in favor of Mission

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The protester similarly alleges that the agency's assessment of a significant strength to Edge Analytic's scenario response for having "addressed write for release" and for being "forward looking" by discussing potential future customers and foreign partners is unsupported by the record.<sup>21</sup> See Comments & Supp. Protest at 37-40. The agency maintains that its evaluation was reasonable because references to releasing intelligence to foreign partners and to open-source intelligence are "relevant to and always a contributing factor in evaluating an [o]fferor's ability to write for release." MOL at 28. The agency then points to a dozen evaluator notes from Edge Analytic's scenario response that discuss foreign partners and open-source intelligence that it claims effectively address write for release and "illustrate the importance of coordination with [a]gency partners, current and future." *Id.* at 28-29.

Mission Essential responds that this is a *post-hoc* argument that is inconsistent with the plain language of the assessed strength which put quotation marks around the words "write for release" to indicate the evaluators determined that Edge Analytic had explicitly addressed it in the oral presentation. Comments & Supp. Protest at 39. The protester alternatively argues that, to the extent the agency's stated rationale for assessing Edge Analytic the significant strength at issue is reasonable, the agency should have similarly credited Mission Essential's proposal for its discussion of working with both future and current foreign and commercial partners. *Id.* at 39-40. We agree that the agency's evaluation is not supported by the contemporaneous record.

As an initial matter, the agency does not identify, and our review of the record does not reveal, anything in Edge Analytic's proposed scenario response that explicitly addresses write for release or otherwise explains how Edge Analytic's discussion of customers and foreign partners was more forward looking.<sup>22</sup> Our review of the record

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Essential. Comments & Supp. Protest at 31-32. We are unpersuaded by the argument. While Mission Essential points to language in its oral presentation proposing to tailor its methods and techniques related to its discussion of the scenario's time horizons, the protester does not meaningfully explain how the agency was unreasonable for failing to consider this language as constituting a "more detailed discussion" or otherwise addressing "subtle nuances that attend the interconnection" of the aspects of the scenario. Without more, we see no basis to consider this aspect of the agency's evaluation unequal or unreasonable.

<sup>21</sup> As used here, the phrase "write for release" refers to "making a written product releasable to the widest audience possible based on [national security] classification and dissemination limitations." AR, Tab 16, SSA Decl. at 8.

<sup>22</sup> The protester notes that the audio recording of Edge Analytic's proposal and the evaluator notes both evidence Edge Analytic having addressed write for release in its response to the program and technical management questions portion of the oral presentation, but not in its scenario response. See Protest Annex at 15. As discussed below, the agency only considered aspects of the scenario response to be

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similarly does not reveal how the agency's various references to disclosure to foreign partners and open-source intelligence in Edge Analytic's proposal uniquely addressed write for release and relevant stakeholders in light of the protester's arguments that they addressed similar concerns. See Comments & Supp Protest at 39 (pointing to aspects of its scenario response that discussed working with foreign allies, commercial partners, and other stakeholders). As a result, and similar to our conclusion above, we find no support for the agency's conclusion that Edge Analytic had, explicitly or otherwise, addressed write for release and uniquely demonstrated a deeper understanding of stakeholders in its scenario response.

Nevertheless, we do not find that the evaluation errors noted above provide a basis to sustain the protest because Mission Essential has failed to demonstrate competitive prejudice. As discussed above, where a protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Blue Origin Federation, LLC; Dynetics, Inc.- A Leidos Co.*, B-419783 *et al.*, July 30, 2021, 2021 CPD ¶ 265 at 33; *Armorworks Enters., LLC*, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. In other words, the protester must show that but for the agency's actions, it would have had a substantial chance of receiving the award. *Id.*

The TOPR provided that the agency would issue the task order on a highest technically evaluated proposal with a fair and reasonable price basis. TOPR at 9. Here, to determine the highest technically evaluated proposal, the SSA compared the relative strengths and significant strengths of Mission Essential's and Edge Analytics's proposals' scenario presentation.<sup>23</sup> AR, Tab 17, Revised Step 1 SDD at 12-13. The SSA concluded that four of Edge Analytic's significant strengths were positive discriminators when compared to Mission Essential's proposal, and that none of Mission Essential's strengths or significant strengths were positive discriminators when compared to Edge Analytic's proposal. *Id.* at 13-15.

The protester contests all four discriminators identified by the SSA. Protest Annex at 4-16; Comments & Supp Protest at 27-40. As discussed above, only two of the four discriminators relied on by the SSA are unsupported by the record. Accordingly, there would be two positive discriminators in Edge Analytic's proposal, and none in Mission

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discriminators when determining which proposal was the highest technically evaluated. AR, Tab 17, Revised Step 1 SDD at 12-13.

<sup>23</sup> The SSA found that the parties' proposals were "equally compelling" with regard to the program and technical management portions of the oral presentations. AR, Tab 17, Revised Step 1 SDD at 12.

Essential's proposal.<sup>24</sup> Given the highest technically evaluated proposal with a fair and reasonable price basis for issuance of the task order, the protester cannot establish that the agency's evaluation errors would have resulted in a change to the protester's competitive position. Under these circumstances, we conclude that Mission Essential has failed to demonstrate that it was competitively prejudiced.<sup>25</sup> See *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 15 (finding no competitive prejudice in a task order procurement under FAR part 16 despite "significant flaws" in the agency's evaluation); see also *Metric 8 LLC et al.*, B-419759.2 *et al.*, July 29, 2021, 2021 CPD ¶ 299 at 25-26 (finding no competitive prejudice in a procurement utilizing a highest technically rated with a fair and reasonable price basis for award where the agency's evaluation error did not affect the competitive standing of the protesters).

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>24</sup> As noted above, the protester argues that the agency should have considered its strength related to the applicable time horizons for scenario activities to be a significant strength and a discriminator compared to Edge Analytic's proposal. Comments & Supp. Protest at 31-32. However, we found no basis to object to the agency's evaluation of this aspect of the proposals.

<sup>25</sup> Mission Essential has not protested the reasonableness of Edge Analytic's proposed price.