



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Kropp Holdings, Inc.

File: B-420857.8; B-420857.9

Date: August 28, 2024

Craig A. Holman, Esq., Kara L. Daniels, Esq., Thomas A. Pettit, Esq., Roe Talmor, Esq., and Nicole Williamson, Esq., Arnold & Porter Kaye Scholer LLP, for the protester. Todd J. Canni, Esq., Danielle A. A. Richardson, Esq., Kevin T. Barnett, Esq., Stephen E. Ruscus, Esq., Kevin N. Dorn, Esq., and Kaitlyn E. Toth, Esq., Baker & Hostetler LLP, for Associated Energy Group, LLC, the intervenor.

Steven M. Sosko, Esq., Defense Logistics Agency, for the agency.

Michael P. Grogan, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's organizational conflict of interest mitigation plan is denied where the record demonstrates the agency reasonably concluded the contractor and agency-proposed measures would sufficiently mitigate potential conflicts.
 2. Protest is sustained where the record fails to demonstrate the agency reasonably considered the impact of the awardee's proposed organizational conflict of interest mitigation plan on an aspect of the firm's underlying non-price proposal.
 3. Protest challenging the agency's evaluation of proposals under various non-price factors is denied where the record demonstrates the agency's evaluation was reasonable and consistent with the terms of the solicitation.
-

DECISION

Kropp Holdings, Inc. (KHI), of Overland Park, Kansas, protests the award of a contract to Associated Energy Group, LLC (AEG), of Miami, Florida, under request for proposals (RFP) No. SPE608-21-R-0203, issued by the Department of Defense, Defense Logistics Agency (DLA), for aviation into-plane (AIR) Card transaction processing services. The protester challenges DLA's consideration of an impaired objectivity conflict of interest (OCI) and contends the agency unreasonably evaluated KHI's and AEG's proposals.

We sustain the protest, in part, and deny it, in part.

BACKGROUND

The agency issued the solicitation on June 22, 2021, pursuant to the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15, seeking contractor support related to DLA's AIR Card program. Agency Report (AR), Tab 25, Conformed RFP, amend. 14 at 1, 9.¹ This program allows for the procurement of aviation fuel and ancillary ground services at commercial airports across the globe using a charge card--the AIR Card. *Id.* at 9. The selected contractor will manage DLA's AIR Card program, which includes transaction processing, customer service, managing a retail merchant network, issuance of charge cards, and operation of an electronic access system. *Id.* As relevant to this protest and as further described below, the contractor will process two categories of fuel transactions, "contract" and "non-contract." A contract transaction concerns an AIR Card purchase of fuel (or ancillary services) for a federal aviation asset from a supplier at a commercial airport under an established DLA contract, where the price is set by that DLA-supplier contract. A non-contract transaction, on the other hand, concerns an AIR Card purchase at a commercial airport at the retail price, which is set by the individual fuel merchant at the time of purchase. Among other tasks, the contractor will be responsible for establishing and maintaining a network of non-contract fuel merchants. The RFP anticipated the award of a fixed-price contract, with a 6-month transition period, 3-year base period of performance, and two 1-year option periods. *Id.* at 90-91.

The solicitation explained that award would be made on a best-value tradeoff basis, considering six factors: (1) technical approach; (2) management approach; (3) AIR Card electronic access system (EAS); (4) merchant acceptance with level III data plan; (5) past performance; and (6) price.² *Id.* at 202. The technical approach factor had six subfactors: (1a) technical capability; (1b) quality management; (1c) transition/risk management; (1d) corporate experience; (1e) security; and (1f) cybersecurity. *Id.* at 203-204. The management approach factor had two subfactors: (2a) merchant network; and (2b) key personnel. *Id.* at 204-205. The merchant acceptance with level III data plan had three subfactors: (4a) continental United States (CONUS) merchant acceptance; (4b) outside of CONUS (OCONUS) merchant acceptance; and (4c) tax exemption supplied by merchants. *Id.* at 205.

For the non-price factors other than past performance, the agency would assign one of five adjectival combined capability/risk ratings: outstanding; good; acceptable; marginal;

¹ All citations to the agency's report are to the Adobe PDF document page numbers, and all citations to the solicitation are to the conformed version, amendment 14, unless otherwise noted.

² The solicitation also included a pass/fail preliminary evaluation factor, concerning whether an offeror's proposal was at no cost to the government. RFP at 202. The AIR Card contractor's revenue will be received from the fees it charges on non-contract transactions. *Id.* at 28.

and unacceptable.³ For past performance, the agency would first assign one of four adjectival relevancy ratings (very relevant; relevant; somewhat relevant; and not relevant) and then one of five adjectival performance confidence ratings (substantial confidence; satisfactory confidence; neutral confidence; limited confidence; and no confidence). *Id.* at 206-207. Concerning price, the solicitation explained that offerors would be evaluated on their percentage refund rate remitted to DLA:

Offerors are expected to propose competitive pricing at the minimum 1% or greater based upon AIR Card® Program Total Sales History (non-contract fuel, non-contract fuel related charges, and non-contract ground services transactions) to calculate refunds of this request for proposal. The sales refund based on the volume of spend will be the only price evaluated for the purpose of the award. Price will be evaluated based on the Total Net Refund for the base period and all option periods.

Id. at 207. DLA reserved the right to conduct a price realism analysis. *Id.*

The technical approach, AIR Card EAS, and merchant acceptance with level III data plan factors were of equal importance and were more important than the other factors. *Id.* at 202. The RFP further explained that the management approach and past performance factors were equally important, and more important than price.⁴ *Id.*

The agency received proposals from AEG and KHI (the incumbent contractor) by the established due date of August 19, 2021. Protest at 18. Following discussions and the submission of proposal revisions, DLA selected AEG for award on June 3, 2022. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 4.

On July 5, KHI filed a protest with our Office, in which it argued DLA's procurement was marred by several conflicts of interest, that the agency failed to consider information relevant to AEG's responsibility, and DLA's evaluation of proposals was unreasonable and unequal. AR, Tab 21, KHI Protest (B-420857.1). Our Office dismissed the protest as academic on July 29, based on the agency's proposed corrective action, which included a reevaluation of proposals and new award decision. *Kropp Holdings, Inc.*, B-420857, July 29, 2022 (unpublished decision).

³ The RFP explained that DLA would assign a rating to each subfactor, and "then assign an overall rating to each Factor based on the Subfactor ratings for that Factor." RFP at 206.

⁴ Concerning the subfactors, (1a) technical capability, (1c) transition/risk management, (1e) security, and (1f) cybersecurity were of equal importance, and were more important than (1b) quality management and (1d) corporate experience. RFP at 202. The subfactors under the management approach and merchant acceptance with level III data plan factors were of equal importance. *Id.*

As part of its corrective action, DLA issued amendment 012 to the RFP, which adjusted the page limitations for offerors' proposals with respect to the technical approach, management approach, and past performance factors (proposal volume 2). AR, Tab 23, RFP Amendment 012 at 2. The agency also engaged in an additional round of discussions with AEG and KHI and solicited final revised proposal from both. Protest at 18.

On January 23, 2023, KHI filed a protest with our Office challenging the scope of DLA's corrective action. KHI's protest challenged, among other things, DLA's conduct of discussions and the agency's decision to limit the scope of proposal revisions. *Id.* at 15. On January 30, our Office dismissed KHI's protest as academic based on the agency's proposed corrective action, which included reissuing discussion letters and allowing for updated proposal revisions. *Kropp Holdings, Inc.*, B-420857.2, Jan. 30, 2023 (unpublished decision).

DLA's corrective action in response to KHI's protest (B-420857.2) included issuing amendment 013 to the RFP, which again adjusted the page limits for offerors' volume 2 proposals. AR, Tab 24, RFP Amendment 013 at 2. In addition, DLA issued revised discussion letters to AEG and KHI, and solicited proposal revisions.

On February 21, KHI filed a second protest challenging DLA's corrective action (B-420857.3, B-420857.4). KHI alleged, among other things, that DLA's conduct of discussions and limitations on proposal revisions were unreasonable and unequal. On May 4, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) teleconference call.⁵ During the ADR call, the GAO attorney advised the parties that the protest would likely be sustained, in part, with respect to DLA's unequal treatment of offerors concerning proposal revisions.

On May 11, our Office dismissed KHI's protest as academic based on the agency's proposed corrective action. *Kropp Holdings, Inc.*, B-420857.3, B-420857.4, May 11, 2023 (unpublished decision). The agency explained it would either "[a]llow offerors to make unrestricted revisions to their Volume 2 proposals, allow discussions on the revisions to Volume 2, and allow offerors to identify and revise inconsistencies and derivative issues in their proposals resulting from those revisions and the revisions made in response to the February 2023 limited discussions letters"; or will "[t]ake broader corrective action as the contracting officer deems appropriate." *Id.* at 1.

On August 31, the contracting officer prepared a memorandum explaining DLA's decision to allow full proposal revisions as part of its corrective action. That same day, the agency

⁵ In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. 4 C.F.R. § 21.10(e); *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 2 n.1. The purpose of such outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. *Booz Allen Hamilton, Inc.*, *supra*.

issued amendment 014 to the RFP and provided AEG and KHI with updated discussion letters. AR, Tab 25, RFP Amendment 14 at 1. On September 21, prior to the deadline for final proposal revisions, AEG requested that DLA provide updated historical sales data for fiscal years 2021 and 2022. In response, on September 28, DLA issued amendment 015 to the RFP, which provided updated historical sales data for fiscal years 2021 and 2022. AR, Tab 26, RFP Amendment 015.

On October 10, AEG filed a protest with our Office, alleging DLA’s release to KHI of an internal DLA memorandum, which concerned the agency’s rationale for issuing amendment 15, constituted a violation of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107, or gave KHI an unfair competitive advantage. AEG also challenged the agency’s decision to allow offerors to revise any parts of their proposals as part of its corrective action pursuant to KHI’s earlier protests (B-420857.3 and B-420857.4). Our Office denied AEG’s protest, concluding that: (1) the agency’s disclosure was not knowingly made, and its conclusions regarding the lack of competitive usefulness of the information were reasonable; and (2) DLA’s decision to allow full proposal revisions was reasonable and consistent with the discretion afforded to agencies when taking corrective action. *Associated Energy Group, LLC*, B-420857.6; B-420857.7, Jan. 10, 2024, 2024 CPD ¶ 23 at 1.

Both KHI and AEG submitted final proposal revisions by the February 29, 2024, due date. COS/MOL at 6. On April 4, DLA completed its determination and findings concerning AEG’s potential organizational conflict of interest, which concluded that any potential OCI concerns were fully mitigated. AR, Tab 31, OCI Memo at 15-16. On May 8, following DLA’s evaluation of proposals, the agency awarded the contract to AEG. COS/MOL at 7. The following is a summary of the final ratings of the proposals of AEG and KHI:

	AEG	KHI
Technical Approach	Acceptable	Acceptable
Management Approach	Good	Acceptable
Electronic Access System	Outstanding	Acceptable
Merchant Acceptance Level III Data Plan	Acceptable	Acceptable
Past Performance	Relevant/Satisfactory Confidence	Very Relevant/Satisfactory Confidence
Price/Refund Rate	1.41%	1.40%

AR, Tab 43, KHI’s Debriefing at 1-4. Following a debriefing, KHI filed this protest on May 22.

DISCUSSION

KHI marshals several arguments concerning DLA's conduct of the procurement.⁶ Specifically, the protester contends DLA gave insufficient consideration to AEG's impaired objectivity OCI and failed to evaluate AEG's proposed OCI mitigation plan in conjunction with the rest of the awardee's proposal. Additionally, KHI argues DLA unreasonably evaluated proposals under several evaluation factors.

As set forth below, we sustain the protest only on the basis that the record provides insufficient evidence to conclude DLA reasonably considered the effects of AEG's OCI mitigation plan on the firm's technical capability approach. We find no additional bases on which to sustain the protest.

OCI

KHI raises two principal challenges stemming from its assertion that AEG's business interests as a DLA and commercial fuel provider, and marketplace participant, creates an impaired objectivity OCI. First, the protester contends that the agency unreasonably considered AEG's OCI mitigation plan as sufficient to mitigate these OCI concerns. Protest at 22-31; Comments and Supp. Protest at 9-20; Supp. Comments at 30-39. In the alternative, KHI argues AEG's proposal does not reflect its OCI mitigation efforts and fails to satisfy various RFP requirements. Comments and Supp. Protest at 20-30; Supp. Comments at 10-30.

The Contract's Requirements

As noted above, this procurement involves several facets concerning the provision of aviation fuel and related services, to include the processing of fuel transactions.⁷ As addressed above and further discussed below, DLA explains there are essentially two types of fuel transactions to be processed by the AIR Card contractor under this requirement: contract and non-contract. AR, Tab 31, OCI Memo at 2.

The contracting officer explains that contract, or into-plane contract, fuel transactions are purchases made by an AIR Card holder (such as a Defense Department pilot) with a fuel/services provider under an established DLA contract at a commercial airport, where the transaction is priced based on the terms of that DLA contract. *Id.* Indeed, the agency explains that the AIR Card "contractor's role concerning these transactions is minimal because DLA Energy awards these contracts pursuant to its internal policies

⁶ Our Office previously dismissed several of KHI's initial and supplemental protest allegations as legally and factually insufficient. See GAO Notice of Resp. to Intervenor's Req. for Dismissal, Jun. 14, 2024; GAO Notice of Resp. to Req. for Dismissal, Jul. 16, 2024.

⁷ The RFP provides the steps a contractor must take when processing AIR Card transactions, including receiving, uploading, tracking, and submitting invoices for various transactions. See RFP at 50-54.

and sets the terms and conditions, including pricing.” COS/MOL at 19. That is, DLA provides “all contract information to the AIR Card® contractor, whose responsibility is to maintain a system that ‘automatically’ matches the transaction data to the established Into-Plane terms before it is sent to DLA Energy.” *Id.* DLA states the RFP does “not allow the contractor to charge any processing fee for these transactions to the Government or Into-Plane Contractor.” AR, Tab 31, OCI Memo at 2. However, there are a limited number of transactions that cannot be automatically processed; in such circumstances, the contractor must manually process such transactions and resolve any payment or other disputes with the supplier. *Id.* at 9.

On the other hand, non-contract fuel transactions are not covered by a preexisting DLA contract, but instead, are made with a fuel-supplier, or merchant, within the AIR Card contractor’s network. Thus, unlike contract transactions where prices with suppliers are prospectively negotiated by DLA, non-contract transactions are priced by the merchant at the time of purchase. *Id.* As the contract officer further explains, non-contract transactions:

[A]re made with merchants within the AIR Card® contractor’s merchant network using the AIR Card®. The RFP requires the contractor to provide a network of merchants who will abide by the AIR Card® policies and accept the AIR Card®. The existence of this network allows for these non-contract purchases at locations where there is no Into-Plane contract. These transactions are priced at the retail prices set by the individual merchant at the time of purchase. For these transactions, the AIR Card® contractor initially reimburses the merchants and then DLA Energy reimburses the AIR Card® contractor. The AIR Card® contractor may charge the merchants processing fees for these transactions at the rate agreed upon in the AIR Card® contract.

Id. at 3. The solicitation also encompasses the provision of related services.⁸ *Id.*

AEG’s Potential OCIs and Mitigation Plan

Because of AEG’s business interests as a commercial and government provider of fuel and flight services, AEG’s proposal indicated that there was the potential for the appearance of impaired objectivity and unequal access to information OCIs, and proposed a plan to mitigate them. In this regard, AEG recognized that its current provision of fuel and other services, both on a contract and non-contract basis, to government and commercial customers could potentially present conflicts with its serving as DLA’s Air Card administrator under the resulting contract. Specifically, AEG’s proposal explains that “[b]ecause AEG presently is an aviation-fuel supplier for the U.S. Government, including DLA an AIR Card® Merchant and, if selected as the awardee under the instant Solicitation, would be the Operator of the AIR Card®

⁸ For example, the solicitation contemplates non-fuel transactions, such as ground services. AR, Tab 31, OCI Memo at 3.

Program, AEG recognizes the potential for the appearance of impaired objectivity and unequal access to information OCI's." Tab 64, AEG Final Proposal Revision, Vol. 1 at 152. Thus, consistent with the solicitation, AEG offered an OCI mitigation plan with its proposal. *Id.* at 152-185; AR, Tab 47, AEG Initial Vol. 1 Proposal at 167-185.⁹

There are several salient features to AEG's proposed OCI mitigation strategy, as noted by DLA. AEG first addressed potential unequal access to information concerns. Specifically, AEG provided that if it were awarded the contract, "AEG would have access to the non-public trading information of other Merchants, which could potentially provide AEG with unequal access to competition sensitive information and, in turn, an unfair competitive advantage in competing as a Merchant to provide fuel to the U.S. Government." AR, Tab 64, AEG Final Proposal Revision, vol. 1, at 155-156. To mitigate this potential unfair advantage when competing for future contracts to provide fuel to the government (and thereby preserve its ability to compete for such contracts), AEG established a separate operating division, Performance Payment Solutions (PPS), "which, if AEG is awarded the contract, will be separate from its 'Aviation Fuel' division." *Id.* at 156. DLA noted that PPS would be firewalled off from other AEG business units, "including those that would potentially benefit from the information obtained as the AIR Card® contractor." AR, Tab 31, OCI Memo at 4. The agency noted that PPS would be organizationally, physically, and electronically separated. *Id.* In addition to the firewall controls, DLA noted AEG's proposed use of non-disclosure agreements, training, audits, and a compliance monitor. *Id.*

Second, and relevant to the protester's allegations here, AEG also identified an impaired objectivity OCI risk, or at least the appearance of such. For example, because the RFP mandated the AIR Card contractor to investigate and resolve certain merchant disputes, AEG asserted these requirements present "at least the appearance of requiring AEG to evaluate the activities of Merchants, which may include itself." AR, Tab 64, AEG Final Proposal Revision, vol. 1, at 158. To address the risk of a potential impaired objectivity OCI, AEG represented that it would not be a supplier of fuel at non-contract locations, thus making PPS the only "AEG entity involved in the non-contract locations transactions[.]" AR, Tab 64, AEG Final Proposal Revision, vol. 1, at 159. For contract transactions, AEG noted that processing of transactions is done by an

⁹ As relevant here, the RFP required offerors to identify and address any potential OCI issues, requiring that:

At the time of proposal submission, the Contractor, and any significant subcontractor/team member/consultant, shall disclose any known or potential Organizational Conflict of Interest (OCI) which presently exists or may exist at the time of award of any resultant contract as described in FAR Subpart 9.5-Organizational and Consultant Conflicts of Interest to the [contracting officer]. If OCI(s) exist, Offeror's shall provide a copy of their firm's policy and procedures for tracking, reporting, mitigating, neutralizing, and evaluating OCIs.

RFP at 66.

automated system, where the AIR Card contractor does not have discretion. *Id.* at 160. However, for a certain number of transactions, contract invoices cannot be processed (or otherwise resolved) through the automated system, requiring the AIR Card contractor to engage with DLA and the fuel merchant to resolve the issue. For these transactions, AEG proposed “to subcontract such limited rejected transactions to a non-conflicted firewalled subcontractor and have the non-conflicted subcontractor report directly to the appropriate DLA Energy official consistent with the separation outlined above under non-contract locations.” *Id.* at 161. Similarly, AEG proposed to use a firewalled subcontractor to process AEG’s own invoices at the contract locations. *Id.*

DLA’s Evaluation of AEG’s OCI Mitigation Plan

The protester advances several challenges to the agency’s consideration and acceptance of AEG’s OCI mitigation plan.¹⁰ In the main, KHI contends DLA failed to properly investigate whether AEG, a fuel supplier, would be able to render impartial judgment when conducting its responsibilities under the contract. Specifically, KHI argues that AEG’s business relationships would, despite the proposed mitigation efforts, prevent the awardee from fairly overseeing the conduct of the fuel/service providers with whom the firm has relationships or competes in the fuel/services market.¹¹ Comments and Supp. Protest at 9-20; Supp. Comments at 30-38.

The FAR requires that contracting officers identify and evaluate potential OCIs, and directs contracting officers to avoid, neutralize, or mitigate potential significant conflicts of interest so as 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 broadly categorized into three types: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an impaired objectivity OCI arises where a firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests. FAR 9.505(a); *Diversified Collection Servs., Inc.*, B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6; *PURVIS Sys., Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

¹⁰ As the protest allegations principally concern the potential for an impaired objectivity, rather than an unequal access to information OCI, our discussion here focuses on that aspect of KHI’s challenges.

¹¹ Based on the underlying record--to include AEG’s submission of an OCI mitigation plan, and DLA’s evaluation of that plan--and the pleadings produced in response to this protest, the parties advance from a common understanding that there exists the potential, or at least the appearance of, an impaired objectivity OCI. While our decision takes no position as to whether the underlying circumstances do, in fact, establish the necessary predicate for an impaired objectivity OCI, we focus our attention on the reasonableness of the agency’s consideration of AEG’s proposed OCI mitigation plan.

In considering whether there is an actual or potential OCI, the FAR advises contracting officers to examine the particular facts of the contracting situation and the nature of the proposed contract, and to exercise common sense, good judgment, and sound discretion in deciding whether a significant OCI exists, and in determining the appropriate means for resolving any significant OCI that has been identified. FAR 9.505. We have explained that “the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.” *Analysis Grp., LLC*, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 at 4 (*quoting Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009)). Our Office reviews the reasonableness of a contracting officer’s OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists and the means for resolving such a conflict, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. Once an agency has given meaningful consideration to whether an OCI exists, or whether the OCI can be sufficiently mitigated, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. See *DV United, LLC*, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6; *Alion Sci. & Tech. Corp.*, B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

DLA identified several approaches to mitigate the potential for an impaired objectivity OCI, both as proposed by AEG in its mitigation plan, and as identified by DLA based on the government’s own controls and mitigation techniques utilized in supervising KHI’s incumbent performance. At non-contract locations, AEG would not be supplying fuel. AR, Tab 31, OCI Memo at 9. At contract locations, DLA would process transactions through an automated system, with minimal discretionary action from AEG, and would rely upon a firewalled subcontractor when processing certain types of transactions where AEG’s objectivity might be impaired. *Id.* at 8-9. Also central to the agency’s conclusions was DLA’s ability to provide oversight of AEG’s contract performance. *Id.* at 12-13.

In her OCI memorandum, the contracting officer determined that there is no significant risk of impaired objectivity with respect to “contract” or into-plane contract transactions, even though AEG would be (potentially) supplying fuel at those locations. *Id.* at 12. This is because AEG would not be evaluating its own performance or providing guidance to DLA, and would not be in a position to exercise subjective judgment regarding its own work, given that its transactions would be automatically processed or handled by a firewalled subcontractor. *Id.* Given the limited role in contract transactions, and DLA’s oversight, DLA found no potential for AEG to have material impaired objectivity. *Id.* Furthermore, for the subset of transactions where the automated system could not be utilized, AEG proposed to utilize a firewalled subcontractor to handle those transactions.

For non-contract transactions, DLA identified AEG’s recusal from supplying fuel, DLA’s ability to gauge the reasonableness of charged prices utilizing internal auditing tools,

and its other audit functions to reduce improper charges as important. *Id.* at 13. The contracting officer again noted DLA's robust system of oversight:

Any ancillary services charges are posted to a web server accessible by the Government accountable officials who are required to verify the ancillary services charges. Therefore, while the AIR Card® contractor could fail to perform its responsibilities under the contract to reduce system errors, the Government will quickly notice the discrepancies when invoices are processed through its own systems for payments. The Government conducts weekly audits for the primary purpose of identifying such improper billing. This audit allows DLA Energy to create a system check to better ensure the integrity and accuracy of the AIR Card® contractor and vendors. DLA Energy also performs random samples of transactions which are then compared to actual purchase tickets to identify any discrepancies. The weekly audit has proven to be highly successful in identifying improper invoicing and card misuse.

Id. Moreover, in addressing the possibility of AEG's impartiality in reviewing non-contract transactions, the contracting officer explained:

Importantly, since AEG will no longer participate as a non-contract fuel provider, AEG will not be involved in evaluating any of its own non-contract transactions. Regarding its monitoring of other non-contract merchants, since it is no longer competing with them for non-contract transactions, there is no incentive for AEG to improperly investigate, audit, report, or reject charges for these transactions. To the extent these non-contract merchants also compete for Into-plane contracts, improperly reviewing and rejecting their transactions would provide no clear benefit to AEG because non-contract AIR Card® purchases are not considered during past performance assessments by DLA. Also, in addition to DLA Energy's ability to identify processing issues during its own routine oversight, merchants have the ability to raise issues to DLA Energy's attention. Therefore, if AEG were to improperly investigate, audit, report, or reject charges, it would risk contract penalties, including financial decrements and termination, for no clear benefit, since it will no longer compete for non-contract purchases.

Id.

The contracting officer also addressed four areas where AEG's potential conflicted financial interests could impair AEG's efficient and effective performance of the contract and potentially cause the government to pay higher prices for fuel: (1) AEG's potential disincentive to sign up a wide merchant base of non-contract suppliers for the program; (2) AEG's potential disincentive to conduct aggressive discount negotiations as a fuel supplier; (3) AEG's ability to steer business towards its own business interest; and (4) AEG's ability to maintain an even-handed approach to its non-contract merchants

and maximize competition. *Id.* at 14. DLA highlights that due to the contract's fee structure (whereby the contract obtains transaction fees on all non-contract purchases), AEG would be financially incentivized to have an expansive network, rather than relying on its pre-existing network with which it might have business relationships. DLA also noted the agency would obtain monthly reports identifying the vendor and location for non-contract purchases, allowing the agency to monitor for any indication of favoritism. *Id.* In addition to its proactive oversight, DLA also noted that "merchants have the ability to raise issues to DLA Energy's attention" to the extent AEG was acting in a biased fashion in performing its contract duties. *Id.* at 13.

Based on our review of the record, we find reasonable the agency's conclusion that AEG's proposed efforts, coupled with agency oversight, mitigated the potential OCI risks. The OCI memorandum reflects that the contracting officer undertook a nuanced, thoughtful consideration of the potential OCI concerns, ultimately concluding the risks were sufficiently mitigated. *Id.* at 15. Based on the remediation measures proposed, the structure and incentives of the contract, and DLA's robust oversight capabilities, we find no basis to sustain KHI's protest allegations.

Contrary to KHI's assertion, the record shows DLA reasonably concluded that AEG's mitigation plan sufficiently mitigated any potential conflicts as it relates to AEG's potential business interests. For example, the protester avers that while AEG may be recusing itself from supplying fuel in non-contract locations, it still will provide fuel at contract locations. Accordingly, because "[s]ome contract location competitors also compete in the non-contract market[,] AEG thus will now oversee the AIR Card® market participation of those with which AEG competes both for noncontract and contract transactions." Supp. Comments at 34.

While KHI is correct in its assessment, DLA's mitigation plan addresses this point. In this regard, DLA notes that its audit and oversight functions--which, the agency explains, was a central feature in mitigating KHI's own potential conflict when it was awarded the incumbent contract--would identify potential problems. AR, Tab 31, OCI Memo at 13. Moreover, aggrieved merchants can report potential malfeasance to DLA, which would result in financial penalties for AEG. *Id.* And finally, DLA notes that AEG could not steer business because it is the cardholders, not AEG, who "determine the locations they will use based on mission needs." *Id.* at 15.

The protester also points to AEG's potential commercial interests, outside of the federal government, as a source of potential conflict. Comments and Supp. Protest at 16; Supp. Comments at 36. While the agency concedes the contracting officer does not directly address this specific point, DLA contends (and we agree) its mitigation strategies would similarly apply to both the federal and non-federal spheres. Supp. COS/MOL at 10. Again, DLA notes its own substantive contract oversight and monitoring would proactively detect any potential bias through AEG's performance, and that aggrieved merchants could report directly to DLA of potential issues. AR, Tab 31, OCI Memo at 13. As DLA explains, AEG has both positive and financial incentives "to treat its merchants fairly and abide by the terms of the contract." Supp. COS/MOL

at 10. Specifically, as a carrot, AEG has a positive financial incentive not to favor or exclude a class of merchants; the only revenue AEG collects would be on fees charged on non-contract transactions, so it would behoove AEG to have an expansive network of merchants to drive up sales. AR, Tab 31, OCI Memo at 14. As a stick, AEG is disincentivized from showing bias in the performance of the contract due to penalties assessed by DLA for not enforcing AIR Card rules and restrictions. *Id.* at 13 (“Therefore, if AEG were to improperly investigate, audit, report, or reject charges, it would risk contract penalties, including financial decrements and termination, for no clear benefit, since it will no longer compete for non-contract purchases.”).

Accordingly, based on the record before us, we find no basis to conclude the agency unreasonably found the potential for an impaired objectivity OCI was properly mitigated.

AEG’s OCI Mitigation Plan and its Technical Proposal

KHI also contends the agency failed to reasonably evaluate disconnects between AEG’s proposal and what the awardee provided in its OCI mitigation plan. In this regard, the protester alleges that across several evaluation factors, AEG’s proposal “contradicts its OCI mitigation plan and otherwise violates the Solicitation.” Comments and Supp. Protest at 20. KHI contends that “[h]ad the Agency properly considered the dissonance between the two different methods of performance (mitigation plan versus actual proposal), the Agency would have rated AEG unacceptable or marginal and KHI would have received the award.” *Id.*

Under the technical capability subfactor, the RFP required offerors to “produce an overall solution description document that describes the business solution, including how it addresses the functional requirements detailed in the [performance work statement] (PWS).” RFP at 203. As relevant here, the solicitation explained that “[i]f the offeror is teaming with subcontractors, the offeror shall explain the relationships, duties, and responsibilities of each subcontractor.” *Id.*

AEG’s OCI mitigation, as explained above, would rely in part on an unidentified, non-conflicted, firewalled subcontractor to perform certain tasks on the contract. AR, Tab 64, AEG Final Proposal Revision, Vol. 1 at 158. This subcontractor would, per the terms of AEG’s OCI mitigation plan, resolve a certain subset of non-contract transactions, and report directly to DLA. *Id.* at 159-161; AR, Tab 31, OCI Memo at 12-13. However, as noted by KHI, the version of AEG’s technical proposal in the record fails to address the role of this unidentified subcontractor and, consistent with the RFP’s requirements under the technical capability subfactor, fails to “explain the relationships, duties, and responsibilities of each subcontractor.”¹² RFP at 203.

¹² The agency produced, in its agency report, a heavily redacted version of AEG’s technical proposal and DLA’s evaluation of such. KHI’s supplemental protest argued the agency misevaluated AEG under several of the non-price factors, where the agency failed to consider the “[p]atent [d]isconnect” between AEG’s OCI mitigation plan and its
(continued...)

Similarly, KHI argues the agency's evaluation record, contemporaneous or otherwise, does not evidence that DLA examined, under the technical capability subfactor, this firewalled subcontractor's duties and responsibilities.

Agencies are required to consider the effect that a firm's OCI mitigation measures have on its technical approach, and whether 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 merits of a firm's proposed approach. *ARES Tech. Servs. Corp.*, B-415081.2, B-415081.3, May 8, 2018, 2018 CPD ¶ 153 at 6; *Deloitte Consulting, LLP*, B-422094, B-422094.2, Jan. 18, 2024, 2024 CPD ¶ 36 at 8-9. We conclude the record does not demonstrate the agency

non-price proposal volumes. Comments and Supp. Protest at 20. In DLA's supplemental 5-day letter, the agency explained that it produced all responsive materials relevant to this protest allegation with the agency's initial report. See e.g., DLA Supp. 5-Day Letter at 2 ("KHI's supplemental argument concerning this Subfactor does not challenge anything that KHI alleges or believes is in AEG's proposal. Rather, it argues AEG's proposal allegedly lacked content about its subcontractor in its response to the Subfactor. Accordingly, except to the extent that DLA discovers any additional redacted content related to the argument, nothing else in AEG's response to the Subfactor is relevant to the ground.").

In response to KHI's objection to the proposed production--on the basis that, given its challenges raised, the protester was entitled to unredacted versions of AEG's technical proposal and DLA's evaluation of that material--we asked DLA to produce information from AEG's technical proposal addressing AEG's implementation of its OCI mitigation plan. See GAO Notice of Resp. to Req. for Dismissal and Document Objection, Jul. 16, 2024 (providing the "agency should produce responsive documents addressing the allegation, to include relevant portions of AEG's proposal, and DLA's technical evaluation."). The agency produced only minimal additional excerpts from the proposal, such as those referencing AEG's proposed new business division, but did not produce any additional information relevant to the proposed subcontractor.

We have recognized that where an agency represents that it will produce all relevant documents, and that the documents will fully reflect the agency's analyses and evaluations, we will generally accept the agency's representations, based on a presumption of good faith. *TriCenturion, Inc.; SafeGuard Servs., LLC*, B-406032 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 52 at 13. Notwithstanding this general principle, however, it is incumbent on an agency to submit an adequate record supporting the reasonableness of its evaluation and source selection decision. We have repeatedly cautioned that where an agency fails to document its evaluation, or fails to retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for our Office to conclude that the agency had a reasonable basis for the source selection decision. *Id.* Thus, our consideration here is limited to the record produced by the agency that it represented as containing all responsive, relevant information.

reasonably considered AEG's proposed OCI's mitigation strategies with respect to the firm's proposed technical approach with respect to subfactor 1a (technical capability).

In rebuttal to the protester, DLA makes several arguments, none of which we find persuasive. Supp. COS/MOL at 11-13. First, the agency contends that because AEG would only use this subcontractor for a limited number of transactions, DLA "did not consider it necessary for AEG to reference it in its technical proposal." *Id.* at 12. However, this evaluation conclusion is found nowhere in the contemporaneous record, but instead, is advanced by DLA in its pleadings responding to KHI's protest allegations. In reviewing an agency's procurement actions, we do not limit our consideration to contemporaneously documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 4 n.3. Our Office will accord lesser weight to *post hoc* arguments or analyses because judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, we conclude the agency's *post hoc* justification--crafted in the heat of litigation, with no support in the contemporaneous record--to be a *post-hoc* rationalization deserving of little weight. *RemedyBiz, Inc*, B-421196, Jan. 17, 2023, 2023 CPD ¶ 29 at 9.

Second, DLA contends because, under the technical capability subfactor, the RFP did not provide additional insight concerning what degree of subcontractor involvement constituted "teaming", the agency determined AEG was not required to address its subcontractor under this subfactor, ostensibly because the agency did not believe the proposed subcontractor to be a major or significant subcontractor. *Id.*; see RFP at 203 ("If the offeror is teaming with subcontractors, the offeror shall explain the relationships, duties, and responsibilities of each subcontractor."). Again, support for this conclusion is found nowhere in the underlying record, and nothing in the solicitation indicates that the agency intended to draw a distinction between minor or major subcontractors, or otherwise exempt certain classes of subcontractors when fulfilling the solicitation's explicit proposal submission requirements. Furthermore, as noted by the protester, the agency's position is undercut by the FAR's definition, which similarly does not include such a distinction between minor and major subcontractors or teaming partners. See FAR 9.601(2) (noting that a contractor team arrangement includes a situation where a "potential prime contractor agrees with one or more other companies to have them act as its subcontractors under [a contract]").

Third, DLA argues KHI cannot demonstrate prejudice, where the protester, too, failed to sufficiently identify one of its proposed subcontractors in its technical capability narrative.¹³ Supp. COS/MOL at 12. In this regard, DLA notes that the protester

¹³ Competitive prejudice is an essential element of any viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a

(continued...)

explained it would partner with a tax reclamation firm for certain transactions, but--inconsistent with the technical capability subfactor--failed to “explain the relationships, duties, and responsibilities” therein. *Id.*; see AR, Tab 28, KHI Final Proposal Revision, Vol. 2 at 91 (noting that KHI “will partner with one or more tax reclamation specialist [firms], e.g., [DELETED], to directly reclaim taxes from merchants when taxes are improperly assessed on AIR Card® transactions.”).

However, DLA makes an apples-to-oranges comparison. Unlike AEG’s produced technical volume, KHI references its subcontractor and the work the subcontractor will perform in its narrative discussion. That is, unlike AEG, KHI’s technical proposal does, consistent with the RFP, identify the relationships, duties, and responsibilities of the tax subcontractor. *Id.* (noting when KHI will utilize this subcontractor and what the subcontractor would do). This is in stark contrast to AEG’s technical proposal which, in the redacted version produced as part of this protest, provides no insight as to the relationships, duties, and responsibilities of AEG’s proposed subcontractor. Moreover, AEG’s OCI mitigation plan, standing alone, similarly does not provide sufficient information to satisfy the RFP’s requirement that an offeror “explain the relationships, duties, and responsibilities of each subcontractor.” RFP 203.

Finally, DLA argues that even if offerors were required to identify their subcontractors under the technical capability subfactor, the agency’s failure to consider AEG’s omission would be *de minimis* error. Supp. COS/MOL at 13 (“Given the extremely limited role of AEG’s proposed firewalled subcontractor, whether AEG offered a few sentences explaining that limited role in its technical proposal could not have reasonably impacted the evaluation.”). However, without anything in the record to demonstrate that DLA did consider this material feature of AEG’s OCI mitigation plan, but ultimately concluded this aspect was so trivial as to not warrant consideration under the technical capability subfactor, we cannot agree with the agency’s conclusion. Indeed, as evidenced by the agency’s evaluation of AEG’s mitigation plan, the use of this subcontractor was a feature important to DLA. See AR, Tab 31, OCI Memo at 11, 12 (identifying AEG’s reliance on the firewalled subcontractor as part of its plan to mitigate potential OCI concerns). Moreover, running counter to DLA’s conclusion that this portion of AEG’s mitigation plan was inconsequential, we note the agency, during discussions, raised concerns about AEG’s approach with regard to the use of this subcontractor. See AR, Tab 55, DLA Discussion Letter to AEG, Feb. 15, 2024, at 1 (“DLA Energy seeks confirmation that, if awarded the contract, AEG . . . will subcontract the processing of AEG’s Fuel Division invoices at contract locations.”). DLA’s *post-hoc* assertions that the paucity of transactions requiring the use of this subcontractor did not require AEG to discuss the subcontractor in its technical proposal finds no footing in the record.

substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 10; *DynCorp Int’l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 12-13.

Thus, the record here establishes that offerors were required to address (in their respective technical capability proposals) the relationships, duties, and responsibilities of proposed subcontractors. AEG proposed a subcontractor in its OCI mitigation plan that the agency found to be material in mitigating potential OCI concerns. However, neither AEG's technical capability proposal nor the agency's evaluation addressed the relationships, duties, or responsibilities of the proposed subcontractor. Because the protest record does not demonstrate DLA reasonably considered AEG's use of this subcontractor under the technical capability subfactor, we sustain this allegation.¹⁴

OCI Mitigation and Corporate Experience/Past Performance

Along similar lines, KHI alleges DLA failed to consider the impact of AEG's OCI mitigation strategy as it relates to the agency's evaluation of the awardee's offered corporate experience and past performance. As part of its mitigation effort, and as a central feature of its technical proposal, AEG planned to utilize PPS--a newly created, firewalled division within AEG--to perform the requirements of this contract. AR, Tab 31, OCI Memo at 4 ("As the centerpiece of its mitigation effort, AEG noted it had already established a separate division referred to as 'Performance Payment Solutions' (PPS)."); AR, Tab 66, AEG Final Proposal Revision, vol. 2 at 3 ("AEG has established a separate firewalled division called Precision Payment Solutions (PPS) that will perform the work under this RFP."). As noted above, PPS would be organizationally, physically, and electronically separated from AEG. AR, Tab 31, OCI Memo at 4. AEG explains PPS would serve as a "separate operating division," firewalled from AEG. Tab 64, AEG Final Proposal Revision, Vol. 1 at 156. Further, AEG states its "leadership will not be within the AIR Card® Program firewall[.]" *Id.* at 157.

KHI argues, given that PPS would be separate from AEG's management, workforce, and facilities, the agency unreasonably imputed AEG's offered corporate experience and past performance to PPS. Indeed, the protester provides that "[g]iven the lack of experience of AEG's PPS division and AEG's failure to show how the experience described relates to the PPS division that will perform the work involved and the lack of information regarding whether the experience is similar to the AIR Card® program as stated in the PWS, the record lacks support" for DLA's ratings attributed to AEG's under the corporate experience subfactor and the past performance factor. Comments and Supp. Protest at 39.

Concerning the corporate experience subfactor, DLA was to examine "the offeror's previous experience in providing internet logistics programs similar to the AIR Card®

¹⁴ KHI also contends the agency's evaluation is similarly flawed under the two management subfactors because AEG failed to discuss its subcontractor in the management proposal. Comments and Supp. Protest at 20-22; Supp. Comments at 20-23. However, as we conclude KHI fails to point to provisions of the solicitation that would reasonably necessitate AEG discussing its subcontractor under the management approach subfactors, these allegations do not provide a basis to sustain the protest.

program” based on having “at least 3 years of corporate and/or government experience in respect to logistics, data management, and system development” to determine “whether the offeror can manage the scope of work of the resultant contract.” RFP at 204. Regarding past performance, the RFP explained that DLA would examine prior performance to evaluate “the offeror’s ability to meet the solicitation requirements, including the offeror’s ability to conform to contract requirements, specifications and standards of good workmanship, the offeror’s ability to meet delivery schedules, to respond to administrative issues in a timely manner, and to complete a contract.” *Id.* at 206.

AEG did not propose any corporate experience or past performance references related specifically to PPS, but instead, relied on AEG’s experience and past performance as the offeror. AR, Tab 66, AEG Final Proposal Revision, vol. 2 at 40-44; 99-103. Further, the evaluation record does not demonstrate the agency considered whether AEG’s corporate experience and past performance should be attributed to PPS, a newly created, firewalled entity within AEG. AR, Tab 68, AEG Technical Evaluation at 9; AR, Tab 32, AEG Past Performance Evaluation at 1-5.

The parties offer differing positions as to the propriety of the agency’s actions, in this regard. In the protester’s view, the awardee cannot simultaneously offer PPS as a completely separate, walled-off entity performing the requirements of this contract, yet also claim that AEG’s corporate experience and past performance history will have bearing on how PPS will perform. To support its position, KHI principally relies on our line of decisions, discussed below, requiring that an offeror demonstrate the meaningful involvement of a corporate parent or affiliate in the performance of the work in order for an agency to reasonably consider the corporate experience or past performance of the parent or affiliate.

In response, DLA contends its evaluation was reasonable, and KHI’s reliance on inapposite GAO decisions to support its position undercuts its position. The agency argues because PPS is merely a division within AEG, and not an affiliate or separate legal entity (as GAO’s decisions have previously addressed), there would be no reason for the agency to discard AEG’s offered experience for this effort where AEG is the offeror. Moreover, the agency claims that because AEG “utilized its experience and resources to develop portions of the EAS, establish its merchant network, and staff the division that will manage the AIR Card® contract[,]” the use of these resources “would allow for consideration of AEG’s corporate experience and past performance[.]” Supp. COS/MOL at 15.

As the parties note, our Office has previously stated that an agency may properly attribute the experience or past performance of a parent or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. Because a corporate affiliate is a separate legal entity from the firm submitting the proposal, the relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities or

other resources--will be provided, or relied upon, for contract performance such that the parent or affiliate will have meaningful involvement in contract performance. *Ecompex, Inc.*, B-292865.4 *et al.*, June 18, 2004, 2004 CPD ¶ 149 at 5. While it is appropriate to consider an affiliate's performance record where the affiliate will be involved in the contract effort or where it shares management with the offeror, it is not appropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror. *National City Bank of Indiana*, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190 at 10.

Based on the record in front of us, we find no basis to sustain this protest allegation. The RFP did not require offerors to differentiate their corporate experience and past performance based on what business division, segment, or unit would perform the work. Instead, the solicitation explained DLA would examine an "offeror's" experience and performance record. RFP at 204 ("The Government will evaluate the offeror's previous experience . . ."); at 206 ("The assessment of the offeror's past performance will be used as a means of evaluating the offeror's ability to meet the solicitation requirements . . ."). Absent some provision requiring an offeror to justify the relevance or involvement of an offeror's specific business divisions, units, or segments, we find no basis to conclude that the agency erred in evaluating AEG's corporate experience or past performance here.¹⁵

We also agree with the agency that the decisions from our Office cited by the protester are not analogous to the facts at hand. That is, KHI argues that our prior decisions "establishes that a contractor cannot rely on the experience or past performance of an entity that will not participate in contract performance." Comments and Supp. Protest at 27. However, the protester points to decisions involving corporate affiliates, which are separate legal entities. See *Metrostar Sys., Inc.*, B-416377.5, B-416377.8, Apr. 2, 2020, 2020 CPD ¶ 135 at 8 (sustaining a protest where the agency unreasonably credited an awardee with the corporate experience and past performance of affiliated entities); *Deloitte Consulting, LLP, et al.*, B-411884 *et al.*, Nov. 16, 2015, 2016 CPD ¶ 2 at 9-11 (same, where record failed to demonstrate reasonableness of agency's decision to credit parent company's past performance to the affiliate that would perform the contract). The protester fails to cite any decision from our Office where we have

¹⁵ The RFP's language here is in contrast to other solicitation provisions our Office has reviewed that limit an agency's consideration of the experience or past performance of separate business divisions, units, or segments. See e.g., *Jacobs Tech., Inc.*, B-420016, B-420016.2, Oct. 28, 2021, 2021 CPD ¶ 373 at 6 (solicitation explaining that if submitted past performance "includes data on any affiliated company, division(s), business units, segments, or other organizations of the Offeror, then [the offeror must] provide a narrative to address what they will be responsible for and/or proposing to do and the specific resources (workforce, management, facilities, or other resources) to be employed and relied upon, such that said parent *et al* will have meaningful involvement in contract performance"); *Iyabak Construction, LLC*, B-409196, Feb. 6, 2014, 2014 CPD ¶ 62 at 3 (solicitation explaining that an "offeror will not receive credit for relevant past performance of a parent, affiliate, or [separate] division").

concluded that an operating division of an offeror must be treated as separate and distinct from the offeror as a whole absent specific solicitation language that imposes such a requirement. Here, because PPS, although firewalled, is a division of AEG, and AEG was the offeror to be evaluated per the terms of the solicitation, we find no basis to conclude that the agency acted improperly when it based its evaluation on AEG's corporate experience and past performance information. This protest allegation is denied.

KHI's Remaining Challenges to DLA's Evaluation of Proposals

KHI raises other challenges to the agency's evaluation of proposals. While we do not address every argument the protester has raised, we have reviewed them all and, consistent with the representative examples addressed below, find that none provides any additional basis on which to sustain the protest.¹⁶

¹⁶ In some circumstances, the protester raises collateral or alternative arguments to other protest allegations. For example, KHI contends AEG's proposal to stand up and rely on PPS, a newly created business division within AEG, should have been deemed nonresponsive for violating the solicitation's prohibition on "new business lines." RFP at 191 ("The Contractor may not offer any new business lines."); see Protest at 73-74; Comments and Supp. Protest at 72-75; Supp. Comments at 67-69. While KHI argues that PPS is a "new business line" in contravention of the solicitation's requirements, the agency and intervenor argue that the solicitation's prohibition on new business lines reasonably referred to a prohibition on any new charge card other than those identified in the RFP. See DLA's Resp. to Intervenor's Req. for Dismissal at 9; COS/MOL at 44; Intervenor's Comments at 28-29. In the alternative, DLA and AEG argue that the phrase is patently ambiguous, where it is facially unclear what "new business lines" is intended to cover, and the term is not defined in the solicitation. COS/MOL at 44; Intervenor's Comments at 28-29.

Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *Sikorsky Aircraft Corp.*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 6. A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. Where a patent ambiguity exists but is not challenged prior to the submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

Here, we agree with the agency and intervenor that because the meaning of "new business lines" is patently ambiguous, KHI's protest allegation is untimely. Indeed, "new business lines" is nowhere defined in the RFP, and does not, in our view, have a commonly understood definition that would reasonably put offerors on notice of what conduct would be prohibited. Because KHI failed to challenge the meaning of this

(continued...)

KHI's Evaluation under the Transition/Risk Management Subfactor

Taking one illustrative example, the protester challenges DLA's evaluation of its proposal under transition/risk management subfactor, arguing the agency's assignment of a rating of "Acceptable" was in error, as the agency failed to credit its proposal with additional strengths for features of its approach that, KHI contends, exceeded the solicitation's requirements. Protest at 40-43; Comments and Supp. Protest at 31-32; Supp. Comments at 39-40. In response, DLA argues its evaluation was reasonable and consistent with the terms of the RFP.

Under the transition/risk management subfactor (1c), DLA would evaluate an "offeror's ability, timeliness, and adequacy in demonstrating the transition requirements for contract start-up and contract close-out, contract transition resulting from a change in the incumbent contractor as a consequence of a re-solicitation, and technological advance transition." RFP at 203. The agency's assessment would include, among other things: account setup; card delivery and action; training and training materials; and data transmission and storage. *Id.* Offerors were also to provide a narrative discussion addressing three identified key areas of the AIR Card program. *Id.* at 203-204 (requiring an offeror to address its approach and strategies for demonstrating success in accomplishing a seamless transition; processes and impacts to phase-in and phase-out activities; and plan and strategies to meet requirements and accomplish global merchant acceptance).

DLA's evaluation assigned KHI's proposal an overall rating of acceptable. AR, Tab 40, KHI Technical Evaluation at 8-9. In so finding, DLA noted a single strength for KHI's approach, identifying its status as an incumbent "has the potential to reduce some of the transition risk, which is a benefit." *Id.* at 8. DLA, however, concluded that this strength, coupled with the firm's overall approach, did not warrant a rating of good. *Id.* DLA noted that "there is an abundance of new requirements for this contract[.]" and that "[a]lthough KHI generally addresses the transition requirements in this section of its proposal and addresses the new requirements elsewhere, it does not explain in any detail how it will leverage its position as the incumbent to incorporate those changes during transition." *Id.* Instead, DLA found that KHI "merely discusses its ability to perform today under its EAS and policies which will need to change for a new contract." *Id.* Accordingly, the technical evaluation team concluded that "while the technical evaluation board considers KHI's incumbency a strength, since its transition plan and risk mitigation was otherwise generic and merely indicated an adequate approach to transition, the board assesses KHI as Acceptable rather than Good for this Subfactor." *Id.* at 7-9.

KHI chafes at this assessment, noting the firm offered a "thorough, low-risk transition approach" that supports its ability to "transition with little, if any, risk[.]" Comments and

clearly ambiguous solicitation provision prior to the deadline for the submission of proposals, the allegation is untimely raised and is dismissed. 4 C.F.R. § 21.2(a)(1).

Supp. Protest at 31. The protester argues DLA could not reasonably conclude “that KHI’s [] established personnel, a robust infrastructure, and already compliant systems” merely had the potential to reduce transition risk, as the agency suggested. *Id.* at 31.

The evaluation of proposals is primarily a matter within the agency’s discretion, since the agency is responsible for defining its needs and identifying the best method for accommodating them. *International Preparedness Assocs. Inc.*, B-415416.3, Dec. 27, 2017, 2017 CPD ¶ 391 at 4. In reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals; rather, we will examine the record to determine whether the agency’s evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *OPTIMUS Corp.*, B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. A protestor’s disagreement with the agency’s judgment, by itself, is not sufficient to establish that an agency acted unreasonably. *Hughes Network Sys., LLC*, B-409666.5, B-409666.6, Jan. 15, 2015, 2015 CPD ¶ 42 at 6.

Based on the record, we find no basis to conclude DLA’s evaluation decisions were unreasonable. Here, the contemporaneous record demonstrates DLA considered KHI’s approach, but given the changes in the program requirements, and the fact that KHI’s proposal failed to “explain in any detail how it will leverage its position as the incumbent to incorporate those changes during transition[,]” the agency did not believe the approach warranted more than a rating of acceptable. AR, Tab 40, KHI Technical Evaluation at 8-9. This conclusion is supported by the technical evaluation team chair’s declaration produced during the pendency of this protest. See AR, Tab 46, Technical Evaluation Team Chair Declaration at 4-5 (noting that the features KHI points to in its protest were not sufficiently explained to warrant additional positive assessments). While the protester may disagree with the agency’s assessments, we find no basis to disturb the agency’s evaluation judgments. *Hughes Network Sys., LLC, supra* at 6.

Relevancy of AEG’s Past Performance

As another representative example, KHI argues the agency’s evaluation of AEG’s past performance was unreasonable, where DLA erroneously concluded the awardee had relevant past performance. When a protester challenges an agency’s evaluation of past performance, we will review the evaluation to determine if it was reasonable and consistent with the solicitation’s evaluation criteria and procurement statutes and regulations, and to ensure that it is adequately documented. *Falcon Env’tl. Servs., Inc.*, B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. An agency’s evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror’s performance history, is a matter of discretion, which we will not disturb unless the agency’s assessment is unreasonable or inconsistent with the solicitation criteria. *Metropolitan Life Ins. Co.*, B-412717, B-412717.2, May 13, 2016, 2016 CPD ¶ 132 at 14. A protester’s disagreement with the agency’s past performance judgements, without more, is insufficient to establish that the evaluation was improper. *Beretta USA Corp.*, B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

As noted above, the solicitation explained DLA would evaluate offerors' recent and relevant past performance, where "relevant" was defined as "past performance that is similar in scope, complexity, and dollar value to the subject procurement." RFP at 206. In scoring relevancy, DLA utilized several adjectival ratings: very relevant; relevant; somewhat relevant; not relevant. *Id.* at 206-207. As germane here, a rating of "relevant" was applied where the performance "involved similar scope and magnitude of effort and complexities" as the instant requirement, whereas a rating of "somewhat relevant" was reserved for performance that "involved some of the scope and magnitude of effort and complexities this solicitation requires." *Id.* at 206.

The protester contends the agency's evaluation of the relevancy of AEG's offered performance was flawed; in KHI's view, none of AEG's references could reasonably have been considered "relevant" (as that term was understood under the RFP) and that DLA did not sufficiently document its evaluation conclusions. Comments and Supp. Protest at 51-63; Supp. Comments at 57-63. Based on our review of the record, we agree with the agency that DLA's conclusions concerning the relevancy of AEG's past performance were not unreasonable and sufficiently documented.

The agency focused its evaluation attention on three of AEG's past performance questionnaires (PPQs), two of which were rated as "[r]elevant", and one as "[s]omewhat [r]elevant".¹⁷ AR Tab 32, AEG Past Performance Evaluation Report at 3-4. Overall, DLA rated AEG's past performance as "relevant". *Id.* at 5. The agency explained that "AEG's past performance record demonstrates they have performed on contracts involving the scope and complexities required for this acquisition" and "[i]n particular, the description of effort in the 3 PPQs all involved fuel card transaction processing services similar to the solicitation." *Id.*

The first PPQ DLA examined concerned AEG's work with the French air force, which included use of airport service cards "for the provision of services to end-users allowing the contractor to link each service request to a specific customer for invoicing purposes." AR, Tab 33, AEG Combined PPQs at 1. The PPQ explained AEG's performance involved airport service cards. DLA determined this reference was "relevant" because the performed work "resembled the requirements" of DLA's scope of work. See AR Tab 32, AEG Past Performance Evaluation Report at 3

Description of work mentioned cards being issued in accordance with tail number which falls in line with card embossing requirement within the PWS. Client also touched on resolution of disputes which also resembled the requirements within the PWS. The PPQ Evaluator states the offeror provides issued approximately 2,000 cards, processed 20,000 transactions annually, customer invoices, and resolved payment disputes that does align with the PWS requirements.

¹⁷ DLA determined that AEG's recent contractor performance assessment reporting system (CPARS) references were not relevant. AR, Tab 32 AEG Past Performance Evaluation Report at 2-3.

In the protester's view, the PPQ's "thin summary" does not provide sufficient information about the scope and magnitude of the effort for DLA to have reasonably concluded it was relevant. Comments and Supp. Protest at 56. In support, KHI notes that while this PPQ mentions AEG processed only 20,000 transactions, annually, DLA's requirement is significantly more robust, with 315,000 transactions for fiscal year 2023. *Id.* Moreover, KHI notes that DLA's effort concerns a substantially larger magnitude in terms of dollar value. *Id.*

We find no reason to object to the agency's conclusions regarding the PPQ's relevancy. Again, to receive a rating of relevant, performance had to involve "similar" scope, magnitude of effort, and complexity of the requirement. RFP at 206. Here, the record demonstrates the agency considered these metrics in making its relevancy determination--DLA considered the scope of work (*e.g.*, issuance of cards and the resolution of disputes) as well as the number of transactions, customer invoices, and payment disputes processed or resolved. AR Tab 32, AEG Past Performance Evaluation Report at 3. DLA's evaluators believed these features were similar to the instant requirement. *Id.* To the protester's point, the record does not reflect that the number of transactions processed under this AEG effort is commensurate with the expected transactions for DLA's requirement (20,000 vs. 315,000 transactions). However, the number of transactions processed is not the only comparison metric to gauge similarity. As reflected here, the evaluators looked to the scope and complexity of the services rendered and found those aspects to be similar in nature to the requirements at issue. Here, we cannot find the agency's holistic determination to be unreasonable.

We similarly find no basis to object to DLA's assignment of a rating of "relevant" for AEG's effort related to work for Atlantic Aviation, and a rating of "somewhat relevant" for its performance on the NATO Support and Procurement Agency. AR, Tab 33, AEG Combined PPQs at 7-16. Concerning the Atlantic Aviation contract, while KHI argues the PPQ is limited in detail and reflects work not reasonably similar to DLA's solicited requirement, the agency found otherwise, specifically with AEG's processing of electronic transactions, support for credit/re-bills, technical support with transactions, and use of an electronic gateway. AR Tab 32, AEG Past Performance Evaluation Report at 4. Again, while the protester points to the fact that this effort involved far fewer transactions, we find reasonable the agency's conclusion that the totality of AEG's effort was similar to DLA's requirements in terms of scope, magnitude of effort, and complexity.

In like manner, KHI contends the NATO contract PPQ is too vague and provides too little information for the agency to have reasonably determined the work was "somewhat relevant". Supp. Comments at 59-61. However, under the RFP, assigning a rating of "somewhat relevant" only required DLA to find that the effort involved "some" of the scope, effort, and complexity of the AIR Card requirements. Here, the contemporaneous record states that the reference's "description of work failed to provide relevant information" and "was very minimal in detail." AR Tab 32, AEG Past

Performance Evaluation Report at 3-4. However, based on the agency's review of AEG's proposal and the minimal information in the PPQ, AEG's use/processing of 300 airport service cards "for the provision of services to end-users" was deemed to involve elements of the scope of the AIR Card requirement. On this record, we cannot find DLA's conclusion that AEG's work for NATO was "somewhat relevant" to be unreasonable.¹⁸ This protest ground is denied.

RECOMMENDATION

We recommend that the agency reevaluate AEG's proposal, in conjunction with the firm's OCI mitigation plan, in a manner consistent with the discussion above and make a new source selection decision based on that reevaluation. We also recommend that the agency reimburse KHI its reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for

¹⁸ In any event, the underlying evaluation record demonstrates that the source selection authority recognized that the protester had more relevant experience but raised concerns with the quality of KHI's performance. See AR, Tab 69, Source Selection Decision Document at 22 ("[A]lthough KHI has more relevant experience than AEG, KHI's past performance record includes some recent performance issues."); see also AR, Tab 35, KHI's Past Performance Evaluation Report at 5-7 (noting that KHI received a rating of "[v]ery [r]elevant" for submitted performance references, but only a rating of "[s]atisfactory [c]onfidence" based on an assessment of KHI's overall performance, which included "significant errors in their performance and deliverables."). Competitive prejudice is an essential element of any viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 10; *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 12-13. On this record, the agency reasonably understood KHI's past performance was more relevant than AEG's past performance; this advantage under the relevancy criterion, however, did not offset KHI's documented past performance issues under the quality criterion.

costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained, in part, and denied, in part.

Edda Emmanuelli Perez
General Counsel