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Decision

Matter of: Ellwood National Forge Company--Protests and Costs

File: B-416582; B-416582.2; B-416582.3; B-416582.5

Date: October 22, 2018

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DIGEST

1. Protest challenging the agency's evaluation of the protester's proposal as technically unacceptable is denied where the evaluation was reasonable, consistent with the solicitation, and adequately documented.
 2. Protest that the agency was required to reopen discussions before rejecting the protester's proposal as technically unacceptable is denied where the agency was under no obligation to reopen discussions regarding the protester's technically unacceptable final revised proposal.
 3. Protest challenging the technical capability of the awardee is dismissed as untimely because it was raised more than 10 days after the protester knew or reasonably should have known of its basis for protest.
 4. Protester is not an interested party to challenge the agency's decision to proceed with a single award where the protester submitted a technically unacceptable proposal.
 5. Request for a recommendation that the protester be reimbursed its reasonable costs of pursuing its protest is denied where the agency promptly took partial corrective action.
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DECISION

Ellwood National Forge Company (ENF), of Irvine, Pennsylvania, protests the award of a contract to Superior Forge and Steel Corporation, a small business, of Lima, Ohio,

under request for proposals (RFP) No. FA8681-17-R-0036, which was issued by the Department of the Air Force, for BLU-137/B Penetrator Warhead production. ENF challenges the Air Force's evaluation of its proposal as technically unacceptable. The protester also challenges the agency's determination that Superior was capable of performing the requirements, as well as its decision to proceed with a single award.¹ The protester also requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests based on the agency's partial corrective action taken in response to ENF's initial protest.

We deny the protest in part, dismiss the protest in part, and deny the request for costs.

BACKGROUND

On June 22, 2017, the Air Force issued the RFP contemplating the award of a fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract for the production of BLU-137/B Penetrator Warheads. RFP, Evaluation Factors for Award, ¶ M-1.2.² The RFP provided for the award of five production lots on an anticipated schedule of one annual production lot each year for five years. The first lot will be for a low rate initial production (LRIP), followed by four individual full rate production lots. RFP, Statement of Work (SOW), ¶ 3. The planned total LRIP quantity is 1,000 units, with the total maximum quantity being 15,000 units. RFP, Ordering Procedures, ¶¶ 3 and 6. The RFP informed offerors that the agency intended to make two or more IDIQ contract awards with each production lot buy being competed among the contract holders, but it also expressly reserved the right to make one award or no awards. RFP, Evaluation Factors for Award, ¶ M-1.2.

Award was to be on a lowest-priced, technically acceptable (LPTA) basis, considering technical and price. *Id.*, ¶ M-1.1. With respect to price, the agency was to evaluate offerors' proposed prices for reasonableness and balance. *Id.*, ¶ M-4.0. With respect to technical, which was to be evaluated for acceptability, the Air Force was to consider: (1) technical experience and capability; (2) manufacturing and quality; and (3) schedule and production capacity. *Id.*, ¶ M-1.7. Only the first factor, technical experience and capability, are relevant to the issues in the protest.

¹ As addressed herein, the Air Force initially made a second contract award to A. Finkl and Sons, Co., d/b/a Finkl Steel, of Chicago, Illinois. Finkl intervened in ENF's initial protest. Following partial corrective action taken in response to ENF's initial protest, the agency terminated Finkl's contract, and Finkl no longer satisfied the requirements of an intervenor pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.0(b)(1).

² The RFP was subsequently amended four times; references herein are to the RFP as amended. Additionally, references to page numbers are to the Bates numbering used by the Air Force in its agency report (AR).

An offeror's technical experience and capability was to be evaluated for compliance with three measures of acceptability (MOA): (1) ability to produce AF-96 or comparable steel material (MOA 3.1.1); (2) refinement and work hardening (MOA 3.1.2); and (3) heat treating (MOA 3.1.3). Id., ¶ M-3.1. Under MOA 3.1.1, the proposal would be acceptable if the offeror demonstrated knowledge and experience producing AF-96 material or comparable steel products, and had done so within the last 10 years. Id. This information was to include demonstrating knowledge and experience with material property requirements (e.g., tensile strength, yield strength, elongation to failure, and Charpy impact toughness as measured at -40 degrees Fahrenheit), as cited in technical drawing XSP20168701, titled "BLU-137/B Material Specification, AF-96", which was included in the RFP's technical data package. Id.

Under MOA 3.1.2, the proposal would be acceptable if the offeror demonstrated knowledge and experience of refining and work hardening (e.g., forging) techniques applicable to refining and work hardening AF-96 material or comparable steel material, and had done so in the last 10 years. Id. Under MOA 3.1.3, the proposal would be acceptable if the offeror demonstrated the knowledge and experience in connection with performing heat treatment operations for AF-96 or comparable steel material, and had produced such material within the last 10 years. Id. Relevant to the issues in this protest, the RFP specifically warned offerors that they had to provide a complete supporting rationale for any exceptions to the RFP's terms and conditions, and that the agency reserved the right to find any such exceptions unacceptable. Id., ¶ M-1.4.

The Air Force initially received five proposals, including from ENF, Superior, and Finkl, by the RFP's amended closing date, but one offeror withdrew its proposal before the establishment of the competitive range. Contracting Officer's Statement of Fact (COSF) at 6. Based on the initial proposals received, the Air Force determined that none of the four remaining proposals were technically acceptable, but it included all of the proposals in the competitive range because it believed that they could be made technically acceptable through discussions. AR, Tab 20, Competitive Range Determination, at 1. The Air Force then opened discussions, and sent 14 evaluation notices (EN) to ENF, 16 ENs to Finkl, 8 ENs to Superior, and 22 ENs to the fourth offeror. COSF at 7. In addition to issuing written discussion questions, the agency notified offerors that it would answer any questions that the offerors had with respect to the agency's discussion questions. See, e.g., AR, Tab 22, Competitive Range Letter to ENF, at 2. Following telephone conversations with the offerors that posed questions, the Air Force submitted written clarifying responses to the offerors. See, e.g., AR, Tab 24, Air Force Letter to ENF.

After the receipt of discussion responses, the Air Force found that the proposals submitted by ENF, Finkl, and Superior were acceptable, while the fourth offeror's proposal remained technically unacceptable. AR, Tab 31, Pre-Final Proposal Revision Request Briefing, at 184. The Source Selection Authority (SSA) adopted the evaluators' recommendation to close discussions and request final proposal revisions (FPR) from the four offerors in the competitive range. Id. at 185. In its invitation to ENF to submit a FPR, the Air Force expressly notified the protester that its "Technical Approach [was]

currently assessed as 'Acceptable' as a result of additional information [ENF] provided during discussions." AR, Tab 33, FPR Letter to ENF, at 1. Additionally, the letter also stated that discussions had concluded, and warned ENF that changes in its FPR had to be clear and substantiated, and the agency would not conduct further discussions. Specifically, the letter provided as follows:

Discussions are now closed. The Government intends to make award without further discussions. Therefore, if changes are made to your proposal, those changes would be made without the benefit of further discussions. As such, you are cautioned that lack of clarity, substantiation, and completeness in the changes could create misunderstandings or discrepancies.

Id.

Relevant here, following the receipt of the offerors' FPRs, the Air Force evaluated the proposals of ENF, Finkl, and Superior accordingly:

	MOA 3.1.1	MOA 3.1.2	MOA 3.1.3	Total Evaluated Price³
ENF	Unacceptable	Acceptable	Acceptable	\$130,074,000
Finkl	Acceptable	Acceptable	Acceptable	\$142,414,000
Superior	Acceptable	Acceptable	Acceptable	\$146,174,000

AR, Tab 43, Source Selection Decision, at 1-2.

The evaluators concluded that ENF's FPR was technically unacceptable due to changes introduced by ENF in the FPR. AR, Tab 41, Source Selection Evaluation Board Final Report, at 1. Specifically, the agency determined that ENF had included two exceptions to the chemistry and mechanical property requirements that departed from the RFP's technical design package requirements, and introduced "confusion and doubt about ENF's knowledge of the production of AF-96 as cited in the [technical data package] and their knowledge of the mechanical property requirements." Id. The SSA concurred with the evaluators, finding that while both of ENF's exceptions departed from the RFP's technical specifications, it was ENF's contradictory statements and lack of explanation for the exceptions to the material requirements that resulted in the unacceptability of its proposal. AR, Tab 43, Source Selection Decision, at 3. In this regard, the SSA specifically found that ENF's exceptions included no supporting

³ For purposes of calculating offerors' total evaluated prices, the Air Force used its best estimated quantity for each production lot, which was 1,000 units per lot. RFP, Evaluation Factors for Award, ¶ M-4.2. Thus, the total evaluated prices, which were calculated based on an estimated total of 5,000 units, were less than the awarded contract ceilings, which were based on a maximum potential quantity of 15,000 units.

rationale for why they were needed or why the requirements could not be met as written in the RFP, and thus the exceptions did not comply with the RFP's requirement that any exceptions had to be fully supported. Id. at 4-5. Since ENF's lowest-priced proposal was technically unacceptable, and therefore ineligible for award, the SSA decided to make awards to Finkl and Superior, which submitted the two LPTA proposals. Id. at 10. The contract ceilings, which were calculated based on a potential maximum quantity of 15,000 units, for Finkl and Superior were \$419,633,500 and \$476,935,075, respectively. COSF at 9.

Following a debriefing, ENF filed this protest with our Office on July 16, 2018. In its initial protest, the protester challenged the Air Force's evaluation of its proposal as technically unacceptable, and the evaluation of Finkl's proposal. Specifically, the protester alleged that: (1) Finkl should have been found ineligible for award because it has an immitigable foreign ownership, control, and influence (FOCI) issue because its ultimate corporate parent is foreign; (2) the agency failed to reasonably determine whether Finkl was a Specially Designated National (SDN) either listed by the Department of the Treasury's Office of Foreign Assets Control or otherwise ineligible for award as a matter of law because one or more SDNs own, directly or indirectly, 50 percent or more of Finkl; and (3) the agency had no basis to conclude that Finkl satisfied the required technical experience with AF-96 or comparable material. See Protest at 21-33.

On July 31, the Air Force notified our Office of its intent to take partial corrective action in response to ENF's protest. Specifically, the agency represented that it would issue ENs regarding FOCI to all competitive range offerors. Notice of Partial Corrective Action at 1. ENF objected to the agency's notice of partial corrective action, arguing that the proposed corrective action, in essence, "would simply be a repeat of the flawed approach for evaluation of FOCI which ENF already challenged." ENF Objection to Proposed Partial Corrective Action at 3. Our Office denied the protester's objection to the proposed partial corrective action because the protester merely anticipated adverse actions by the agency, and therefore its objections were premature. Decision Granting Agency's Request for Partial Dismissal (Aug. 6, 2018) (unpublished decision) at 1 (citing Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4). On August 8, the Air Force amended its notice of corrective action to indicate that it would also investigate ENF's allegations regarding Finkl's SDN status. Amended Notice of Partial Corrective Action at 1. Our Office subsequently granted the agency's request to dismiss the SDN related allegations as academic in light of the agency's amended proposed partial corrective action.

The Air Force proceeded to file its agency report responding to ENF's remaining protest allegations challenging the evaluation of the protester's proposal and the agency's evaluation of Finkl's technical acceptability. On August 27, ENF filed its comments on the AR, which included supplemental protest grounds challenging the evaluation of Finkl's proposal, and alleging that the agency engaged in disparate treatment in its evaluation of ENF's and Finkl's proposals. On August 30, the Air Force notified our Office that it had concluded its partial corrective action and determined that Finkl is a

U.S. company that is under FOCl. Therefore, the agency terminated Finkl's contract. See Agency Notice of Completion of Partial Corrective Action at 1-2.⁴ In light of the termination of Finkl's contract, our Office dismissed ENF's supplemental protest as academic.

On September 5, ENF filed a second supplemental protest alleging four grounds. First, the protester argued that the agency's decision not to reopen discussions following the receipt of FPRs was unreasonable because the decision was based on the Air Force having two acceptable proposals, which was no longer the case after Finkl's termination. Second, ENF alleged that the Air Force was not authorized to make a single award to Superior because the original source selection decision, which made two awards, had not made a best interest determination to proceed with a single award as contemplated by the RFP. Third, the protester alleged that Superior lacks the capability to perform the full requirements because it is a small business concern with no government contract experience. Fourth, ENF alleged that, based on its allegations in its first supplemental protest regarding the agency's disparate treatment as between the proposals of ENF and Finkl, it was likely that the agency similarly disparately treated ENF's and Superior's proposals.

On September 14, ENF filed a request, pursuant to 4 C.F.R. § 21.8(e), for a recommendation that it should be reimbursed for its reasonable costs incurred in pursuing its initial protest. The protester contended that its FOCl allegations were clearly meritorious, and the Air Force unduly delayed implementing its promised corrective action.

DISCUSSION

ENF raises four primary grounds of protest. First, the protester alleges that the Air Force erroneously evaluated its proposal as technically unacceptable. Alternatively, ENF alleges that the agency unreasonably declined to reopen discussions. Third, the protester challenges the agency's determination that Superior is capable of performing the requirements of the contract. Fourth, ENF challenges the reasonableness of the agency's decision to proceed with a single award. Additionally, the protester seeks a recommendation that it should be reimbursed the reasonable costs of pursuing its protest because it alleges that the agency unduly delayed taking corrective action in response to ENF's clearly meritorious protest. For the reasons that follow, we deny the protest in part, dismiss the protest in part, and deny the request for a recommendation for costs.⁵

⁴ On September 7, Finkl filed a protest with our Office challenging the termination of its contract. See A. Finkl and Sons, Co., d/b/a Finkl Steel, B-416582.4. Our Office elected not to join Finkl's protest with ENF's protest, and will resolve that protest in a separate decision.

⁵ ENF raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's arguments and find
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Evaluation of ENF's Proposal

ENF challenges the Air Force's evaluation of its FPR as technically unacceptable. The protester contends that the agency unreasonably evaluated changes made in the FPR as constituting exceptions to the RFP's material requirements. Rather, ENF contends that it introduced clarifications that were consistent with the RFP's requirements. Because we find that the agency reasonably evaluated ENF's FPR as, at best, introducing ambiguity with respect to ENF's intended compliance with the RFP's material requirements, we find no basis on which to sustain the protest.

In reviewing protests of agency evaluations, we review the record to ensure that the evaluation and source selection decision were reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. Crowder Constr. Co., B-411928, Oct. 8, 2015, 2015 CPD ¶ 313 at 4. It is an offeror's responsibility to submit a well written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. Independent Sys., Inc., B-413246, Sept. 15, 2016, 2016 CPD ¶ 260 at 5. An agency is not required to infer information from an inadequately detailed proposal, or to supply information that the protester elected not to provide. Optimization Consulting, Inc., B-407377, B-407377.2, Dec. 28, 2012, 2013 CPD ¶ 16 at 9 n.17.

As an initial matter, ENF presents a separate argument contending that it was unreasonable for the Air Force to characterize its FPR revisions as "exceptions." This argument, however, is devoid of merit. Indeed, the agency did not unilaterally characterize the revisions as "exceptions." Rather, it was ENF that identified the changes as "exceptions" in its FPR. Specifically, ENF, with respect to two SOW provisions, wrote: "Please see ENF exceptions contained in ENF FA8681-17-R-0036 Volume II Subfactor 1 – Technical Expertise and Capability – Rev 1 (20 May 18)." AR, Tab 38, ENF FPR, at 44 and 46 (emphasis added). Thus, our Office will not countenance ENF's arguments that the agency unreasonably considered the protester's own characterization of its changes.

With respect to the merits of the protester's arguments, we similarly find that they are without merit. The first exception related to the SOW requirement to manufacture, assemble, and deliver the warhead assemblies in accordance with the requirements of the RFP's technical data package. As relevant here, the technical data package included technical drawing No. XSP20168701, titled "BLU-137/B Material Specification, AF-96" (hereinafter, the "Technical Drawing"). RFP, Technical Data Package, at 76. The Technical Drawing provides specifications for chemical composition, casting of

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that they do not provide a basis on which to sustain the protest or to warrant a recommendation that ENF be reimbursed for its protest costs.

ingots, heat treatment, and requirements for the mechanical testing procedures for BLU-137/B AF-96 steel. Id. at 77. The Technical Drawing also incorporates a number of government and non-government technical documents, including American Society for Testing and Materials (ASTM) A788/A788M, titled “Standard Specification for Steel Forgings, General Requirements.” Id.

The Technical Drawing includes Table 2, titled “Metallurgical Composition of AF-96 Heat Sample,” which sets forth permissible minimum and maximum ranges for various elements. Id. at 80. It states that the permissible ranges “shall be determined [in accordance with] ASTM A788/A788M,” but also provides that variations “are permitted [in accordance with] ASTM A788/A788M limitations.” Id. at 79. The ASTM specification includes a separate table titled “Permissible Variations in Product Analysis for Killed Steel,” which provides permissible variations over the specified maximum limits and under the specified minimum limits for the elements set forth in the Technical Drawing’s Table 2. AR, Tab 9, ASTM 788/A788M, at 7.

With respect to these requirements, ENF’s FPR included an exception stating that the Technical Drawing’s “Table 2 chemistry MUST be considered to be advisory and allow the producer to modify the metallurgical components outside of the Table 2 min and max ranges.” AR, Tab 38, ENF FPR, at 122 (emphasis in original). The agency found this exception to introduce ambiguity with respect to whether ENF could or would satisfy the material requirements to perform in accordance with the technical data package’s requirements. Specifically, based on the protester’s representation that the required Table 2 chemistry requirements “MUST” be considered advisory, and its demand to modify the components of the Table’s permitted ranges, without clarification that such variances would fall within the permitted variances set forth in ASTM 788/A788M, the agency determined that such statements conflicted with other representations in the proposal that ENF would perform in accordance with the RFP’s requirements. AR, Tab 41, Source Selection Evaluation Board Final Report, at 1; Tab 43, Source Selection Decision, at 4-5.

ENF alleges that the agency’s evaluation was unreasonable because its “exception” was in fact consistent with the RFP because the protester merely intended to confirm that variations were permissible in accordance with ASTM A788/A788M. Even accepting that this was ENF’s intention, we find no basis to object to the agency’s evaluated concern where the proposal did not clearly delineate ENF’s intention. In this regard, setting aside that the “exception” would be superfluous because permissible variances were already enumerated in the technical data package, the exception did not expressly articulate that ENF would comply with the Table 2 chemistry requirements or ASTM A788/A788M permitted variances. Rather, the exception indicated that the Table 2 chemistry requirements “MUST” be considered “advisory”, which the agency reasonably construed as suggesting that ENF would not comply with the requirements. Furthermore, the exception did not indicate that ENF would comply with the permitted variances, and, thus, the agency reasonably understood the exception as introducing ambiguity with respect to whether the protester would comply with the RFP’s chemistry requirements. The exception is devoid of any supporting rationale, and thus failed to

meet the RFP's requirements to sufficiently substantiate any proposed exceptions. RFP, Evaluation Factors for Award, ¶ M-1.4. On this record, we find no basis to object to the agency's assessment of a deficiency in ENF's FPR.

While this deficiency alone would be sufficient to render the proposal technically unacceptable, we similarly find no basis to object to the second assessed deficiency. The Technical Drawing included Table 1, titled "AF-96 Physical Properties." RFP, Technical Data Package, at 78. Table 1 included qualification test properties, as well as single test minimum acceptable results and minimum acceptable results based on a three test average. Id. With respect to these requirements, ENF's FPR included an exception suggesting that two of the Table 1 qualification test property requirements would need to be reduced. Specifically ENF included the following language in its FPR:

The requirements of [ENF's material specification] have been carefully formulated to [DELETED] in resultant forged, machined and heat treated items. In order to assure producibility [sic] and cost effectiveness (modified Mechanical Properties will reduce the per case cost by [DELETED] per case) the [Technical Drawing's] Table 1 [DELETED] and [DELETED] requirements must be reduced.

AR, Tab 38, ENF FPR, at 123 (emphasis added).

As with the prior exception, the Air Force found that this additional exception proposed to deviate from the Technical Drawing's physical property qualification requirements, without any supporting rationale. The agency found that the exception, which conflicted with other aspects of the proposal indicating that ENF would comply with the requirements, similarly introduced an unacceptable ambiguity in the FPR. AR, Tab 41, Source Selection Evaluation Board Final Report, at 1; Tab 43, Source Selection Decision, at 4-5.

ENF argues that the agency's evaluation was unreasonable because it was apparent that the protester was not taking exception to the RFP's requirements, but rather was offering an alternative proposal. Here again, however, the protester's FPR provides no contemporaneous support for ENF's current position. Nowhere does the FPR indicate that ENF was offering this as an alternative proposal. Similarly, the exception does not indicate that it is conditional. For example, it does not state that "if" the agency wished to reduce costs, ENF could modify the physical property requirements. Rather, the exception suggests that ENF's material specification "must" reduce certain physical property requirements in order to "assure" "producibility." On this record, we find no basis to question the reasonableness of the Air Force's determination that ENF's FPR introduced ambiguous exceptions which rendered the proposal technically unacceptable.

Discussions

ENF alternatively argues that, even assuming that its FPR was ambiguous, the Air Force unreasonably failed to reopen discussions. In this regard, the protester argues that the RFP required the Air Force to consider, throughout the evaluation, the “correction potential” of any uncertainty, with such judgment being within the sole discretion of the agency. RFP, Evaluation Factors for Award, ¶ M-1.5. ENF contends that the agency erred in not considering whether the alleged ambiguities were correctable. For the reasons that follow, we find no basis on which to sustain the protest.

The Air Force expressly considered the correction potential of proposals, and elected to open discussions with all offerors in the competitive range. AR, Tab 31, Pre-Final Proposal Revision Request Briefing, at 184-85. The agency then engaged in a robust round of discussions, providing both a number of written discussion questions and an opportunity to seek clarification from the agency with respect to the written questions. At the conclusion of discussions, the Air Force expressly notified ENF that its proposal was technically acceptable, and that any changes made in its FPR would be made without the benefit of further discussions. AR, Tab 33, FPR Letter to ENF, at 1. As we have repeatedly found, an agency is not required to reopen discussions to afford an offeror an additional opportunity to revise its proposal where a weakness or deficiency is first introduced in the firm’s revised proposal. See, e.g., Family Health Int’l, B-414621, July 28, 2017, 2017 CPD ¶ 356 at 14; Research Analysis & Maintenance, Inc., B-410570.6, B-410570.7, July 22, 2015, 2015 CPD ¶ 239 at 10. On this record, we find no basis to question the reasonableness of the agency’s exercise of its discretion not to conduct additional rounds of discussions.⁶

Evaluation of Superior’s Proposal

Following the termination of the second contract award to Finkl, ENF asserts that the agency erred in finding that Superior has the requisite technical capability to perform the full requirements of the RFP. Specifically, the protester alleges that, based on a review of Superior’s System for Award Management (SAM) and Dunn & Bradstreet profiles, Superior is a small business with only 100 employees and no prior government contract experience.

ENF’s allegations, raised for the first time in the protester’s second supplemental protest, are untimely. Under our Bid Protest Regulations, a protest involving other than

⁶ We similarly find no basis to sustain ENF’s supplemental protest allegation that the agency’s decision not to re-open discussions, which was based in part on the SSA’s determination that there were at least two technically acceptable proposals, could not be found reasonable based on the subsequent termination of Finkl’s contract. As set forth above, we generally will not review an agency’s determination on whether to reopen discussions.

an alleged impropriety in a solicitation which is apparent prior to the time set for the receipt of proposals must be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). ENF was aware of the award to Superior on June 27, and had access to all of the information relied upon in its second supplemental protest (*i.e.*, Superior's SAM and Dunn & Bradstreet profiles) at that time. ENF's challenges to the evaluation of Superior's technical capability, which were first raised in ENF's second supplemental protest, constitute an improper piecemeal presentation of issues. The timeliness requirements of our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues. See Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; 4 C.F.R. § 21.2(a)(2).

ENF argues that its protest is timely because it had no basis to challenge Superior's technical capability when Superior was one of two awardees. In this regard, ENF effectively argues that its protest ground is based on the fact that Superior will now be the only contractor. This argument is unavailing. This is an IDIQ contract with an estimated production quantity of 5,000 units, and a maximum ceiling quantity of 15,000 units. It was always the case that Superior could have received any quantity ranging from the 300 unit minimum guaranty up to the maximum ceiling quantity of 15,000 units. All of ENF's allegations question Superior's general capability based on its alleged lack of government contracting experience, and small number of employees. Nothing in ENF's arguments persuasively demonstrate why its concerns would not apply with equal measure to Superior's ability to perform whether as a single awardee or one of multiple awardees. Thus, we find that this argument is untimely, and therefore it is dismissed.

Decision to Proceed With a Single Award

ENF also alleges that the RFP precludes the Air Force from proceeding with a single award without conducting and documenting a new source selection decision. Specifically, the protester contends that, following the termination of the second contract award to Finkl, the agency is precluded from making a single award without documenting why proceeding with a single award is in the government's best interest. For the reasons that follow, we find no basis to sustain the protest.

Specifically, we find that ENF is not an interested party to challenge the agency's award decision. In this regard, in a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. Wolverine Servs. LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3-4. Because we find that the Air Force reasonably evaluated ENF's proposal as technically unacceptable, and dismiss as untimely ENF's allegations regarding Superior's technical acceptability, the protester is not an interested party to challenge the agency's award decision. See Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1); Priority One Servs., Inc., B-415201.2, B-415201.3, Apr. 13, 2018, 2018 CPD ¶ 182 at 9; Baltimore Gas & Elec. Co., B-406057 *et al.*, Feb. 1, 2012, 2012 CPD ¶ 34 at 15 n.15.

In any event, ENF's protest relies on an unreasonable interpretation of the RFP. The protester seizes on language from the RFP's Ordering Procedures to assert that the Air Force never conducted an analysis of whether it was in the government's best interest to proceed with a single award. The RFP stated that the Air Force intended to make two awards, but expressly reserved "the right to make one (1) award or no award at all." RFP, Evaluation Factors for Award, ¶ M-1.2. The RFP's Ordering Procedures, which were incorporated in a separate attachment, elaborated on the government's intentions with respect to the number of anticipated awards. Specifically, the RFP advised that:

In the event two awards are made, an awardee is guaranteed a minimum quantity of no less than 300 units. However, the Government reserves the right to award only one (1) contract for 100% of the LRIP Lot if two (2) contract awards are determined not to be in the best interest of the Government.

RFP, Ordering Procedures, ¶ 3.

ENF's argument that the agency was precluded from making a single award without documenting why two awards would not be in the government's best interest fails to recognize that the agency received only one technically acceptable proposal. Thus, the Air Force only had one proposal on which it could legally make a contract award. ENF's argument, therefore, would result in the absurd result of requiring the Air Force to document why it would not be in the government's interest to award a contract to a technically unacceptable proposal. Thus, we find no merit to the protester's allegation.⁷

Reimbursement of Protest Costs

ENF additionally requests that we recommend that the agency reimburse its reasonable costs of pursuing its protest grounds challenging the agency's evaluation of Finkl's proposal. The protester asserts that its FOIA allegations were clearly meritorious based on the agency's implementation of partial corrective action, which resulted in the termination of Finkl's contract. ENF further asserts that the Air Force unduly delayed completing the corrective action in response to the clearly meritorious FOIA allegations, as ENF was unreasonably required to incur costs to file comments and a supplemental protest with respect to its challenges to other aspects of the agency's evaluation of Finkl's proposal. For the reasons that follow, we find that the Air Force promptly took corrective action, and therefore deny the protester's request.

⁷ To the extent that ENF argues that the Air Force was required to consider whether to reopen discussions when it was left with only one technically acceptable proposal, we disagree. As discussed above, the RFP did not require the agency to conduct a best interest analysis where there was only one acceptable proposal.

Our Bid Protest Regulations provide that we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.8(e). We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Inland Power Grp., Inc.--Costs, B-410470.2, Feb. 3, 2015, 2015 CPD ¶ 69 at 1. As a general rule, so long as an agency takes corrective action by the due date of its agency report, we regard the action as prompt, and will not recommend reimbursement of protest costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2.

Here, the agency report was due by August 15. On July 31, and prior to the submission of the agency report, the Air Force notified our Office that it would take corrective action with respect to Ellwood's FOCI-related allegations. Agency Notice of Partial Corrective Action at 1.⁸ The Air Force issued clarification questions to the offerors in the competitive range and requested responses by August 10. ENF Request for Costs Recommendation at 5. On August 15, the agency submitted its agency report responding to ENF's protest allegations regarding the agency's evaluation of both its and Finkl's technical proposals. On August 30, and after the protester had submitted its comments and first supplemental protest, the agency notified our Office that it had completed its corrective action, which resulted in the termination of Finkl's contract.

Notwithstanding that the agency promptly notified our Office of its intent to take partial corrective action prior to the submission of the agency report and that the corrective action was completed within approximately a month, the protester contends that the agency unduly delayed the implementation and completion of the corrective action. Specifically, the protester argues that the Air Force possessed all of the relevant information to determine that Finkl had an immitigable FOCI issue as of August 10, and that the agency unduly delayed terminating Finkl's contract until after ENF was put through the expense of commenting on and supplementing its protest with respect to the evaluation of Finkl's technical acceptability. We disagree, as we do not find that the Air Force taking three weeks to review, analyze, and act on offerors' clarification responses was unreasonable under the circumstances. Contrary to ENF's assertion that this was not a "more complex corrective action[]" (Request for Costs Recommendation at 6), the termination of a contract is a serious determination with significant potential legal and business repercussions. Under these circumstances, we find no reasonable basis to conclude that the agency unduly delayed implementing corrective action where it was completed in less than a month.

Additionally, although ENF was required to submit comments, and elected to pursue a supplemental protest, relating to Finkl's technical acceptability, we find that these protest allegations are severable from the FOCI-related issue. In this regard, in

⁸ On August 8, the Air Force amended its proposed partial corrective action to also include the protester's SDN-related allegations. Agency Amended Notice of Partial Corrective Action at 1.

determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or otherwise are not readily severable. JRS Staffing Servs.--Costs, B-410098.6 et al., Aug. 21, 2015, 2015 CPD ¶ 262 at 6. Under this standard, ENF's challenges to the evaluation of Finkl's technical acceptability are clearly severable from its allegation that Finkl was ineligible for award due to FOCI, as they do not rely on similar legal theories or factual premises. For example, there were no allegations that Finkl could only satisfy the RFP's experience requirements through reliance on its corporate parent's experience. Therefore, we find that these protest grounds are severable.⁹

The protest is denied in part and dismissed in part, and the request for costs is denied.

Thomas H. Armstrong
General Counsel

⁹ We also note that the protester did not address how the non-FOCI-related allegations with respect to Finkl were clearly meritorious. See ENF Request for Costs Recommendation at 3-4 (addressing only the merit of the FOCI-related protest ground).