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Decision

Matter of: Criterion Systems, Inc.

File: B-419749; B-419749.2; B-419749.3

Date: July 21, 2021

David T. Hickey, Esq., Amba M. Datta, Esq., and Ken M. Kanzawa, Esq., Kelley Drye & Warren LLP, for the protester.

Scott F. Lane, Esq., Jayna M. Rust, Esq., and Katherine S. Nucci, Esq., Thompson Coburn LLP, for McLane Advanced Technologies, LLC, the intervenor.

Anh T. Nguyen, Esq., for the Department of Energy; and Meagan K. Guerzon, Esq., for the Small Business Administration, the agencies.

Uri R. Yoo, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party notwithstanding intervening offerors where the protester timely challenged the agency's evaluation of intervening offerors' proposals.
 2. Protest that the agency unreasonably failed to compare proposed compensation plans to the current incumbent compensation is dismissed as untimely where the agency expressly advised offerors that it had no access to the incumbent's compensation information, and the protester did not file a protest prior to the deadline for proposal submission.
 3. Protest challenging remaining aspects of the agency's evaluation of proposed compensation is denied where the record shows that the agency's evaluation was reasonable and sufficiently documented.
 4. Protest challenging the agency's price evaluation is denied where the record shows that the agency's evaluation of price proposals was reasonable and consistent with the solicitation.
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DECISION

Criterion Systems, Inc., a small business of Vienna, Virginia, protests the issuance of a task order to McLane Advanced Technologies, LLC, a small business of Vienna, Virginia, by the Department of Energy, National Nuclear Security Administration (NNSA), under request for proposals (RFP) No. 89233120RNA000086 for professional

information technology (IT) services to support NNSA's nuclear materials and weapons transportation missions. Criterion challenges NNSA's evaluation of the awardee's total compensation plan and price proposal, as well as those of all intervening offerors.

We dismiss in part and deny in part the protest.

BACKGROUND

On August 17, 2020, NNSA issued the RFP, contemplating the issuance of a time-and-materials task order with a fixed-price transition, for a base year and four option years. Agency Report (AR), Tab 1.L(a), RFP at 1-2; AR, Tab 1.L(b), RFP attach. 1, Sections L and M at 12.¹ The RFP was issued to holders of the Department of the Army's Computer Hardware Enterprise Software and Solutions (CHES) IT Enterprise Solutions-3 Services (ITES-3S) indefinite-delivery, indefinite-quantity (IDIQ) contracts, as a total set-aside for small businesses. The purpose of the task order was to provide information and telecommunications technology services needed to support the NNSA's Office of Secure Transportation at various locations. RFP at 1; AR, Tab 1.L(c), RFP attach. 3, Performance Work Statement (PWS) at 1.

Award was to be made to the firm that submitted a technically acceptable offer with the lowest evaluated price (*i.e.*, on a lowest-priced, technically acceptable basis). RFP at 13. The solicitation set out four technical capability subfactors for determining technical acceptability: security requirements; key personnel qualifications; total compensation plan; and contract management plan. *Id.* 13-15.

Under the total compensation plan subfactor, each offeror was required to provide a "Total Compensation Plan (TCP) for all incumbent personnel proposed, in accordance with . . . [Federal Acquisition Regulation (FAR) provision] 52.222-46" and to address various aspects of its compensation plan in specified areas: salary and fringe benefits; and staffing and critical skills retention. *Id.* at 7. The RFP informed offerors that the agency would evaluate the technical acceptability of offerors' total compensation plans in accordance with FAR provision 52.222-46, and for "reasonableness, feasibility, and completeness." *Id.* at 15.

Under price, offerors were to propose a fixed-price transition for the first month of the base period and fully-burdened time-and-material rates for all required labor for all periods after the transition by completing a cost model attached to the RFP and providing supporting narratives. *Id.* at 11. The RFP specified that "fully-burdened rates shall include all applicable local, state, and federal taxes and duties to include applicable New Mexico Gross Receipts Tax where/if applicable." *Id.* at 12. The RFP stated that price would be evaluated for reasonableness under FAR section 15.404-1, including for balanced pricing under FAR section 15.404-1(g). *Id.* at 15-16.

¹ Unless otherwise noted, citations to the RFP in this decision are to the updated RFP attachment 1, sections L and M, provided by NNSA at Tab 1.L(b) of the agency report.

As part of the price proposal instructions, the RFP included as an attachment a government resource estimate (GRE), described as “the Government’s estimate of the incumbent labor required to perform this effort, without incorporation of any one Offeror’s specific management or technical approach.” *Id.* at 11. The RFP further described the GRE as follows:

The GRE is based on a market survey of the standard labor categories required for this contract and is not considered to be a Government “plug number.” The GRE provided is not intended to influence the Offeror’s proposal estimates; however, it is to assist Offerors in determining the general overall scope to support development of indirect rates and for development of their management and technical approaches. Offerors are required to develop their own resource estimates that support their unique management and technical approaches and shall provide supporting rationale in narrative form.

Id. The GRE provided an hourly “average market base rate” and a “loaded labor rate” for each of 29 labor categories. AR, Tab 1.I(d), RFP attach. 2, GRE at 1.

The agency received 32 proposals in response to the solicitation, of which 9 were not evaluated for being untimely or non-responsive, or for the offeror’s failure to extend the validity of its proposal as requested by the agency.² AR, Tab 7.A.1, Source Selection Decision Document (SSDD) at 2. Of the remaining 23 proposals, the agency found 13 to be technically acceptable, including Criterion’s and McLane’s. *Id.* at 3. The final technical and price evaluation results of Criterion’s and McLane’s proposals were as follows:

	CRITERION	MCLANE
TECHNICAL	Acceptable	Acceptable
Security Requirements	Acceptable	Acceptable
Key Personnel Qualifications	Acceptable	Acceptable
Total Compensation Plan	Acceptable	Acceptable
Contract Management Plan	Acceptable	Acceptable
PRICE	\$55,795,598	\$44,314,621

Id. at 7-8.

² The RFP was amended eight times. See AR, Tabs 1.A-1.L, RFP and Amendments. The agency received proposals on November 18, 2020, the RFP closing date specified in RFP amendment 7. AR, Tab 1.L, RFP amend. 8 at 1; see AR, Tab 1.K, RFP amend. 7 at 1. By RFP amendment 8, issued on January 19, 2021, the agency revised the period of performance and instructed offerors to validate their proposals through May 1, 2021. AR, Tab 1.L, RFP amend. 8 at 1.

After concluding that McLane proposed the lowest price of those proposals found to be technically acceptable, the agency selected McLane for the award of the task order. *Id.* at 8. Criterion requested and received a debriefing, which was concluded on April 7, 2021, and this protest followed.³

PRELIMINARY MATTERS

The agency requests dismissal of the protest, arguing that the protester is not an interested party with sufficient economic interest in the outcome of the dispute because the protester is not next in line for the award of the task order.⁴ The agency argues that there are intervening offerors who would be next in line for the award of the task order before the protester. Agency's 1st Request for Dismissal at 10-12. In this regard, consistent with the solicitation, the agency made award on a lowest-price, technically acceptable basis. RFP at 13; AR, Tab 7.A.1, SSDD at 8. The record shows that, of the 13 proposals the agency found to be technically acceptable, the protester's proposal had the 11th lowest price. AR, Tab 7.A.1, SSDD at 7-8. As a result, the agency argues, the protester lacks the necessary direct economic interest to challenge the agency's award because it would not be in line for award even if the protest were sustained. Agency's 1st Request for Dismissal at 10-12.

³ The value of the task order awarded to McLane exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of delivery orders under multiple-award indefinite-delivery, indefinite-quantity contracts authorized under title 10 of the United States Code. See 10 U.S.C. § 2304c(e)(1)(B).

⁴ The agency also argues that Criterion is not an interested party because the firm became an other-than-small business through acquisition prior to award. Agency's 2nd Req. for Dismissal, at 2-3, *citing* 13 C.F.R. § 121.404(g)(2)(iii). As a general rule, a large business is not an interested party to challenge an award under a solicitation set aside for small businesses. *Synchrogenix Information Strategies, LLC*, B-414068.6, Dec. 22, 2017, 2018 CPD ¶ 8 at 3. Because the agency's contentions raise legal questions related to the Small Business Act, and the Small Business Administration's (SBA) regulations implementing it, our Office solicited and obtained the views of SBA.

Our Office will generally defer to SBA's judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act. *Research and Development Solutions, Inc.*, B-410581, B-410581.2, Jan. 14, 2015, 2015 CPD ¶ 38 at 6. In its filing with our Office, SBA explains that, under section 121.404(g)(4)--which contains provisions that apply to a multiple-award contract that, as here, is reserved for small businesses--Criterion's size status for the purpose of its eligibility for award of task orders is determined at the time it submitted its proposal for the task order competition, not at the time of the task order award. SBA's Comments at 4. Thus, the SBA indicated that Criterion properly could be considered a small business under these circumstances. *Id.* In light of the SBA's conclusive authority to determine matters of small business size status for federal procurements, we decline to find the protester ineligible for the task order award at issue. Accordingly, we conclude Criterion is an interested party to challenge the award.

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an “interested party” may protest a federal procurement. Our regulations implementing CICA define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the protester’s status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party if it would not be in line for contract award were its protest to be sustained. *Id.*

Generally, if a protester does not timely challenge an intervening offeror that would precede its own eligibility for award under the terms of a solicitation, the protester lacks the direct economic interest required to maintain a protest challenging the agency’s evaluation of an awardee. *See Panum Telecom, LLC*, B-418202, Jan. 17, 2020, 2020 CPD ¶ 34 at 4 (dismissing protest for lack of interested party status because the protester did not timely challenge the evaluation of an intervening offer when the protester learned of the offer from the agency’s report).

Here, the protester did not challenge the agency’s evaluation of the nine intervening offerors’ proposals in its initial protest filing. *See generally* Protest. The record shows, however, that while the agency’s post-award notice to the protester provided information about the awardee and the agency’s evaluation of the protester’s proposal, the notice did not provide any information about the existence of intervening offerors. *See* Protest, exh. 1, Post-Award Notice to Protester. The record also shows that the protester asked specific debriefing questions inquiring as to its position in the overall ranking of proposals, and the agency response did not disclose whether there were lower-priced technically acceptable offers other than the awardee’s. *See* Protest, exh. 2, Post-Award Debriefing at 1. Based on this information, Criterion had no way to know that there were intervening offerors prior to filing its initial protest.

The protester alleges, and the agency does not dispute, that it was not until the agency filed its request for dismissal on April 27, 2021, that the protester learned there were intervening offerors whose proposals were both technically acceptable and lower-priced than the protester’s proposal. Protester’s Opposition to Requests for Dismissal and Supp. Protest (Supp. Protest) at 4. After learning this information, the protester timely challenged the agency’s evaluation of all nine intervening offerors’ proposals. *Id.* at 8-13. Specifically, the protester argues that the agency failed to evaluate the intervening offerors’ total compensation plans, as required by the RFP and FAR provision 52.222-46, and conducted a flawed evaluation of the price proposals. *Id.* In this regard, the protester contends that had the agency performed a proper evaluation of the intervening offerors’ total compensation plans and price proposals, the intervening offerors would not have been eligible for award, resulting in the protester’s proposal being the lowest-priced, technically acceptable offer.

On this record, we conclude that the protester challenged the agency's evaluation of the intervening offers within ten days of when the protester knew, or should have known, the basis for its protest. See 4 C.F.R. § 21.2(a)(2). Accordingly, we decline to dismiss the protest on the basis that the protester is not an interested party. Cf., *Panum Telecom, LLC, supra*.

DISCUSSION

Criterion contends that the agency failed to analyze offerors' total compensation plans in accordance with FAR provision 52.222-46 and the solicitation. Protest at 14-25. The protester also contends that the agency's price evaluation was inadequate and unreasonable. *Id.* at 25-28; Supp. Protest at 11-13. For the reasons discussed below, we dismiss in part and deny in part the protest.⁵

Compensation Plan Evaluation

The protester argues that the agency failed to evaluate offerors' compensation plans as required by FAR provision 52.222-46. Specifically, Criterion asserts that the agency improperly failed to compare offerors' salaries and fringe benefits against the salaries and fringe benefits currently being paid by Criterion, the incumbent contractor, as required by FAR provision 52.222-46(b). 2nd Supp. Protest at 6-19. The protester also contends that the agency unreasonably failed to evaluate the realism of the awardee's proposed compensation, *i.e.*, the impact of the awardee's significantly low proposed compensation--in terms of salaries and fringe benefits--on its ability to recruit and retain incumbent personnel. Protest at 14. In response, the agency argues that it evaluated proposed compensation plans reasonably and in a manner consistent with the terms of the solicitation. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 18-19, 26; Supp. COS/MOL at 4-9. We find the agency's evaluation of the awardee's total compensation plan unobjectionable. We turn first to Criterion's argument that the agency improperly failed to compare the compensation rates proposed by offerors to the incumbent's compensation rates.

The purpose of FAR provision 52.222-46, Evaluation of Compensation for Professional Employees, is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. *A-P-T Research, Inc.*, B-419459, Mar. 12, 2021, 2021 CPD ¶ 274 at 7. In the context of a fixed-price labor-hour contract, our Office has noted that this FAR provision anticipates an evaluation of whether an offeror understands the contract's requirements, and has offered a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding an offeror's proposed compensation. *Apptis Inc.*, B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9. The depth of an

⁵ Although we do not specifically address every collateral argument the protester raises, we have carefully considered all of them and find that none provides a basis to sustain the protest.

agency's price realism analysis is a matter within the sound exercise of the agency's discretion. *Id.* In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. *MicroTechnologies, LLC*, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 7.

As noted, the solicitation required an offeror to submit a total compensation plan for all incumbent personnel proposed in accordance with FAR provision 52.222-46. RFP at 7. The RFP informed offerors that, "[d]ue to the ongoing Covid-19 pandemic and the Government's desire for continuity of services, the Government has determined that all incumbent personnel are critical to the successful performance of the PWS." *Id.*

The RFP required that the compensation plan specifically address a number of requirements under two mandatory areas: (1) salary and fringe benefits; and (2) staffing and critical skills retention. For salaries, the RFP instructed offerors to explain, among other things, "how [their] wage/salary ranges and their corresponding escalation were established for each incumbent employee and corresponding labor category." *Id.* For fringe benefits, the RFP instructed offerors to discuss, among other things, "how the Offeror's proposed policies and practices as it relates to fringe benefits will ensure that the Offeror can attract, hire and retain the exempt incumbent personnel" and to complete a table providing details of various types of fringe benefits. *Id.* at 7-9.

The RFP provided that the agency would determine technical acceptability under the total compensation plan subfactor by evaluating the proposed compensation plans in accordance with FAR provision 52.222-46. *Id.* at 15. The RFP also stated that proposed total compensation plans would be evaluated for reasonableness, feasibility and completeness, and that a "technically acceptable TCP will be at a level of reasonableness, feasibility, and completeness where associated risks do not jeopardize an acceptable level of contract performance." *Id.*

As relevant here, the solicitation also provided, as part of its instructions for price proposals, a government resource estimate (GRE) "based on a market survey of the standard labor categories required for this contract." *Id.* at 11. The solicitation described the GRE as "the Government's estimate of the incumbent labor required to perform this effort" and stated that it was provided "to assist Offerors in determining the general overall scope to support development of indirect rates and for development of their management and technical approaches." *Id.* In response to vendor questions, the agency clarified that GRE rates were government estimates, not floor rates, and that "NNSA does not have insight into current actual labor category base rates and must rely on industry to propose appropriate rates." AR, Tab 1.K(c), RFP amend. 7, 2nd Set of Vendor Questions and Answers at nos. 8, 56. In response to a vendor question requesting current benefit information of the incumbent staff, the agency further informed offerors that "[t]he Government had requested but is unable to release this information because the information is considered business proprietary." *Id.* at no. 35.

We also note that the record shows, prior to issuing the solicitation, the agency requested that Criterion, as the incumbent contractor, provide certain incumbent data for reprourement purposes, including direct labor rates and other labor resource information for the incumbent personnel. AR, Tab 3.C, NNSA Letter to Criterion on Reprourement Data at 1. At that time, Criterion declined to provide the agency with the requested information, stating that “all payroll data is considered company proprietary.” AR, Tab 3.E, Criterion Response to NNSA Request at 1. In its response to the agency, Criterion also stated, “[i]f NNSA would like to provide an estimated range of compensation, we suggest basing it on relevant survey data using the [DELETED] percentile.” *Id.* The agency contends that it followed Criterion’s suggestion and developed the GRE as an alternative to incumbent compensation information. COS/MOL at 25-26.

The record shows that the agency compared the awardee’s proposed labor rates to the GRE, noting that McLane’s proposed rates exceeded the GRE rates for [DELETED] of the 29 labor categories provided in the GRE. AR, Tab 12.A, Comparison of Proposed Labor Rates to GRE at 1. The agency’s evaluation also included examining McLane’s proposed compensation plan against a checklist of RFP requirements under the total compensation plan subfactor. AR, Tab 4.A, Awardee’s Technical Evaluation Summary at 3-6; Supp. COS/MOL at 13; see RFP at 7-8. Under the area of salaries and fringe benefits, the integrated project team (IPT)⁶ concluded that McLane’s proposal met the requirement to “explain how the wage and salary ranges and escalations were established for each incumbent employee and corresponding labor category” and noted as follows:

[McLane] analyzed the requirements, qualifications, and clearance profiles for each of the labor categories per the RFP and the underlying ITES-3S contract. Then, researched the standard salary ranges for each labor category using the online salary survey website glassdoor.com. Offeror extracted the minimum and maximum salary ranges for each labor category and established an average salary for each labor category.

Id. at 3-4. The IPT also concluded that McLane satisfied the requirement to, “per FAR provision 52.222-46, discuss the impact that the Offeror’s proposed TCP will have on attracting, hiring, and retaining the incumbent personnel,” explaining as follows:

[McLane] states they always strive to offer continuation contracts to all high-performing incumbent personnel. Offeror demonstrates ability to retain 90-100% of incumbent staff on other Government contracts. On the Army TAMIS program they also transitioned the existing Project Manager to the new contract.

⁶ The IPT conducted the technical evaluation of proposals in this procurement and documented its evaluations in technical evaluation summary reports for the source selection authority’s consideration. Supp. COS/MOL at 13.

Id. at 4-5. Under the staffing and critical skills retention plan portion, the IPT concluded that McLane provided an approach that describes the basis of the overall staffing approach to attract, hire, and retain the incumbent personnel, documenting that McLane's staffing approach uses a combination of three programmatic steps to fully staff this project, including incumbent workforce hiring, transfer of current McLane employees from other contracts to fill gaps, and recruitment of new personnel to fill remaining gaps. *Id.* at 5. Based on this evaluation, the IPT found McLane's proposal under the total compensation plan subfactor to be technically acceptable. *Id.* at 6.

FAR provision 52.222-46 requires that the agency evaluate an offeror's total compensation plan (salaries and fringe benefits) by considering its impact on recruiting and retention, its realism, and its consistency with a total plan for compensation. FAR 52.222-46(a). The provision also specifies that "proposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees" and cautions that "lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement." FAR 52.222-46(b). Our Office has concluded that, because FAR provision 52.222-46(b) contemplates further evaluation of proposals that envision compensation levels "lower than those of predecessor contractors," the provision necessarily requires the agency to compare the proposed compensation levels against those of the incumbent contractor. See *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 6; FAR 52.222-46(b).

Criterion here argues that the agency improperly failed to compare McLane's proposed labor rates to the incumbent's rates and unreasonably concluded that McLane's low rates were realistic based on the market-based GRE. 2nd Supp. Protest at 6-19. The protester alleges that, although it declined to provide the information to the agency when asked (prior to issuance of the solicitation), it ultimately elected to provide the current incumbent compensation information when it submitted its proposal for this procurement. As a result, Criterion now contends that the agency was required to use the information in its proposal for the purpose of the required comparison under FAR provision 52.222-46(b). *Id.*

In response, the agency does not argue that it performed the comparison against incumbent compensation under FAR provision 52.222-46(b). Rather, the agency contends that it reasonably used the criteria stated in the RFP, including the GRE, to evaluate proposed compensation because, when asked, Criterion refused to provide the incumbent compensation information. The agency argues that Criterion's allegation with respect to this aspect of the evaluation is untimely because the terms of the solicitation--providing the GRE and disavowing insight into the incumbent's (Criterion's) rates--put offerors on notice that the agency would not be comparing proposed compensation plans against incumbent compensation. Supp. COS/MOL at 4-9. We agree with the agency.

Our timeliness rules specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals or quotations be filed before that time. 4 C.F.R. § 21.2(a)(1). Where a protester and the agency disagree about the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Argus Int'l Risk Servs., LLC*, B-411682, B-411682.2, Sept. 25, 2015, 2015 CPD ¶ 303 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.* Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Simont S.p.A.*, B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4.

As noted, the solicitation provided that proposed total compensation plans would be evaluated in accordance with FAR provision 52.222-46, which, by its terms, requires that an agency compare the proposed compensation to the incumbent compensation. However, the solicitation also explicitly informed offerors that the agency did not have the actual labor rates or benefit information of the incumbent contractor (necessary to conduct such a comparison) and offered the GRE as the government's "estimate of incumbent labor" to be used "for development of [the offerors'] management and technical approaches." AR, Tab 1.K(c), RFP amend. 7, 2nd Set of Vendor Questions and Answers at nos. 8, 35, 56; RFP at 11. Moreover, based on its own refusal of the agency's request for incumbent information, Criterion knew at the time it submitted its proposal that the agency did not have the information necessary to conduct the comparison required by FAR provision 52.222-46(b); it cannot now complain that the agency failed to apply the inconsistent solicitation provision in its favor. See *Master Pavement Line Corp.*, B-419111, Dec. 16, 2020, 2020 CPD ¶ 404 at 4 (an offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation).

On this record, we find that the solicitation, read as a whole, provided conflicting information and therefore was patently ambiguous. Specifically, the solicitation informed offerors that the agency did not have incumbent compensation information and yet the solicitation also informed offerors the agency would compare proposed compensation plans against incumbent compensation under FAR provision 52.222-46(b). Accordingly, we dismiss as an untimely challenge to the terms of the solicitation Criterion's allegation that the agency was required--but failed--to evaluate proposed compensation plans by comparing them to the incumbent compensation information. See 4 C.F.R. § 21.2(a)(1); *A-P-T Research, Inc.*, *supra*.

Next, Criterion argues the agency failed to perform a proper price realism assessment as required under FAR provision 52.222-46. We disagree and conclude that the agency's assessment of McLane's compensation plan was reasonable and consistent

with the RFP. In reviewing protests of awards in task order competitions, we do not reevaluate proposals or quotations but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that the agency acted unreasonably. *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

In this regard, the record shows that the agency compared McLane's labor rates to the GRE and found that, on average, McLane's proposed rates were [DELETED] percent higher than the GRE's direct labor rates. AR, Tab 12.A, Comparison of Proposed Labor Rates to GRE at 1. This comparison also showed McLane's proposed rates for [DELETED] of 29 labor categories to be higher than the GRE and, for [DELETED] labor categories for which McLane proposed lower rates, the deviation was less than 10 percent. *Id.* In addition, the agency used a checklist of each requirement under the total compensation subfactor in the RFP to ensure that the IPT assess whether McLane's proposal sufficiently addressed or discussed each requirement, and noted specific aspects of the proposal that support the agency's finding of technical acceptability. AR, Tab 4.A., Awardee's Technical Evaluation Summary at 3-6; Supp. COS/MOL at 13. On this record, we find that the agency evaluated the awardee's compensation plan in accordance with the solicitation and reasonably concluded that it was realistic for recruiting and retaining suitably qualified personnel to meet the agency's objectives. Criterion's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest.

We also find reasonable the agency's evaluation of McLane's fringe benefits. While Criterion argues that the agency's evaluation failed to include a separate comparative analysis of proposed fringe benefits and unreasonably found those benefits to be realistic, our Office has previously found that nothing in FAR provision 52.222-46 requires the agency to find that both an offeror's proposed fringe benefits and salary are independently realistic. *MicroTechnologies, LLC, supra* at 9. Here, the record reflects the agency's consideration of McLane's proposed compensation plan under each of the eight specific RFP requirements in the area of salary and fringe benefits, including three specifically addressing fringe benefits. AR, Tab 4.A., Awardee's Technical Evaluation Summary at 4; see AR, Tab 2.A, McLane Technical Proposal at 15-17. The record also shows that McLane completed the fringe benefits table in the RFP with detailed information and the agency considered this information in concluding that the awardee's proposed compensation plan, as a whole, was technically acceptable. AR, Tab 2.A, McLane Technical Proposal at 15-17; AR, Tab 4.A., Awardee's Technical Evaluation Summary at 4-5. On this record, we find the agency's evaluation of the awardee's fringe benefits unobjectionable and deny this protest ground.

Finally, the protester contends that the agency failed to adequately document its evaluation of the awardee's compensation plan under the terms of the RFP and FAR

provision 52.222-46. 2nd Supp. Protest at 19-20. Specifically, the protester argues that the agency's conclusory statements in the contemporaneous evaluation documents are not supported by explanations sufficient to show the analysis required under the FAR provision. *Id.*

In order for our Office to review an agency's evaluation, the agency must have adequate documentation to support its judgment. *Advanced Tech. Sys., Inc.*, B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 9. In reviewing an agency's evaluation, we do not limit our review to contemporaneous evidence, but consider all information provided, including the parties' arguments and explanations. *Netizen Corp.*, B-418281 *et al.*, Feb. 21, 2020, 2020 CPD ¶ 85 at 6-7 n.5. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered, so long as those explanations are credible and consistent with the contemporaneous record. *Netizen Corp.*, *supra*.

Here, even though the contemporaneous record may be limited in this task order competition conducted on a lowest-price, technically acceptable basis, our review of the record and the agency's explanation show that the documentation is sufficient to permit us to assess the reasonableness of the agency's evaluative judgments. Although the protester claims that we should give no weight to the agency's *post-hoc* statements, we find the agency's explanations of the technical evaluation process credible and consistent with the contemporaneous record.

For instance, while there is no narrative that explains the agency's rationale for finding McLane's compensation plan to be reasonable, the IPT's evaluation report enumerating each requirement considered under the total compensation plan subfactor, supplemented by the agency's explanation of the IPT's evaluation process, sufficiently support the reasonableness of the agency's conclusion. See AR, Tab 4.A., Awardee's Technical Evaluation Summary at 3-6; Supp. COS/MOL at 13. Moreover, even though the source selection decision document did not provide any additional explanation for the source selection authority's agreement with the IPT's finding that McLane's compensation plan was technically acceptable, it did provide additional explanations regarding compensation plans the agency found to be technically unacceptable. AR, Tab 7.A, SSDD at 5-6. These contemporary narratives document that the agency found unacceptable those compensation plans that proposed labor rates significantly below the GRE on the basis that those plans pose a high risk of not retaining the majority of the incumbent staff. AR, Tab 7.A, SSDD at 5-6.

We find that this record sufficiently permits us to conclude that the agency reasonably evaluated offerors' compensation plans in accordance with the RFP and FAR provision 52.222-46. Accordingly, we find the agency's documentation of its compensation plan evaluation to be adequate. See Supp. COS/MOL at 13-15.

Price Evaluation

Criterion also raises several objections to the agency's price evaluation. As discussed below, we find none of the protester's arguments to be meritorious.

First, the protester challenges the agency's price evaluation methodology, alleging that the agency unreasonably determined the awardee's price to be fair and reasonable on the basis of adequate price competition. Protest at 25-26; Supp. Protest at 11-12. We dismiss this aspect of Criterion's protest as legally insufficient based on a lack of prejudice. Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions were improper. *Target Media Mid Atlantic, Inc.*, B-412468.8, June 27, 2017, 2017 CPD ¶ 208 at 9.

The purpose of a price reasonableness evaluation is to determine whether an offered price is too high. *MFL Consulting*, B-417939, B-417939.2, Dec. 3, 2019, 2019 CPD ¶ 395 at 5; *SaxmanOne, LLC*, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 6. As noted above, the record shows that McLane's evaluated price was \$44,314,621, while Criterion's was \$55,795,598, over \$11,000,000 higher than the awardee's evaluated price. To the extent the agency unreasonably conducted its price reasonableness analysis and erroneously found McLane's price to be reasonable, it necessarily follows that Criterion was not prejudiced because its price also should have been found unreasonable. We therefore dismiss this aspect of Criterion's protest for failing to state legally sufficient grounds of protest; in this case, Criterion's allegation fails to demonstrate competitive prejudice. 4 C.F.R. § 21.5(f).

The protester next alleges that the agency deviated from the stated evaluation scheme by conducting an unreasonable price realism analysis. 2nd Supp. Protest at 20-24. The protester bases its argument on the agency's "technical evaluation of price proposal" (TEPP) documents, contending that they evidence the agency's conduct of an impermissible and unreasonable price realism analysis. *Id.*

In order to conduct a price realism analysis in a fixed-price environment, an agency must provide for such an analysis in the solicitation. *Octo Consulting Group, Inc.*, B-416097.3, B-416097.4, Sept. 24, 2018, 2018 CPD ¶ 339 at 8; *Ball Aerospace & Techs. Corp.*, B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8. However, where, as in this case, the solicitation does not provide for a price realism evaluation, an agency is neither required nor permitted to perform one. *Id.* The purpose of a price realism evaluation is to determine whether proposed prices are so low that they are not realistic for the work to be performed, reflect a lack of clear understanding of the requirements of the solicitation, or are not consistent with the methods of performance described in the technical proposal. FAR 15.404-1(d); *C.L. Price & Assocs., Inc.*, B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3.

Here, the RFP's stated price evaluation scheme did not provide for a price realism evaluation and expressly informed offerors that the agency would not conduct a price

realism analysis, other than as part of the total compensation plan evaluation under the technical evaluation. RFP at 11-12, 15-16; AR, Tab 1.I(i), RFP amend. 4, Vendor Questions and Answers at no. 23; AR, Tab 1.K(c), RFP amend. 7, 2nd Set of Vendor Questions and Answers at no. 24. While the TEPPs purport to “document whether the proposed types and quantities of personnel are necessary and reasonable for the proposed scope of effort and consistent with the proposed approach and requirements of the RFP,” they do not contain any analysis of the proposed prices for realism. See, e.g., AR, Tab 6.A.2, TEPP for McLane, at 1. Instead, a review of the TEPPs shows that they consist of the technical evaluator’s general confirmation that an offeror’s technical proposal and price proposal did not contain any inconsistencies with respect to the types and number of personnel proposed, any direct labor assumptions, or other direct costs. The only aspect of the TEPP related to price was a generalized observation that proposed total price and averaged labor rates were significantly lower than the independent government cost estimate (IGCE) as a result of higher estimated labor costs in the IGCE, and speculation about the “driver” for the disparity. *Id.* at 1-2.

Significantly, neither the TEPPs nor the SSDD include any analysis or conclusion as to whether proposed prices are so low that they are not realistic for the work to be performed; reflect a lack of clear understanding of the requirements of the solicitation; or are not consistent with the methods of performance described in the technical proposal. See generally, *id.*; AR, Tab 7.A, SSDD. On this record, we cannot find that the TEPPs represent the agency’s judgment, reasonable or otherwise, on whether offerors’ proposed prices were realistic and, therefore, we conclude that they do not constitute a price realism analysis. Accordingly, because we find that the agency was not permitted to, and properly did not, conduct a price realism review (other than for its evaluation of total compensation plans as discussed above), this protest ground is denied.

Finally, the protester argues that the agency unreasonably failed to reject the awardee’s proposal as non-responsive for failing to incorporate the New Mexico Gross Receipts Tax in its fully-loaded labor rates as required by the solicitation. Protest at 26-27. In its initial protest, Criterion bases its claim entirely on the fact that McLane proposed a significantly lower total price than Criterion, asserting that McLane’s low prices must indicate its failure to incorporate the tax into its rates. *Id.* After the agency showed that McLane expressly stated in its proposal that its fixed prices included the tax, AR, Tab 2.B, McLane Price Proposal at 6, Criterion argues that McLane’s low prices that included the tax should have alerted the agency to investigate whether McLane’s prices were too low. Protester’s Comments at 21-22.

Our Bid Protest Regulations require that protests include a detailed statement of the legal and factual grounds of protest, 4 C.F.R. § 21.1(c)(4), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

As noted, the RFP instructed offerors to propose fully-burdened rates that “include all applicable local, state, and federal taxes and duties to include applicable New Mexico Gross Receipts Tax where/if applicable.” *Id.* at 12. Moreover, neither the RFP instructions nor its cost model spreadsheet required the offerors to provide a breakdown of the fully-loaded rates to show the inclusion of the New Mexico Gross Receipts Tax. See RFP at 11-12; AR, Tab 1.C. RFP attach. 2, Cost Model. The record also shows that McLane expressly stated in its proposal that its fixed prices included the New Mexico Gross Receipts Tax. AR, Tab 2.B, McLane Price Proposal at 6.

On this record, we conclude that the protester’s allegations about the tax--*i.e.*, that the agency unreasonably did not assess whether the awardee’s price proposal incorporated the tax--provide neither allegations nor evidence sufficient, if uncontradicted, to establish the likelihood of improper agency action and, thus, fail to state a valid basis for protest. To the extent the protester is arguing that the agency should have evaluated whether the awardee’s price inclusive of the tax was too low, as discussed above, the RFP here did not require nor permit a price realism analysis other than to assess the proposed compensation plans. As a result, we dismiss this protest ground.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel